

## THE LEGAL REGULATION OF SURROGACY IN RUSSIA

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### *Abstract*

Reproductive technologies and surrogacy can be seen as a new legal knot for Russian law. Being at the intersection between constitutional, family, civil, administrative and tax law, surrogacy creates a real problem for the legislator. Moreover, surrogacy practices are strongly interrelated with moral issues and cultural patterns. This article deals with some aspects of the complex issue of surrogacy. It focuses on developments in Russia in particular, and discusses them from the perspective of public comparative law. The article examines how Russian law, Russian jurisprudence and Russian morals and ideology are dealing with the new legal phenomenon of surrogacy. It argues that legal principles should be harmonised and clear legal priorities should be set in order to ensure the appropriate level of protection of the best interests of the child, parties in national and international surrogacy contracts, and the interests of public order. The article starts by briefly introducing some essential aspects of new reproductive technologies and surrogacy and the notions involved together with a brief comparative review of the international legal regulation of assisted reproduction. It then turns to the current situation in Russia, discussing legal definitions and such issues as surrogacy contracts, the legal position of the child, parental rights, registration of the child and disputes over parental rights. The level of legal certainty and human rights standards in surrogacy arrangements are pressing issues in the legal regulation of surrogacy. To illustrate this, the article refers where possible to related case law. Finally, it touches on ethical issues and the 'morality' of surrogacy arrangements, discussing the ideological underpinning of public discourse on surrogacy in Russia.

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## 1. Introduction

### 1.1. Context and contribution

This article focuses on legal, cultural and moral responses to surrogacy in Russia and discusses divergent approaches to new reproductive technologies in a comparative perspective. The article examines how Russian law, Russian jurisprudence and Russian morals and ideology are dealing with the new legal phenomenon of surrogacy.

Being a destination for ‘surrogacy tourism,’ Russia is as a matter of course involved in the transnational regulation of surrogacy in Europe and worldwide. As a member of the Council of Europe, Russia has an obligation to ensure an effective application of the Council of Europe’s legal instruments at the

national level and to harmonize national law with the principles developed by the European Court of Human Rights. The article studies how Russia has reflected on approaches taken by other European states and by the European Court of Human Rights, in particular providing some examples of how the *Paradiso & Campanelli* case has influenced national discussion on new reproductive technologies and surrogacy.

To provide the context for contemporary views on surrogacy in Russia, it is important to clarify some background information. The literature cited in this article represents the range of views on new reproductive technologies in Russia. The references made exemplify different positions and reflect the overall heterogeneous picture. Being relatively new fields, surrogacy and assisted reproduction are traditionally discussed by family law scholars, and more recently by scholars working in the area of bioethics and medical law.<sup>1</sup> However, the specifics of new

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<sup>1</sup> E. Grigorovitch, *Iskusstvovennoje oplodotvorenije I implantazija embriona* [Искусственное оплодотворение и имплантация эмбриона человека] Автореф. дис. ... канд. юрид. наук. М., 1999; V. Maslyakov, N. Portenko, *Zakonodatelnoje regulirovanie surrogatnogo materinstva* [Законодательное регулирование суррогатного материнства] // "Медицинское право", 2016, N 5; V. Momotov, *Bioetika v kontekste zakonodatelstva I pravoprimeneniya .Surrogatnoe materinstvo* [Биоэтика в контексте законодательства и правоприменения (суррогатное материнство)] // Lex russica. 2019. N 1. С. 29 – 39; E. Burdo, I. Garanina, *Problemy vydelenija reproduktivnih prav cheloveka v rossijskom prave* [Проблемы выделения института репродуктивных прав человека в российском праве человека] // Пробелы в российском законодательстве. 2015. N 5. С. 61 – 68; O. Balashov, *Iskusstvovennoje oplodotvorenije. Chto dumajut pravoslavnyje*. [Искусственное оплодотворение: что думают православные // Биоэтика: принципы, правила, проблемы.] М.: Прогресс Традиция, 1998. С. 147 – 153; A. Pestrikova, *Obyzatelstva surrogatnogo materinstva* [Обязательства суррогатного материнства]: Автореф. дис. ... канд. юрид. наук. Самара, 2007; N. Sedova, *Pravovoj status bioetiki v sovremennoj Rossii* [Правовой статус биоэтики в современной России] // Медицинское право. 2005. N 1. С. 11 – 15; J. Sergeev, J. Pavlova, *Problemy pravovogo regulirovanija ART* [Проблемы правового регулирования

reproductive technologies are often mentioned but not thoroughly critically assessed.<sup>2</sup> Only very few Russian scholars specialize in surrogacy law<sup>3</sup> and therefore have expertise in factual questions about surrogacy or surrogacy law. Moreover, the issue of surrogacy is somewhat insufficiently treated by legal scholars active in the field of European and international law.<sup>4</sup> Recently, more has been written on comparative approaches to surrogacy in the states of the former Soviet Union, like Belorussia and Kazakhstan.<sup>5</sup>

This situation can be primarily explained by the fragmented nature of legal regulation. The actual laws in force regulate some technical aspects of new reproductive technologies in detail like, for example, the medical procedure itself, the list of required tests and record keeping. However, legal regulation still features too many lacunae with regard to the legal relationship between the parties in a surrogacy arrangement, the legal position of the child and so on.

Due to insufficiently detailed regulation, many legal scholars apparently treat surrogacy arrangements as new area of

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применения методов вспомогательных репродуктивных технологий] // Медицинское право. 2006. № 3. С. 3 - 8.

<sup>2</sup> For example, the classics of family law, like, *Family Law* [Семейное право] / В.М. Gongalo, Р. Krasheninnikov, L. Miheeva под ред. П.В. Крашенинникова. 3-е изд., перераб. и доп. М.: Статут, 2016; or А. Nechaeva, *Family Law* [Семейное право]. М.: Юристъ, 2008; О. Rusakova, *Family Law* [Семейное право]. Эксмо; Москва; 2010.

<sup>3</sup> For example, Т. Borisova, *Surrogatnoe materinstvo v Rossijskoj Federazii* [Суррогатное материнство в Российской Федерации: проблемы теории и практики.] Монография. М.: Проспект, 2012; Е. Mitryakova, *Pravovoe regulirovanie surrogatnogo materinstva v Rossii* [Правовое регулирование суррогатного материнства в России:] Автореф. дис. ... канд. юрид. наук. Тюмень, 2006; Е. Ivaeva, *Problemy realizacii konstituzionnyh prav cheloveka v Rossijskoj Federazii na primere surrogatnogo materinstva* [Проблемы реализации конституционных прав человека в Российской Федерации на примере суррогатного материнства:] Дис. ... канд. юрид. наук. М., 2004.

<sup>4</sup> А. Soltsev, А. Koneva, *Mezhdunarodnye obyazatelstva Rossii v sfere zashity prav detej* [Международные обязательства Российской Федерации в сфере защиты прав детей в свете деятельности международных универсальных и региональных контрольных органов по правам человека] // Евразийский юридический журнал. – 2013. – № 10. – С. 38-42.

<sup>5</sup> К. Zhirikova, *Opyt stran SNG v pravovom regulirovanii surrogatnogo materinstva* [Опыт стран СНГ в правовом регулировании суррогатного материнства]// "Российская юстиция", 2018, N 11.

civil law, discussing surrogacy contracts in relation to service contracts.<sup>6</sup> Despite the deficiencies in regulation, ART clinics offer contracts with different levels of elaboration and so legal practice in the field is growing.

Contemporary views on surrogacy are being discussed by scientists from other disciplines, including ethics, religion, demography and anthropology.<sup>7</sup>

New case law emerging in the context of new reproductive technologies will be discussed where possible.

### 1.2. Main definitions

In vitro fertilization and embryo transplantation are defined by the World Medical Association<sup>8</sup> as a medical technique which is available for the treatment of infertility. It has the potential to benefit both individual parents and society generally, not only through the alleviation of infertility but also through a possible avoidance of genetic disorders and by enhancing fundamental studies on human reproduction and contraception. A surrogate mother, as defined by the World Medical Organization, is a woman who carries a pregnancy resulting from third-party oocytes and sperm with the intention or agreement that the offspring will be brought up by one or both of the individuals who produced the oocytes and sperm.<sup>9</sup> A surrogacy arrangement is

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<sup>6</sup> I. Shapiro, *Sravnitelno-pravovoj analiz uslovij dogovorov o pravovom materinstve i vozmezdno go okazani ja uslug* [Сравнительно-правовой анализ условий договоров суррогатного материнства и возмездного оказания услуг] // "Семейное и жилищное право", 2018, N 3.

<sup>7</sup> O. Savvina, *Vlijani je reproduktivnogo turizma na zakonodatelstvo* [Влияние "репродуктивного туризма" на законодательство, регулирующее суррогатное материнство] // "Lex russica", 2018, N 2; N. Sedova, *Vse zakona byli kogda-to normami morali* [Все законы когда-то были нормами морали, но не все моральные нормы становятся законами] // Биоэтика. 2009. N 1. С. 37 - 42.

<sup>8</sup> WMA Statement on In-Vitro Fertilization and Embryo Transplantation, adopted by the 39th World Medical Assembly Madrid, Spain, October 1987 and rescinded at the WMA General Assembly, Piñanesberg, South Africa, 2006. Available at: <https://www.wma.net/policies-post/wma-statement-on-in-vitro-fertilization-and-embryo-transplantation/>.

<sup>9</sup> The World Medical Organization. Assisted Reproduction in Developing Countries - Facing up to the Issues, in: Progress in Reproductive Health Research. № 63.2003. Available at: <http://www.who.int/reproductivehealth/publications/infertility/progress63.pdf>

defined by the European Court of Human Rights<sup>10</sup> as a situation in which a woman bears a child for a couple who take responsibility for the plans for conception, and to whom the child will be handed over after his or her birth. In a surrogacy arrangement, the gametes may either come from the couple seeking to have the child (the intended parents) or from one member of that couple – in which case the child has a genetic relationship with at least one of the intended parents – or from two donors, possibly including the surrogate mother. In the vast majority of cases, in vitro fertilization is used.

Clearly, the term surrogacy covers several possible situations. First, the intended parents of the child may also both be his genetic parents; second, the child's conception may result from IVF (in vitro fertilization) using sperm from the intended father, and the surrogate mother is both the 'carrier' and the genetic parent; third, sperm from the male partner in the couple and a donated oocyte may be used, or alternatively donor sperm and the intended mother's oocyte – in this situation the intended parents have only a partial genetic relationship with the child; and the final variation is when both gametes are donated and transferred to the surrogate mother – in this case the intended parents have no genetic relationship with the child.

### 1.3. Approaches to maternity

The issue of the type of surrogacy constellation is central in determining legal maternity. Consequently, different approaches to maternity are paramount in the legal regulation of rights and duties in surrogacy relations, including the priority of deciding upon the future of the child. Surrogacy practices cause serious legal problems in determining legal maternity.<sup>11</sup> Nowadays, there is no full certainty that a mother who gives birth to a child is the mother in every respect. From both legal and moral perspectives,

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<sup>10</sup> Questions and answers on the *Paradiso and Campanelli v. Italy* Judgement (27 January 2015). Available at: [http://www.echr.coe.int/Documents/Press\\_Q\\_A\\_Paradiso\\_and\\_Campanelli\\_ENG.pdf](http://www.echr.coe.int/Documents/Press_Q_A_Paradiso_and_Campanelli_ENG.pdf).

<sup>11</sup> Russian Yearbook of the European Convention on Human Rights, issue 1, Statute, 2015.

both parties in a surrogacy arrangement have claims to parentage.<sup>12</sup>

According to Antokolskaja, a well-known Russian expert in family law, a strong maternal-foetal bond and a biological relationship between a surrogate mother and a foetus may develop, leading to strong feelings and psychological ties.<sup>13</sup> Pregnancy stimulates maternal instincts and determines a mother-child relationship, argue Rybakov and Tihonova.<sup>14</sup>

The Russian Orthodox Church emphasizes the strong biological and physiological ties that connect a mother and a child.<sup>15</sup> Silujanova and Silujanov criticize the legal notion of 'potential parents' being a wide circle of people wishing to have a child, including a couple officially married or officially unmarried or a single woman or even a man.<sup>16</sup> In their opinion, such extension of parentage and maternity definitions signals that the traditional family is in crisis. According to these authors, surrogacy limits the natural right of a child to have a mother and a father.

By contrast, some other Russian authors, such as Flyagin, point out that maternity is not limited to a biological capability of reproduction, and neither can it be restricted to the relationship

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<sup>12</sup>S.F. Afanasjev, *Grazhdanskaja prozessual'naja storona del ob ispolnenii dogovora o predostavlenii uslug surrogatnogo materinstva* [Гражданская процессуальная сторона дел об исполнении договора о предоставлении услуг суррогатного материнства] // *Arbitrazhnyj i grazhdanskij prozess* [Арбитражный и гражданский процесс]. N 7.2014.

<sup>13</sup>M.V. Antokoljskaja, *Family Law* [Семейное право]. Textbook, 2d ed. Moscow, 2002.

<sup>14</sup>O.J. Rybakov, S.V. Tihonova, *Doktrina estestvennogo prava i filosofija transgumanizma: vozmozhnostj kommunikazii* [Доктрина естественного права и философия трансгуманизма: возможность коммуникации], *Lex russica*, N 2, 2014.

<sup>15</sup>*Osnovy sozialnoj koncepczii Russkoj pravoslavnoj zerkvi, Glava 12.4, Problemy bioetiki*. [Основы Социальной концепции Русской православной церкви. Глава 12.4 "Проблемы биоэтики". [Электронный ресурс] URL: <http://www.Patriarchia.ru/db>.

<sup>16</sup>I. Silujanova, V., K.A. Silujanov, *Reprodukcija cheloveka: etiko-pravovye problemy* [Репродукция человека: этико-правовые проблемы.] // *Medizinskoje pravo* [Медицинское право]. N 4, 2013. С. 35 - 38.

between a mother and a child during the first year of the child's life.<sup>17</sup>

One of the central issues in the legal definition of surrogacy is intention. Together with the genetic relationship between the parent(s) and the child, intention creates an essential feature of the parent-child relationship (upbringing, caring, living in a family with a common sense of family life). According to an intent-based approach to legal maternity, the woman who intends to raise a child is the mother.<sup>18</sup> The intent-based approach, however, sets different standards for surrogacy arrangements and for parents conceiving a child in a natural way, where intent is not always present. It is clear that this lack of consensus on fundamental issues such as the definition of maternity hinders the harmonization of legal norms.

The legal determination of maternity has deep roots in national normative tradition.<sup>19</sup> Nowadays, Russian discourse on the family is influenced by a transformation of the traditional family model and emerging alternative models of family, partner and parent-child relationships. One newly popularized topic is 'collective parenthood,' writes Tatarinzeva.<sup>20</sup> If the model of multi-paternity is introduced into Russian family law, it will be necessary to establish normative principles on the nature of the rights of every parent and limits to their interaction and capabilities of independently exercising their rights.<sup>21</sup>

These societal developments challenge Russian constitutional and family law.<sup>22</sup> Tensions between traditional

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<sup>17</sup>Flyagin A.A. Pravovoj status roditel'ej pri surrogatnom materinstve [Правовой статус родителей при суррогатном материнстве].// *Grazhdanskoe pravo* [Гражданское право], N 3, 2015.

<sup>18</sup> A.M. Larkey, *Redefining Motherhood: Determining Maternity in Gestational Surrogacy Agreements* 51(3) *Drake Law Review*, 605-631(2003).

<sup>19</sup> Irina P. Lotova, *A systematic approach to the study of family values in modern Russian society*. "Статистика и Экономика." №5, 2015.

<sup>20</sup> E. Tatarintseva, *Modeli pravootnoshenij po vospitaniju rebenka v semje* [Модели правоотношений по воспитанию ребенка в семье и тенденции их формирования в национальном семейном праве.] М.: Юстицинформ, 2017.

<sup>21</sup>[https://ivan4.ru/news/semeynye\\_tsennosti/parliamentary\\_hearings\\_30\\_03\\_17\\_the\\_concept\\_of\\_the\\_parent\\_child\\_relationship\\_in\\_the\\_rf\\_ic/](https://ivan4.ru/news/semeynye_tsennosti/parliamentary_hearings_30_03_17_the_concept_of_the_parent_child_relationship_in_the_rf_ic/).

<sup>22</sup> For example, S. Narutto, *Semja kak konstituzionnaja tsennostj* [ Семья как конституционная ценность]// "Актуальные проблемы российского

understanding of motherhood and the family in Russia, and even 'gender stereotypes'<sup>23</sup> and divergent approaches in Europe have been examined both by the Russian Constitutional Court<sup>24</sup> and by the European Court of Human Rights.<sup>25</sup>

The limits to the constitutional right to family are not so obvious and simple, argues prominent Russian family lawyer Svetlana Narutto.<sup>26</sup> Complexity and diversity are characteristic of parental relationships in present times. As an example, the parental rights of the persons who are engaged in a surrogacy arrangement are made dependent on the consent of the surrogate mother.

Commenting on Article 38, 1 of the Russian Constitution, Judge of the Constitutional Court Gadzhiev asks what kind of family is protected by the Constitution and if actual partner relationships should have the same protection as the traditional family. He suggests that constitutional values should not be treated as fixed facts but should take into account the development of social reality.<sup>27</sup>

The legal determination of maternity and its biological configurations are related but in tension. The legislation in force treats different kinds of social family relationships between a child

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права", 2017, N 5; A. Tolstaja, *Fakticheskiy brak: perspektivy pravovogo razvitiya* [Фактический брак: перспективы правового развития] // Закон. 2005. N 10. С. 21 - 29; N. Kostrova, *Kaka zashititj semju I prava detej* [Как защитить семью и права детей: проблемы совершенствования семейного законодательства] // Закон. 2010. N 8. С. 131 - 135.

<sup>23</sup> A. Timmer, *From inclusion to Transformation: Rewriting Konstantin Markin vs. Russia*, in Eva Brems (ed.), *Diversity and European Human Rights. Rewriting Judgements of the ECHR* (2013), 148-171.

<sup>24</sup> Resolution from the 6<sup>th</sup> of December 2013 N 27-П Постановление от 6 декабря 2013 г. N 27-П по делу о проверке конституционности положений статьи 11 и пунктов 3 и 4 части четвертой статьи 392 Гражданского процессуального кодекса Российской Федерации в связи с запросом Президиума Ленинградского окружного военного суда. available at: <https://rg.ru/2013/12/18/ks-dok.html>.

<sup>25</sup> The European Court of Human Rights, Grand Chamber, case of *Konstantin Markin v. Russia*, App.no. 30078/06. At: [hudoc.echr.coe.int/app](http://hudoc.echr.coe.int/app).

<sup>26</sup> S. Narutto, *Semja kak konstituzionnaja tsennostj* [Семья как конституционная ценность] // "Актуальные проблемы российского права", 2017, N 5

<sup>27</sup> G. Gadzhiev, *Ekonomicheskaja effektivnostj, pravovoja etika I doverije k gosudarstvu* [Экономическая эффективность, правовая этика и доверие к государству] // Журнал российского права. 2012. N 1. С. 10 - 21.

and other persons who are not his/her biological parents but who take care of him/her as not fully identical to parental relationships.

The tension between biological and legal parenthood is well illustrated by the legal relationship of adoption. Russian family law views adoption as a legal relationship very close to parenting. According to article 136, 1 of the Family Code, on the request of adoptive parents [приемные родители] the court can register them as legal parents [родители] in the register of births. However, the legal status of adoptive parents has a complex nature. According to article 15,1 of the federal law 'On Guardianship' some aspects of adoption are regulated by family law and some by civil law. Adoptive parents, guardians or other substituting parents cannot be deprived of their parental rights precisely because their rights are not equal to the rights of biological parents. A resolution of the Supreme Court of the Russian Federation has confirmed this position.<sup>28</sup>

From a sociological perspective, writes expert in family law Antokolskaja, adoption is a form of social fatherhood and motherhood. Although the rights and duties of adoptive parents are almost equal to those of parents, the real relationship of adoption depends substantially on the attitudes of a child and if he/she sees the adoptive parents as his/her relatives.<sup>29</sup> The jurisprudence of the Constitutional Court has confirmed the complex nature of the legal relationship of adoption.<sup>30</sup>

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<sup>28</sup> The Plenum of the Supreme Court of the Russian Federation 14.11.2017 N 44  
Постановление Пленума Верховного Суда РФ от 14.11.2017 N 44

"О практике применения судами законодательства при разрешении споров, связанных с защитой прав и законных интересов ребенка при непосредственной угрозе его жизни или здоровью, а также при ограничении или лишении родительских прав" // "Российская газета", N 262, 20.11.2017.

<sup>29</sup> М. Antokolskaja, *Семейное право* [Семейное право]. 2-е изд., перераб. и доп. М., 2003. С. 196.

<sup>30</sup> Resolution of the Constitutional Court Федерации from the 20<sup>th</sup> of March 2014 N 633-О Определение Конституционного Суда Российской Федерации от 20 марта 2014 года N 633-О; Resolution from the 31<sup>st</sup> of January 2014 N 1-П, Постановление от 31 января 2014 года N 1-П.

#### 1.4. Comparison of legal perspectives on assisted reproduction and surrogacy

The focus of this article is not the comparison of different legal approaches in itself, as it is almost impossible to embrace rich plentitude of views and studies in the field of assisted reproduction.<sup>31</sup> A brief comparative background should rather identify possible views and help to situate Russian responses to surrogacy in comparative perspective.

At the level of international law, the World Medical Association has adopted the Madrid Declaration, which contains main principles and recommendations.<sup>32</sup> It is generally recognized that as new reproduction technologies and surrogacy practices constitute a relatively new practical field they are linked with “ever-increasing dilemmas and controversies”<sup>33</sup> and often conflict with the moral principles or ethical restrictions of some people and societies. The United Nations Committee on Bioethics has recognized the transnational character of scientific practices and underlined the “necessity of setting universal ethical guidelines covering all issues raised in the field of bioethics and the need to promote the emergence of shared values.”<sup>34</sup>

International organizations such as the Council of Europe tend to treat a wide set of issues related to surrogacy rather than surrogacy itself. The European Court of Human Rights has recognized “the wide margin of appreciation of individual states and a lack of consensus on these issues in Europe.”<sup>35</sup> In European

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<sup>31</sup> B. Stark, *Transnational Surrogacy and International Human Rights Law*, 18(2) *ILSA Journal of International and Comparative Law* (2012), 369-386; P. Gerber and K. O'Byrne (eds.), *Surrogacy, Law and Human Rights* (2015).

<sup>32</sup> WMA Statement on In-Vitro Fertilization and Embryo Transplantation, adopted by the 39th World Medical Assembly Madrid, Spain, October 1987 and rescinded at the WMA General Assembly, Pilanesberg, South Africa, 2006. Available at: <https://www.wma.net/policies-post/wma-statement-on-in-vitro-fertilization-and-embryo-transplantation/>.

<sup>33</sup> Universal Declaration on Bioethics and Human Rights, 32 C/Resolution 24, 2005. Available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=31058&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=31058&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>34</sup> Resolution adopted on the report of Commission II I at the 18th plenary meeting on 19 October 2005. The 32d Session of the UNESCO General Conference, 32 C/ Resolution 24.

<sup>35</sup> *Mennesson v. France* (application no. 65192/11); *Labassee v. France* (Application no. 65941/11). See also: C. Fenton-Glynn, *International Surrogacy Before the European Court of Human Rights*, 13(3) *Journal of Private International Law*

Union law, family law belongs to the competence of single Member States and the field has not yet been harmonized. Only a few relevant matters are covered by EU regulations, such as matrimonial matters, matters of parental responsibility and recognition, and enforcement of judgments.<sup>36</sup>

A comparative analysis of legal regulations reveals quite different approaches to these issues in different countries, ranging from full prohibition, as in Germany,<sup>37</sup> for example, to an absence of any explicit regulation, as for example in Poland<sup>38</sup>. Countries like Germany prohibit any surrogacy relations because it is not possible to separate social and biological maternity. Such a distinction would lead to various psychological problems and conflicts for the parties involved and for the identity of the child. German law acknowledges as a child's mother the woman who gave birth to it. Nevertheless, the German high courts recognize parentage by same-sex couples if at least one of the parents is biologically related to the child, finding in such cases no violation of public order.<sup>39</sup> According to the German Constitutional Court, life partners can be as beneficial for a child as parents as married partners. Thus, the Court gives preference to the integrity of

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(2017), 546-567; Richard F. Storrow, *International Surrogacy in the European Court of Human Rights*, 43(4) *North Carolina Journal of International Law* (2018) 38.

<sup>36</sup> Regulation (EC) no. 1347/2000 on Jurisdiction and Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses (Brussels II) as revised by Regulation (EC) no. 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) no. 1347/2000, *OJ L* 338/1, 23.12.2003, effective as of 1 March 2005. Green Papers on maintenance obligations (COM(2004) 254), on the applicable law and jurisdiction in divorce matters (COM (2005) 82) and on succession and wills (COM (2005) 65); C. Thomale, *State of play of cross-border surrogacy arrangements – is there a case for regulatory intervention by the EU?*, 13(2) *Journal of Private International Law* (2017) 463-473.

<sup>37</sup> K. Diedrich, S. Al-Hasani, T. Strowitzki, *Reproduktionsmedizin in Deutschland – vom Embryonenschutzgesetz bis zur Präimplantationsdiagnostik*, 51 *Gynäkologie* (2018) 713.

<sup>38</sup> Z.V. Chernova, *Semejnaja politika v Evrope i Rossii: gendernyj analiz* [Семейная политика в Европе и России: гендерный анализ]. СПб. Норма, 2008.

<sup>39</sup> Bundesgerichtshof Beschluss X I I Z B 4 6 3 / 1 3 vom 10. Dezember 2014. Available at: <http://juris.bundesgerichtshof.de>

family life over formal marriage registration.<sup>40</sup> In Poland, with an absence of any explicit regulation, interpretation of surrogacy arrangements is left to the judiciary. The mother of a child is the woman who gave birth to the child according to the Family and Guardianship Code. Therefore, according to the prevailing opinion of jurisprudence, surrogacy agreements are void as they are contrary to the law and public policy and are unenforceable. This also applies to agreements where a surrogate mother gives her consent to the future adoption of the child by the genetic parents, because consent to the adoption of a child cannot take place earlier than six weeks after birth.<sup>41</sup>

Between these positions, we find all possible mixtures of prohibition and tolerance in legal provisions concerning surrogacy. Using gestational surrogacy arrangements is prohibited in Italy. Danish law requires written donor consent and a genetic relationship of at least one of the intended parents in artificial fertilization and it prohibits surrogacy. Austria has introduced a number of restrictions on using assisted reproduction technologies.<sup>42</sup> Greek law restricts the number of fetuses produced from the sperm of one donor to ten and automatically recognizes the male member of the couple as the father in the case of written consent by the female member to artificial fertilization.<sup>43</sup> In the USA, some states prohibit and some, like California, recognize and practise surrogacy arrangements

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<sup>40</sup> Judgment of 19 February 2013 – 1 BvL 1/11 – 1 BvR 3247/09 – Available at: [http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/02/1s20130219\\_1bvl000111en.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/02/1s20130219_1bvl000111en.html).

<sup>41</sup> J. Kosińska-Wiercińska, J. Wierciński, *Family Law in Poland: Overview* (2015) Available at: <https://content.next.westlaw.com>; M. Radkowska-Walkowicz, *Frozen Children and Despairing Embryos in the 'New' Post-Communist State: The Debate on IVF in the Context of Poland's Transition*, 21(4) *European Journal of Women's Studies*, 2014, 399–414.

<sup>42</sup> Stellungnahme der Bioethikkommission beim Bundeskanzleramt zum Entwurf eines Bundesgesetzes, mit dem das Fortpflanzungsmedizingesetz, das Allgemeine bürgerliche Gesetzbuch und das Gentechnikgesetz geändert werden (Fortpflanzungsmedizinrechts-Änderungsgesetz 2015 – FMedRÄG 2015). Available at: <http://archiv.bundeskanzleramt.at/DocView.axd?CobId=57878>.

<sup>43</sup> A.N. Hatzis, *The Regulation of Surrogate Motherhood in Greece*, available at: [users.uoa.gr/~ahatzis/Surrogacy.pdf](http://users.uoa.gr/~ahatzis/Surrogacy.pdf).

widely.<sup>44</sup> Israel prohibits commercial surrogacy.<sup>45</sup> Canada's Royal Commission on New Reproductive Technologies rejects commercial surrogacy but to some extent permits altruistic surrogacy arrangements as cases giving a benefit or service to another in a way that expresses benevolence.<sup>46</sup>

### 1.5. Opinion on surrogacy

Public opinion is not always surrogacy-friendly. As the World Medical Organization explains, attitudes to assisted reproduction are very much influenced by specific cultural and social contexts.<sup>47</sup> Legal opinions rank from “surrogacy being a legitimized sale of children”<sup>48</sup> to surrogacy being the last chance for infertile couples to have a fulfilling family life.<sup>49</sup>

At one pole, surrogacy is deemed an dehumanizing form of labour. At the opposite pole, addressing the question of whether surrogacy is categorically unethical, some authors challenge anti-surrogacy arguments by comparing surrogacy to other invaluable services such as health care.<sup>50</sup> Some discuss the tendency to commodify reproduction.<sup>51</sup> Others support surrogacy by drawing

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<sup>44</sup> Max-Planck-Datenbank zu den Rechtlichen Regelungen zur Fortpflanzungsmedizin in Europäischen Ländern. Available at: <https://meddb.mpicc.de/>.

<sup>45</sup> D. Birenbaum-Carmeli, *Contested Surrogacy and the Gender Order: An Israeli Case Study*, 3(3) *Journal of Middle East Women's Studies* (2007) 21-24.

<sup>46</sup> D. Snow, *Criminalising commercial surrogacy in Canada and Australia: the political construction of 'national consensus'*, 51(1) *Australian Journal of Political Science* (2016) 1-16.

<sup>47</sup> The World Medical Organization. *Assisted Reproduction in Developing Countries - Facing up to the Issues*. In: *Progress in Reproductive Health Research*. №63.2003. Available at: <http://www.who.int/reproductivehealth/publications/infertility/progress63.pdf>.

<sup>48</sup> D.M. Smolin, *Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children*, 43 *Pepp. L. Rev.* (2016), 265.

<sup>49</sup> A.A. Pestrikova, *Obyazatelstva surrogatnogo materinstva [Обязательства суррогатного материнства]* (2007).

<sup>50</sup> M. Davies (ed.), *Babies for sale? Transnational Surrogacy, Human Rights and the Politics of Reproduction* (2017); P-H. Shuck, *The Social Utility of Surrogacy*, 13(1) *Harvard Journal of Law and Public Policy* (1990) 132-137.

<sup>51</sup> Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, *Columbia Public Law & Legal Theory Working Papers* (2008) 08153, [http://lsr.nellco.org/columbia\\_pllt/08153](http://lsr.nellco.org/columbia_pllt/08153).

on constitutional rights to privacy, which should include a right to hire a surrogate.<sup>52</sup> Ethical issues are often discussed with regard to global surrogacy arrangements.<sup>53</sup> Much concern has been raised about increasing surrogacy tourism to developing countries where low health care standards and poverty place women at risk of exploitation and harm.<sup>54</sup> Discussing the ethical arguments against international surrogacy, some authors notice that employment alternatives for potential surrogate mothers could be even more exploitative or more harmful than surrogacy itself, and call for Fair Trade Surrogacy regulations.<sup>55</sup> Ultimately, nowadays there is neither a single legal approach to reproduction and surrogacy in the world and nor is there a consensus on the moral issues related to surrogacy arrangements.

Against this brief comparative background, let me now turn to discussing the legal regulation of surrogacy arrangements in the Russian Federation.

## 2. Surrogacy arrangements in Russia

### 2.1. The main facts about surrogacy in Russia

New reproductive technologies and surrogacy have been practised in Russia since approximately 1996.<sup>56</sup> Statistics show that nowadays there are more than 3 million children in Russia born by means of new reproductive technologies and surrogacy arrangements.<sup>57</sup> Russia has around 150 clinics offering assisted

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<sup>52</sup> A.M. Larkey, *Redefining Motherhood: Determining Maternity in Gestational Surrogacy Agreements*, 51(3) *Drake Law Review* (2003) 605-631.

<sup>53</sup> A. Banerjee, *Reorienting the Ethics of Transnational Surrogacy as a Feminist Pragmatist*, 5(3) *The Pluralist* (2010), 107-121.

<sup>54</sup> G.K.D. Crozier, D. Martin, *How to Address the Ethics of Reproductive Travel to Developing Countries: A Comparison of National Self-Sufficiency and Regulated Market Approaches*, 12(1) *Developing World Bioethics* (2012) 45-54.

<sup>55</sup> H. Cassey, *Fair Trade International Surrogacy*, 9(3) *Developing World Bioethics* (2009) 111-118 (2009).

<sup>56</sup> I. Krasnopoljskaja, *ЕКО-невидалъ. [ЭКО невидаль. Первому российскому ребенку из пробирки исполнилось 30 лет.]* Available at: <https://rg.ru/2016/02/08/gennadij-suhih-v-rf-est-programma-pomoshchi-besplodnym-param-v-ramkah-oms.html>

<sup>57</sup> E. Novoselova, *Мама на devyatj mesyatsev [Мама на девять месяцев]* // *Rossijskaja gaseta [Российская газета]*. 2006. N 424. Available at: <http://www.rg.ru>.

reproduction, and with almost 69,000 IVF tests a year it occupies the third place for this practice globally.<sup>58</sup> There are data banks of potential surrogates which include information on their age, health and the number of their own children.<sup>59</sup>

Despite the reproductive boom, important aspects of the complex issue of surrogacy are not adequately regulated in Russian legislation. These include donor definition, the rights of genetic parents, the rights of the surrogate mother and finally the legal position of the child. This is the predominant opinion in Russian literature.<sup>60</sup> Currently, relations in assisted reproduction are regulated by family law, medical law and a number of administrative acts which are only able to reflect the latest technological developments in a limited way.

Public policy grounds in surrogacy arrangements are given no importance at the constitutional level and are only indirectly mentioned in administrative acts. The related protection of equality is left to judicial discretion.<sup>61</sup>

Moreover, the further issues of succession and property rights do not seem to preoccupy the mind of the legislator.<sup>62</sup> Judicial practices reveal an extremely mixed picture, ranging from very open-minded protection of equality to consideration of taxing donors.

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<sup>58</sup>Xth International Congress on reproduction, Russia, Moscow. 2016. At: [www.reproductive-congress.ru](http://www.reproductive-congress.ru).

<sup>59</sup>M. Brovkina, *Zhivot naprokat* [Живот напрокат]. Available at: <https://rg.ru/2016/10/05/reg-ufo/na-iuge-rossii-sozdan-bank-dannyh-surrogatnyh-materej.html>.

<sup>60</sup>A. Kristaforova, V. *Surrogatnoje materinstvo v Rossijskoj Federaczii: osnovnyje ponyatija, problemy pravovogo regulirovanja, rolj notariusa* [Суррогатное материнство в Российской Федерации: основные понятия, проблемы правового регулирования, роль нотариуса] // *Semejnoe i zhilishchnoe pravo* [Семейное и жилищное право]. N 3, 2014. P. 24 - 28.

<sup>61</sup>A.N. Levushkin, I.S. Saveljev, *Trebovanja, predjavlyаемые zakonodatelem k buduschim roditeljam rebenka, rozhdenogo s primeneniem tehnologii surrogatnogo materinstva* [Требования, предъявляемые законодателем к будущим родителям ребенка, рожденного с применением технологии суррогатного материнства] // *Sovremennoe pravo* [Современное право], N 9, 2015.

<sup>62</sup>Z.A. Shukshina, *Pravo nasledovanija i sovremennye reproduktivnyje tehnologii* [Право наследования и современные репродуктивные технологии], // *Medizinskoje pravo* [Медицинское право], №6, 2011.

In order to assess the level of legal certainty in surrogacy arrangements in Russia, in this part of the article I will discuss the definition of surrogacy and new reproductive technologies in Russian law and will review the provisions on surrogacy contracts in Russia. Furthermore, to evaluate the human rights standards in surrogacy arrangements, I will examine the legal regulation of child registration, the child-parent relationship, disputes over fatherhood or motherhood in surrogacy arrangements and the central issue of the legal position of the child. Where possible, I will discuss the related case law. Finally, in order to analyse the current limitations in applying the principles of equality and non-discrimination, I will focus on references to public policy grounds in surrogacy arrangements.

## **2.2. The definition of surrogacy and donorship in Russian Law**

Surrogacy and new reproductive technologies are legally recognized in the Russian Federation. Article 55 of the Russian Federation Citizens' Health Protection Act contains the main provision on surrogacy, defining surrogate motherhood as "bearing (вынашивание и рождение) a child (including premature birth) according to a contract entered into by a surrogate mother (a woman bearing a child after an embryo has been transferred (implanted) to her) and potential parents whose gametes have been used for the fertilization, or by a single woman who is not able to bear a child according to medical indications."<sup>63</sup> A woman can become a surrogate mother if she is aged between 20 and 35, has at least one healthy child of her own, has received positive medical certification, and has given her written informed free-will consent. If she is officially married according to the law of the Russian Federation, the written consent of her husband is obligatory.

An important part of surrogacy treatment is donation. The Federal Law on donation of blood and blood components regulates blood donation.<sup>64</sup> By contrast, a separate administrative

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<sup>63</sup> Federal Law from November, 23, 2011 N 323-ФЗ "On the Basics of Protection of Health of Citizens in the Russian Federation". Available at: <https://rg.ru/2011/11/23/zdorovie-dok.html>.

<sup>64</sup>Federal Law of July 20, 2012 No. 125 "On Donorship of Blood and its Components". Available at: [www.consultant.ru](http://www.consultant.ru).

act by the Russian Ministry of Health regulates the donation of gametes. Ministry of Health decree No. 107n<sup>65</sup> defines donors and sets standard requirements for those wishing to become one. Donors are persons who donate their gametes to other people to treat infertility and do not have a parental commitment to the future child. The legislator thus gives priority to intention and the social component of parentage over the genetic relationship in the definition.

In 2017 the Plenum of the Russian Supreme Court confirmed that if donor gametes are used in a surrogacy arrangement, neither the donors of genetic material nor the legal parents of a child have a right to dispute the legal registration of a child on these grounds. Whether the donor was known or anonymous does not lead to any legal consequences regarding paternal rights and the parental relationship.<sup>66</sup>

Regardless of definitions, the complexity of surrogacy arrangements and the absence of comprehensive federal regulation open possibilities for abuse of contractual donor relationships in surrogacy. For instance, in 2004 a couple concluded a contract with a surrogate mother. This woman received donor sperm from the male member of the couple. After the child was born, the surrogate mother renounced her consent to give the child to the couple, identified the fatherhood of the sperm donor and successfully claimed alimony, which was allowed by the Russian court.<sup>67</sup>

There are standard requirements to become a donor in terms of age, health and absence of serious infections and diseases. In surrogacy arrangements, the woman or the intended parents

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<sup>65</sup>Decree of the Ministry of Health of the Russian Federation of 30.08.2012 No. 107n "On regulations of use of assisted reproductive technologies, including counter-indications and restraints concerning its use", 11.06.2015. Available at: [www.consultant.ru](http://www.consultant.ru).

<sup>66</sup>The Plenum of the Supreme Court of the Russian Federation, Resolution 16 th of May, 2017 N 16 O [Пленум Верховного Суда Российской Федерации Постановление от 16 мая 2017 г. N 16 O Применении судами законодательства при рассмотрении дел, связанных с установлением происхождения детей.] Available at: <http://www.vsrif.ru>.

<sup>67</sup>A.A. Pestrikova, *Obyazatelstva surrogatnogo materinstva* [Обязательства суррогатного материнства] Samara, 2007.

have the right to know the nationality and physical constitution and features of the donor. The remaining information is secret.

In insufficiently regulated commercial surrogacy arrangements, the anonymity of donors can cause long-term legal, medical and moral problems. Romanovskij makes a serious argument against the principle of anonymity of donors. He notes a "kind of anarchic activity of the Russian ART clinics,"<sup>68</sup> which are created and closed spontaneously. A common database of donor gametes is inexistent. If a clinic is liquidated, in several years no information on donors will be available and will be possibly completely lost.

Citizens have the right to cryoconservation of their gametes and embryos. The industrial use of gametes and embryos is forbidden in the Russian Federation. The Federal Law on the Transplantation of Organs and Tissues of a Man<sup>69</sup> explicitly excludes embryo and gamete transplantation outside the legal scope of this law (Article 2). In line with international norms set out in the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, using techniques of medically assisted procreation to help choose the sex of a child is prohibited, except where it would help to avoid serious genetic disorders.<sup>70</sup>

According to Russian law, a surrogate mother cannot be a donor of an ovule (oocyte). In this way, the legislator prohibits a genetic relationship between the surrogate mother and the child. Thus, the Family Code of the Russian Federation adheres to the '*mater est quam gestatio demonstrat*' principle and gives priority to 'birth physiology' over 'genetic physiology.' At the same time, the Federal Law on the Basics of the Health Care Policy uses the notion of 'potential parents' in relation to people whose gametes

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<sup>68</sup> G.B. Romanovskij, *Anonymity of donors of gender cells and contemporary family law*. [Анонимность доноров половых клеток и современное семейное право.] (Романовский Г.Б./"/"Семейное и жилищное право", 2010, N 5.

<sup>69</sup> Federal Law from December 12, 1992 N 4180-1 (in red. 29.11.2007) "On the transplantation of organs and tissues of a man". Available at: [www.consultant.ru](http://www.consultant.ru)

<sup>70</sup> The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No 164). Available at: <http://www.coe.int/en/web/bioethics/oviedo-convention>.

are used in a surrogacy arrangement.<sup>71</sup> However, the law retains the prerogative right of the surrogate mother to decide on the parental relationship. She has to give her written consent for the intended parents of the child to be registered as such.<sup>72</sup>

### 2.3. Surrogacy Contracts

Assisted reproduction in Russia is offered by licensed clinics. A surrogacy arrangement is normally formalized in a complex contractual relationship between the intended parents, the surrogate mother and the clinic.

Here I will mention two issues which are crucial for the adequate protection of the interests of the parties in a surrogacy contract.

First, the very nature of a surrogacy contract has not yet been clarified.<sup>73</sup> Some authors treat surrogacy as a special type of family law contract.<sup>74</sup> Indeed, the Family Code incorporates one element involved in a surrogacy arrangement, namely the registration of children. However, the family law does not cover the other remaining elements. Most authors agree that surrogacy represents a special type of civil law contract<sup>75</sup> and should be

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<sup>71</sup> Article 55, 9 of the Federal Law on the Basics of Protection of Health of Citizens in the Russian Federation. Available at: [www.consultant.ru](http://www.consultant.ru).

<sup>72</sup> Article 52,3 of the Family Code of the Russian Federation. Available at: [www.consultant.ru](http://www.consultant.ru).

<sup>73</sup> M. Startchikov, *Dogovor okazaniya medizinskih uslug* [Договор оказания медицинских услуг: правовая регламентация, рекомендации по составлению, судебная практика и типовые образцы.] М.: Инфотропик Медиа, 2017; S. Chashkova, *Svoboda formirovaniya uslovij dogovora o surrogatnom materinstve kak netipichnoj* [Свобода формирования условий договора о суррогатном материнстве как нетипичной договорной конструкции] // *Законы России: опыт, анализ, практика*. 2016. N 2. С. 58 – 64; К. Kirichenko, *Opređenje predmeta dogovora surrogatnogo materinstva* [Определение предмета договора суррогатного материнства] // *Семейное и жилищное право*. 2016. N 1. С. 9 – 12; S. Losovskaja, M. Shodonova, *Subjektnyj sostav dogovora surrogatnogo materinstva* [Субъектный состав договора суррогатного материнства] // *Семейное и жилищное право*. 2016. N 3. С. 7 - 10.

<sup>74</sup>L.V. Kruzhalova, I.G. Morosova, *Spravochnik jurista po semejnemu pravu* [Справочник юриста по семейному праву], Sankt-Peterburg, 2007.

<sup>75</sup>J.A. Dronova, *Chto nuzhno znatj o surrogatnom materinstve* [Что нужно знать о суррогатном материнстве]. Moscow, 2007.

regulated by norms related to services,<sup>76</sup> in the sense that a surrogate mother provides certain services to a couple. She receives compensation for medical examinations, travel, absence from work, possible injuries and for her 'service.' Nevertheless, she is not fully protected from arbitrariness by a clinic or from unexpected actions by the intended parents. Only the financial obligations of the parties to the contract are enforceable.<sup>77</sup>

There has been an attempt to make a surrogacy contract a mandatory condition for the registration of a child born in a surrogacy arrangement.<sup>78</sup> The draft law, however, has not been ratified so far.

Since a special type of contract with a surrogate mother is not explicitly mentioned in Russian civil law, its enforcement was deemed fully invalid in Russian courts until recently. The priority is normally to be given to explicit provisions in the Family Code providing the right of a surrogate mother to decide upon the future of a child.

In 2017 the Plenum of the Supreme Court of the Russian Federation in Resolution No. 16 "On application of the law related to identification of a child"<sup>79</sup> noted that if a surrogate mother has not given her consent to register potential parents as legal parents of the child born in a surrogacy arrangement, this fact cannot be an absolute ground for rejecting the claim of potential parents to

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<sup>76</sup>A. Aslsmurzaeva, *Surrogatnoje materinstvo: probely zakonodatel'stva* [Суррогатное материнство: пробелы законодательства] // EZ-Juristy [ЭЖ-Юрист]. 2011. N 30; A.V. Malutina, *Vserossijskij zhurnal nauchnyh publikacij* [Всероссийский журнал научных публикаций]. Juridicheskie nauki [Юридические науки]. №1 (11) 2012.

<sup>77</sup>S.S. Shevtchuk, *Nekotorye problemy pravovogo regulirovanja primeneniya iskusstvennyh metodov reprodukcii* [Некоторые проблемы правового регулирования применения искусственных методов репродукции] // Jurist, 2002. N 9.

<sup>78</sup> Законопроект N 1177252-6 "О внесении изменений в Семейный кодекс РФ и статью 16 Федерального закона "Об актах гражданского состояния" в части применения вспомогательных репродуктивных технологий" (внесен в Государственную Думу 19.09.2016).

<sup>79</sup> The Plenum of the Supreme Court of the Russian Federation, Resolution from the 16<sup>th</sup> of May 2017, N 16 Пленум Верховного Суда Российской Федерации Постановление от 16 мая 2017 г. N 16 О применении судами законодательства при рассмотрении дел, связанных с установлением происхождения детей. Available at: <http://www.vsrif.ru>.

register them as legal parents of the child. The court should decide if a surrogacy contract has been concluded, examine its provisions and clarify why the surrogate mother has withdrawn her consent.

Obviously, there is a certain dynamic in the attitudes of the judiciary and we find more nuanced interpretations of the freedom of contract principle in conjunction with the principle of equality.

As the *Paradiso* case illustrates,<sup>80</sup> an important aspect of a surrogacy contract is the relationship between the clinic, the intended parents, the donor and the surrogate mother. In the IVF procedure carried out in Russia for Italian citizens *Paradiso* and *Campanelli*, unknown gametes were used. The Italian authorities decided to remove the child and place him under guardianship on the ground that he had no biological relationship with the Italian couple. Including a genetic test of the newly born child in the obligations of the clinic would save couples the trouble of giving evidence of their biological relationship. The current contractual scheme does not guarantee the adequate and effective protection of the interests and rights of any of the parties.

The *Paradiso* case has raised several important concerns with regard to surrogacy contracts.

First, the question of liability of a medical institution involved in a surrogacy arrangement is not specified in Russian law. Significantly, the clinic which was involved in the *Paradiso & Campanelli* case still exists providing “all-inclusive surrogacy packages to its clients.”<sup>81</sup> The law firm cooperating with the clinic treats surrogacy contracts as a type of commercial service: “A contract between a surrogate mother and biological parents is a common contract of commercial services.” Putting aside moral reasons, the law firm claims that any “good quality work deserves to be well-paid, including work of this kind.”<sup>82</sup>

Some Russian legal scholars strongly reacted to the *Paradiso* case. *Vershinina* in an article refers to the *Paradiso* case explicitly<sup>83</sup>

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<sup>80</sup> Questions and Answers on the *Paradiso* and *Campanelli v. Italy* judgment. Available at: [http://www.echr.coe.int/Documents/Press\\_Q\\_A\\_Paradiso\\_and\\_Campanelli\\_ENG.pdf](http://www.echr.coe.int/Documents/Press_Q_A_Paradiso_and_Campanelli_ENG.pdf).

<sup>81</sup> <http://vitanovaclinic.ru/en/program/allinclusive/>.

<sup>82</sup> [www.jurconsult.ru](http://www.jurconsult.ru).

<sup>83</sup> G. *Vershinina*, *O nekotorykh problemakh primenenija zakonodatelstva pri rassmotrenii del svyazannykh s ustanovleniem proishozhdenija detej* [О некоторых проблемах

and argues that if a fraud has taken place or any kind of illegal agreement between the clinic and the couple exists, the issue should be regulated by criminal law.

Second, the clinic involved in the *Paradiso* case openly rejects the importance of the citizenship of the intended parents or their marital status.<sup>84</sup> However, among legal professionals *Paradiso* has induced broader debates precisely on the differences in legal approaches to surrogacy worldwide.

Without mentioning the *Paradiso* case directly, Tagaeva and Aminova<sup>85</sup> argue that a foreign fact element can restrict carrying out some kinds of reproductive technologies in transnational surrogacy contracts. Some countries fully prohibit surrogacy arrangements. Citizens of those countries can become parties to surrogacy contracts in other states. Therefore, *lex voluntatis* can be restricted on public policy grounds or imperative national laws.

Scholars recall the strong moral and ethical implications that surrogacy contracts often have and their impact on the legal position of a child. Therefore, the authors insist on particular state control in surrogacy contracts. "Breach of contractual obligations either by the immediate contractual parties (genetic parents and a surrogate mother), or by a medical organization should lead to liability. In this regard, it is necessary to take into account both the national law of the genetic parents but equally the law of the state where the surrogacy arrangement takes place."<sup>86</sup>

"Unfortunately, the authors conclude, the choice of law rules in relation to new reproductive technologies lag behind the actual development of medical techniques."<sup>87</sup>

From the international private law perspective, choice of law in surrogacy contracts is a difficult question. The authors

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применения законодательства при рассмотрении дел, связанных с установлением происхождения детей] // Законы России: опыт, анализ, практика. 2018. N 1. С. 11 - 15.

<sup>84</sup> <http://vitanovaclinic.ru/en/services/surrogacy/>.

<sup>85</sup> S. Tagaeva, F. Aminova, *Problemy primeneniya pravoporyadka k oslozhnennym inostrannym elementom otnoshenijam voznikaushim iz vspomogatelnyh reproduktivnyh tehnologii* [Проблемы применения правопорядка к осложненным "иностранному элементу" отношениям, возникающим из вспомогательных репродуктивных технологий] "Вестник Пермского университета. Юридические науки", 2017, N 2. С. 192 - 202.

<sup>86</sup> S. Tagaeva, F. Aminova, cit. at 85, 199.

<sup>87</sup> S. Tagaeva, F. Aminova, cit. at 85, 194.

presume, that *lex personalis* can create problems in international surrogacy arrangements because many states prohibit surrogacy. The choice of the national law of the intended parents create unfavourable conditions for them. Tagaeva and Aminova argue that for transnational surrogacy contracts is it crucial to study national rules before entering a surrogacy contract. Neglect can create serious problems with regard to the rights and legal position of a child and even create limping parental relationships, which are recognized in the state where the surrogacy arrangement has taken place but not in the legal order of the intended parents. Finally, the authors plead for the harmonization of rules regulating parental relationships.

A second issue that is crucial for the adequate protection of the interests of the parties in a surrogacy contract, in our opinion, has to do with the regime of medical secrecy, which includes secrecy of donorship and secrecy of surrogacy treatment. A factor that creates a serious gap in the regulation of surrogacy and opens up the possibility of malpractice is the fact that although the commercial use of gametes is prohibited there are banks of gametes which can be used by cooperating clinics.<sup>88</sup> If such gametes are sent from Russia to the USA for use in surrogacy treatments, the regime of secrecy cannot be applied there according to US law, and *vice versa*. The absence of harmonized regulation causes serious legal collisions and conflicts.

International surrogacy and donor contracts represent a vast field for legal collisions between those legal orders which recognize the legality of surrogacy and new reproduction technologies as a basis for the acquisition of parental rights and those which do not. Due to differences in legal regulations and certain essential differences in the financial aspects of surrogacy, so-called surrogacy tourism is becoming more and more popular. Cases such as *Menesson v. France*, *Labassee v. France* in 2014, and *Paradiso and Campanelli v. Italy* in 2015 call for standards to be set.

Regulatory divergences open doors for manipulation and exploitation. Assisted reproduction is a developing lucrative business in Russia. Absence of clear contractual rules, provisions

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<sup>88</sup><http://reprod.ru/about/novosti/klinika-novaya-zhizn-nachala-sotrudnichestvo-s-odnim-iz-krupnejshih-mi/>.

on liability all undermine the level of legal certainty and finally hinder the adequate judicial protection of all persons involved.

The need for harmonization has been expressed by the United Nations Committee on Bioethics: "A growing number of scientific practices have extended beyond national borders and the necessity of setting universal ethical guidelines covering all issues raised in the field of bioethics and the need to promote the emergence of shared values have increasingly been a feature of the international debate. The need for standard-setting action in the field of bioethics is felt throughout the world, often expressed by scientists and practitioners themselves and by lawmakers and citizens."<sup>89</sup> A UN General Conference considered that it was "opportune and desirable to set universal standards in the field of bioethics with due regard for human dignity and human rights and freedoms, in the spirit of cultural pluralism inherent in bioethics."<sup>90</sup> The lack of appropriate regulations and harmonized guidelines is a serious obstacle to ensuring non-discrimination and effective enforcement.

#### **2.4. The legal position of the child**

The absence of a properly structured enforceable surrogacy contract<sup>91</sup> in Russian law has a negative effect on the legal position of the child. Since the regulation is fragmented, there is no legal certainty about the legal position of the child in surrogacy arrangements. What happens if the newly born child is handicapped and the intended parents refuse to take him? What happens if they have their own children in the meantime, or in the worst case become ill themselves, incapable or die? All these questions receive no answer. Children's rights of inheritance are not mentioned in any way by the legislator. As already mentioned, from the legal perspective there are many kinds of surrogacy depending on the combination of donor material and the persons involved. Lebedeva mentions the diversity in the legal

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<sup>89</sup> Resolution adopted on the Report of Commission II I at the 18th plenary meeting on 19 October 2005. The 32d Session of the UNESCO General Conference, 32 C/ Resolution 24.

<sup>90</sup> The UN General Conference on 32 C/Res. 24. 32 Session October 2003

<sup>91</sup>T.E. Borisova, *Surrogatnoje materinstvo v Rossijskoj Federazii; problemy teorii i praktiki* [Суррогатное материнство в Российской Федерации: проблемы теории и практики]. Moscow, 2012.

definitions of kinship. There is no agreement on the legal priority between genetic relationship and intention in cases of conflict. Criteria for a genetic relationship, legally expressed intention, the legitimacy of reproductive technologies and surrogacy treatments and the best interests of the child all need to be weighed and applied either separately or simultaneously by the court.<sup>92</sup> Emphasising the particular delicacy of surrogacy arrangements, the European Court of Justice called for a cautious and individual approach to the question of balancing the biological and factual rights of a father (parents) to examine what was really in the best interests of a child.<sup>93</sup> Thus, the complexity of surrogacy arrangements ends up becoming a complexity of recognition of parental rights and the legal position of the child. Notwithstanding the complexity of the issue, there is good news from Russian judicial practice.

On non-discrimination grounds and the principle of the child's best interests, the Russian courts recognize the possibility of changing the date and place of birth of a child born in a surrogacy arrangement when registering the birth.<sup>94</sup>

Two children born to a surrogate mother in the city of Rzhev, Tverj region, were, however, initially registered by their parents in Moscow, where they live. The State Registration Authority asked the court of the first instance to change the erroneously made entry. This claim of the State Registration Authority was satisfied. However, the Court of Appeal has finally reversed the initial decision.

The Court of Appeal applied the procedural rules on adoption according to article 1 of the Code of Civil Procedure by analogy. The Court noted that on the one hand the laws on reproductive technologies and surrogacy in particular do not explicitly regulate the registration procedure for children born in surrogacy arrangements. On the hand, the law contains no explicit

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<sup>92</sup>O.J. Lebedeva, *Juridicheskaja kategorija "rodstvo" v sovremenном semejnom prave* [Юридическая категория "родство" в современном семейном праве].// *Semejnoje i zhilischnot pravo* [Семейное и жилищное право], 2013, N 3.

<sup>93</sup> Decision of the ECHR of the 21st of December 2010 "Anayo v. Germany". Available at: NJW.2011. Bd. 3565.

<sup>94</sup> Appeal Ruling by the Moscow City Court of September 18th 2013 (Case №11-26919).

prohibition of changing the place and date of birth of a child born in a surrogacy arrangement if it is in the child's best interest.

According to the article 47 of the Civil Code and article 15 of Federal Law No. 143 "On acts of civil status" the parents of a child cannot choose the place of birth when registering a child. The Russian Constitution guarantees the right to privacy, to family and private life, and protects motherhood and childhood. It allows limiting these rights only to the extent necessary to protect competing public policy grounds.

The Court of Appeal found that changing the entry in the register would be against the child's best interest and would unnecessarily limit the constitutionally protected rights of citizens. To guarantee the secrecy of a surrogacy arrangement and to protect the best interests of the children the Court of Appeal recognized the possibility of changing the date and place of birth of a child born in a surrogacy arrangement when registering the birth.

With regard to the legal registration of a child, the Paradiso case received no official response in Russia. Both Italy and the Russian Federation are signatories to The Hague Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents. According to Russian law, foreign citizens can be registered as parents of a child born on the territory of the Russian Federation. In the situation with a surrogacy arrangement – as has been mentioned earlier – married persons are registered as parents of a child born in a surrogacy arrangement if they provide a document from a medical organization confirming the birth of a child and a document confirming the consent of the surrogate mother to register these same persons as the parents of a child. If one parent or both parents of a child are foreigners, the Federal Law "On Citizenship"<sup>95</sup> of the Russian Federation recognizes the foreign citizenship of a child. However, according to Article 12, g of the Federal Law "On Citizenship," if a child is born in the territory of the Russian Federation, both or one of his parents are foreigners and the nationality of the parents does not provide for a citizenship for the child, the child receives Russian nationality.

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<sup>95</sup> ст. 12 Федерального Закона № 62 от 31.05.2002 «О гражданстве».

Since the child has not been denied Italian citizenship, the issue has not received any further official reaction.

In Russian legal discourse, the *Paradiso* case has been mostly discussed as an ECHR case.<sup>96</sup> Nevertheless, it has inspired more dynamic and nuanced reflection on surrogacy within the national judiciary in Russia.

On 27 September 2018 the Russian Constitutional Court issued Resolution N 2318-O on surrogacy and the registration of parent-child relationships.<sup>97</sup> The claimants challenged the absolute right of a surrogate mother to give consent to the registration of the intended parents of a new born child as his legal parents. The application was rejected on formal grounds. The Court confirmed its legal position expressed in Resolution N 880-O of 15 May 2012. In conformity with the legal position of the European Court of Human Rights and the wide margin of appreciation, the existing national model of surrogacy, in the opinion of the Court, is not the only possibly model for protecting motherhood, family and children's rights.

In his dissenting opinion, Judge Kokotov directly refers to the opinions expressed by De Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov on *Paradiso and Campanelli* in 2017 and critically assesses important deficits of the current surrogacy regulation in Russia.<sup>98</sup> He argues that a birth of a child having two

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<sup>96</sup>I. Garanina, T. Lysenko, *Osnovnye voprosy realizatsii prava na surrogatnoe materinstvo v mezhdunarodnom prave i sudebnoj praktike Rossijskoj Federatsii* [Основные вопросы реализации права на суррогатное материнство в международном праве и судебной практике Российской Федерации] "Российский судья", 2017, N 7.

<sup>97</sup>The Constitutional Court of the Russian Federation, Ruling from the 27<sup>th</sup> of September 2018 N 2318-O Конституционный Суд Российской Федерации. Определение от 27 сентября 2018 г. N 2318-O "Об отказе в принятии к рассмотрению жалобы граждан С.Д. и С.Т. на нарушение их конституционных прав пунктом 4 статьи 51, пунктом 3 статьи 52 Семейного Кодекса Российской Федерации, пунктом 5 статьи 16 Федерального Закона "Об актах гражданского состояния", частью 9 статьи 55 Федерального Закона "Об основах охраны здоровья граждан в Российской Федерации".

<sup>98</sup>Descending Opinion Judge Kokotov: "Совпадающее мнение судей Винсента А. де Гаэтано, Паулу Пинту де Альбукерке, Кшиштофа Войтычека и Дмитрия Дедова к постановлению Европейского Суда по правам человека от 24 января 2017 года по делу "Парадизо и Кампанелли против Италии (жалоба N 25358/12)".

mothers causes serious moral, ethical and legal problems related to the rights of the child and his parents. From the legal perspective, it is essential to avoid legal uncertainty in a short period after the birth of a child and to resolve potential conflicts about parental rights promptly excluding lengthy proceedings. Countries permitting surrogacy implement different solutions that all have certain natural justifications. The Judge stresses that within the wide margin of appreciation, different national models of surrogacy should guarantee a due balance of constitutional rights of the child, genetic parents and surrogate mother.

Russia realizes a gestational surrogacy model including commercial surrogacy. The law allows a surrogate mother to revoke her obligation to give a child born in a surrogacy arrangement to the potential parents. This model imparts an essential element of risk to surrogacy contract. However, such an element of risk is in the nature of the contract, and parties can take it into consideration before entering into contractual relationships. Furthermore, the surrogacy contract can provide for rules minimizing risk, like, for example, the obligation of a surrogate mother to fully compensate the intended parents for all expenses in the surrogacy arrangement.

The aim of constitutional jurisprudence, as Judge Kokotov points out, would be to assess the constitutionality of lacking differentiated regulation with regard to different surrogacy models (commercial and non-commercial surrogacy) in Russia. He questions the constitutionality of the single model of gestational surrogacy in general, suggesting that commercial surrogacy might incorporate stronger protection of the rights of genetic parents.

Another important aspect that is missing in the current legal regulation of surrogacy contracts is the availability of clear criteria for malpractice by a surrogate mother.

## 2.5. Legal aspects of the child-parent relationship in surrogacy arrangements. Registration of the child and parental status of the intended parents

There are different theories on the foundation of parental status.<sup>99</sup> In the Russian Federation, recognition of parents' rights is generally based on genetic relationship and official registration. In its Article 51, 4, the Family Code of the Russian Federation states that the names of married persons who have given their consent in written form to the artificial fertilization or implantation of the embryo are to be recorded as the child's parents in the Register of Births if the child is born as a result of the application of these methods. Married persons who have given their consent in written form to the implantation of an embryo in another woman for her to bear it may only be registered as the child's parents with the consent of the woman who has given birth to the child (the surrogate mother). Accordingly, as previously mentioned, the legal parent-child relationship can only be established with the consent of the surrogate mother. According to Article 16 of Federal Law No. 143 "On acts of civil status,"<sup>100</sup> married persons who have given their consent to the implantation of an embryo in another woman should concurrently provide a document from a medical organization confirming the birth of the child and a document confirming the consent of the surrogate mother to register these same persons as the parents of the child.

The law protects surrogate mothers, which has raised much discussion. Many lawyers see it as a possibility for the couple to be blackmailed. Even though the intended parents have a contract with the surrogate mother, they cannot enforce it in the case of her refusing to give them the child. As an example, in 2012 the Russian Constitutional Court recognized the right of a surrogate mother to decide on the future of a child, claiming a wide margin of appreciation in surrogacy cases and conformity with European and international case law.<sup>101</sup>

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<sup>99</sup>A.A. Kirichenko, *Vopros opredelenija osnovanij roditeljskogo statusa* [Вопрос определения оснований родительского статуса]. // *Semejnoje i zhilishchnoje pravo* [Семейное и жилищное право]. N 6, 2008.

<sup>100</sup>Federal Law №143 "On acts of civil status" 1997-2014. Available at: [www.consultant.ru](http://www.consultant.ru).

<sup>101</sup>Ruling of the Constitutional Court of the Russian Federation of May 15th 2012 N 880-O "On the non-admissibility of a petition by citizens T.P and T.J

There has been an attempt to modify this provision: in 2016 a draft law was proposed to amend the Family Code eliminating the mandatory consent of a surrogate mother.<sup>102</sup> It has not so far been reviewed by the Parliament.

The high courts in Russia in their turn begin to differentiate between commercial and non-commercial surrogacy, stressing the importance of contractual provisions. On 16 May 2017 the Supreme Court of the Russian Federation issued a resolution "On implementation of laws in cases establishing the origin of a child."<sup>103</sup> In paragraph 31 it states that in disputes arising from surrogacy arrangements, the refusal of a surrogate mother to register the potential parents as legal parents cannot be an absolute ground for rejection of their claim. In this case, the court should examine if a surrogacy contract has been concluded, what its provisions are, if the intended parents are the child's genetic parents and what the reasons are for the surrogate mother's refusal to give her consent. In every case the priority should be given to the best interests of the child."

Vershinina criticizes the insufficient elaboration of the above-mentioned Resolution. "In the situation of insufficient regulation of surrogacy, it would be very helpful if the Supreme Court would specify the grounds for rejection or satisfaction of a claim." Moreover, the court should study the legality of a surrogacy contract itself, since surrogacy is construed in Russian law as a medical technique treating infertility and not allowed on other grounds."<sup>104</sup>

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regarding article 51, 4 of the Family Code of the Russian Federation and Article 16, 5 of the Federal Law "On acts of civil status," including a dissenting opinion by Judge S.D.Knyazev [Определение Конституционного Суда Российской Федерации от 15 мая 2012 г. N 880-О "Об отказе в принятии к рассмотрению жалобы граждан Ч.П. и Ч.Ю. на нарушение их конституционных прав положениями п. 4 ст. 51 СК РФ и п. 5 ст. 16 Федерального закона "Об актах гражданского состояния", а также Особое мнение судьи Конституционного Суда Российской Федерации С.Д. Князева касательно Определения от 15 мая 2012 г. N 880-О]. Available at: [www.consultant.ru](http://www.consultant.ru).

<sup>102</sup> Draft Law N 1177252-6 "О внесении изменений в Семейный кодекс РФ и статью 16 Федерального закона "Об актах гражданского состояния" в части применения вспомогательных репродуктивных технологий" (внесен в Государственную Думу 19.09.2016).

<sup>103</sup> Российская газета. 24 мая 2017 г.

<sup>104</sup> G. Vershinina, cit. at 83, 13.

**2.6. The possibility of disputing fatherhood or motherhood in surrogacy arrangements is an important indicator of the level of legal certainty for the parties and of the legal position of the child**

Article 52, 2 of the Family Code states that a claim disputing fatherhood by a person registered as a child's father on the ground of Article 51, 2 of the Code may not be satisfied if at the moment of making the entry the person was aware that he was not actually the child's father. According to Article 52, 3 of the Family Code, a spouse who gave his consent in written form, in conformity with the legally established procedure, to applying the method of artificial fertilization or implantation of an embryo, does not have the right to refer to these circumstances when disputing the fatherhood. Spouses who have given their consent to the implantation of an embryo in another woman, and also the surrogate mother (the second part of Item 4, Article 51 of the same code), do not have the right to refer to these circumstances when disputing the motherhood and fatherhood after the entry in the register of births has been made.

In the modern context of pluralistic family relationships, the high courts in Russia have started revising interpretations of complex constellations related to biological and social parenthood. In particular, in 2017 the Plenum of the Supreme Court issued a resolution on the application of the law related to establishing the origin of a child.<sup>105</sup> There is a certain shift in balancing conflicting rights in favour of intention.

The Supreme Court says the following. If the court finds out, that the person who is registered as a child's father (or mother) is not his or her biological father (or mother), then the claim disputing the entry made in the state register of births can be satisfied. If the mother of a child or his or her guardian do not demand identification of the child's biological father, or if the biological father himself does not claim his fatherhood and simultaneously the person initially registered as the child's father objects to modification of the registration, then in exceptional

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<sup>105</sup> The Plenum of the Supreme Court of the Russian Federation from the 16<sup>th</sup> of May 2017 N 16 О Пленум Верховного Суда Российской Федерации Постановление от 16 мая 2017 г. N 16 О Применении судами законодательства при рассмотрении дел, связанных с установлением происхождения детей. Available at: <http://www.vsrif.ru>.

cases the court can reject the claim disputing the entry in the state register of births. The court should examine if a child has developed long-term emotional ties with the person, if the person has an intention to raise and bring up the child as his own and to decide on the best interest of the child.

## 2.7. Public policy grounds in surrogacy arrangements

The core principles of the dignity of the person and the integrity of his/her personality, life and body are the foundations of the human rights to reproduction, health protection and care, as well as to the rights to privacy and family life.<sup>106</sup> The main purpose of new reproduction technologies and surrogacy is the treatment of infertility.<sup>107</sup> The law stipulates that every adult woman of a fertile age has a right to artificial fertilization and implantation of an embryo. A woman has the right to information about the procedure for artificial fertilization and implantation of an embryo, and about the medical and legal aspects of the treatment.

The Constitution of the Russian Federation and other organic laws are silent on possible public policy grounds related to surrogacy treatment and new reproduction technologies. There is an indirect mention of public policy reasoning in Decree No. 107n of the Ministry of Health, which states that new reproduction technologies and surrogacy treatments are basically permitted in the Russian Federation in the case of medically acknowledged infertility, which means that hypothetically the legislator restricts surrogacy technology to those who are not able to have children themselves. In practice, however, clinics advertise new reproduction technologies and surrogacy for everybody.<sup>108</sup>

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<sup>106</sup>E.V. Perevozchikova, *Konstituzionnoe pravo na zhisnj i reprodukcionnye prava cheloveka* [Конституционное право на жизнь и репродуктивные права человека], Kazanj, 2006.

<sup>107</sup>M.L. Chernyshova, A.B.V. Chernyshov, E.M. Osmano, G.J. Klimenko, V.V. Lebedev, A.I. Korzhavina, *Bioeticheskie i pravovye problemy besplodija i vspomogatel'nyh reprodukcionnyh tehnologij* [Биоэтические и правовые проблемы бесплодия и вспомогательных репродуктивных технологий]. Tambov. 2010.

<sup>108</sup> For example, <http://www.spbivf.com/ru/surrogatnoe-materinstvo-i-donorskie-programmi/>

## 2.8. Equality and Non-Discrimination principles

Equality and non-discrimination principles in surrogacy arrangements can be interpreted from different perspectives.

From the gender perspective, the reproductive rights of a person are considered most sensitive, as Hasova points out.<sup>109</sup> Article 55, 3 of the Russian Federation Citizens' Health Protection Act recognizes the right of married or unmarried couples to apply reproduction technologies provided they give their mutual informed free consent. A single woman has an equal right.

In protecting the equality of single women, the Russian judiciary is quite progressive and traditionally sympathetic. Russia's selective compliance with universally recognized international standards has long been a topic in academic discussion.<sup>110</sup> Despite the established criticisms of the Russian judicial system, courts in Russia are very forward in protecting equality rights in family matters. Two decisions by the Sankt Petersburg District Court recognizing the equal right of a single are examples the right of a woman to maternity and registration of her child,<sup>111</sup> as is a similar verdict by the Moscow District Court.<sup>112</sup>

However, the legislator denies single men an equal right to parentage, thus infringing the international principle of gender equality. Some authors criticize the regulations for being discriminatory against single men.<sup>113</sup> Their limited access to assisted reproduction contradicts the provisions of article 19, 3 of

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<sup>109</sup>О.А. Hasova, *Reproduktivnyje prava v Rossii: predely zakonodatel'nogo regulirovaniya* [Репродуктивные права в России: пределы законодательного регулирования] // *Konstituzionnoe pravo: vostochnoevropskoe obozrenije* [Конституционное право: восточноевропейское обозрение]. N 4, 2000. P. 16.

<sup>110</sup> See, for example, *Rule of Law in Russia. Issues of Implementation, Enforcement and Practice*. International Collective Monograph. Moscow. Statute. 2010.

<sup>111</sup>Ruling of Kalininskij District Court of Sankt-Petersburg from August 5, 2009 in civil matter N 2-4104 [Калининский районный суд г. С.-Петербурга, решение от 5 августа 2009 г. по гражданскому делу N 2-4104, судья Корчагина А.Ю.].

<sup>112</sup>Ruling of Kuntzevskij District Court of Moscow from November 3, 2009 in civil matter N 2-3853/09 [Кунцевский районный суд г. Москвы, решение от 3 ноября 2009 г. по гражданскому делу N 2-3853/09, судья Макарова М.Э.].

<sup>113</sup> J.V. Belyaninova, T.S. Guseva, N.A. Zakharova, L.V. Savina, N.A. Sokolova, J.V. Hlistun, *Commentary to the Federal Law 323 "On the Basics of Protection of health of citizens in the Russian Federation"* (2016) available at: [www.consultant.ru](http://www.consultant.ru)

the Russian Constitution securing equality for men and women.<sup>114</sup> Here again, Russian jurisprudence seems to be more open-minded than the legislator. In 2010-2011, in several cases Russian district courts upheld the equal right of a single man to parentage, indicating that Russian law contains no normative limitations on a single woman or a single man realizing her or his right to parentage through the use of new reproduction technologies.<sup>115</sup> It is interesting that the first known verdict of this kind was given by a male judge. However, according to the law, surrogacy is open to officially married couples and single women.

In May 2018 a draft law changing the provisions of the Family Code with regard to unregistered couples was brought before the Russian Parliament. It initiates the recognition of the right of unregistered couples to enter into surrogacy arrangements.<sup>116</sup>

Presumably, by analogy with adoption it is only open to heterosexual couples. Article 127, 1 of the Family Code of the Russian Federation provides a right to adoption for everyone except – in paragraph 13 – persons of the same sex in a union acknowledged and registered as a marriage according to the law of a foreign country which authorizes such unions, and citizens of such a country not officially married.<sup>117</sup> In this vein the law does not recognize the right of LGBT couples to enter into surrogacy arrangements. In conjunction with the legal positions expressed by the Constitutional Court of the Russian Federation on adoption, it is not realistic to assume that homosexual couples can

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<sup>114</sup> Article 19, 3 of the Constitution of the Russian Federation. Available at: [www.consultant.ru](http://www.consultant.ru)

<sup>115</sup> Ruling of Babushkinskij District Court of Moscow of August 4, 2010 in civil matter No. 2-2745/10. [Бабушкинский районный суд г. Москвы, решение от 4 августа 2010 г. по гражданскому делу N 2-2745/10, судья Мартыненко А.А.]; Ruling of Smoljninskij District Court of Sankt-Petersburg in civil matter N 2-1601/11 [Решение Смольнинского районного суда г. Санкт-Петербурга от 4 марта 2011 г. по гражданскому делу N 2-1601/11].

<sup>116</sup> Проект Федерального закона N 473140-7 "О внесении изменений в отдельные законодательные акты Российской Федерации в части государственной регистрации рождения ребенка, в результате применения вспомогательных репродуктивных технологий" (ред., внесенная в ГД ФС РФ, текст по состоянию на 24.05.2018).

<sup>117</sup> The Family Code of the Russian Federation. The Federal Law №223 of 29.12.1995 with changes of 20.04.2015. Available at: [www.consultant.ru](http://www.consultant.ru).

be granted a right to legally adopt a child or to openly enter into surrogacy arrangements.

However, some agencies propose for lesbian couples to act in a single woman capacity and homosexuals to use the model of ‘traditional surrogacy,’ which is not mentioned in the law. Here, a biological father and – ideally – a single woman (a surrogate mother) are registered as parents of the child and the woman legally terminates her parental rights after the delivery, so the biological father become the only parent of the child.<sup>118</sup>

General attitudes to LGBT unions in Russia are either negative or cool. 72% of the Russian population find homosexuals morally unacceptable.<sup>119</sup> Many Russian authors rigidly hold, moreover, that access to surrogacy should be forbidden for homosexual couples. Romanovskij,<sup>120</sup> for example, calls for “reproduction prevention of people with unconventional sexual orientation.” However, there is also an opposite opinion. Discussing the issue of adoption of children in homosexual families, Vorozhejkina, a leading expert of the “Levada-Center,” for example, claims that in choosing between an orphanage and adoption by a homosexual couple, adoption provides in any case better conditions for a child.

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<sup>118</sup> See, for example, [www.jurconsult.ru](http://www.jurconsult.ru)

Иван, 25 лет, Москва. Я гей. Планирую завести ребенка. Как это сделать?  
– При реализации гражданами своих репродуктивных прав никакая дискриминация недопустима. Ваша сексуальная ориентация не имеет в данном случае никакого значения. Это излишняя информация, которая к тому же представляет собой охраняемую законом тайну Вашей личной жизни и, следовательно, не может никого касаться.

Вам нужно будет пройти установленное медицинское обследование, после чего выбрать в специализированном агентстве будущую генетическую мать своего ребенка (донора ооцитов) и гестационную суррогатную мать, которая и будет вынашивать Вашего малыша.

<sup>119</sup> V. Sakevitch, Отношение к разводам, внебрачным отношениям, гомосексуализму, абортam, контрацепции в 40 странах мира. Demoscope Weekly. № 595 – 596/21 April - 4 May 2014.

Available at: <http://www.demoscope.ru/weekly/2014/0595/reprod01.php>.

<sup>120</sup> G.N. Romanovskij, *Pravovoe regulirovanije vspomogatel'nyh reproduktivnyh tehnologij* [Правовое регулирование вспомогательных репродуктивных технологий] in// *Biomedizinskoje pravo v Rossiii I za rubezhom* [Биомедицинское право в России и за рубежом]. Prospekt. 2015.P.129.

Some Russian scholars suggest using reproductive technologies according to so-called 'social indications,' like sexual abstinence, psychological phobia related to pregnancy and persons having serious anatomic or aesthetic defects.<sup>121</sup>

Another important aspect in interpretation of the principle of equality is the age of persons entering into surrogacy arrangements. Mitryakova express doubts on the reasonableness of surrogacy arrangements for genetic parents who are 60-70 years old. The law should contain a limitation on the age of genetic parents, the author points out.<sup>122</sup>

From the other side's perspective, so to say, the law does not clearly regulate the question if a surrogate mother is a legal subject of a parental relationship and is entitled to social benefits. The problem of the legal position of a surrogate mother is well illustrated by the situation regarding a medical certificate allowing her to be on leave from work. The law provides for a medical certificate of disability for pregnant women and mothers after the birth of a child. Decree N 624n of 29.06.2011 "On the approval of the procedure of issuing medical disability certificates"<sup>123</sup> provides for medical certificates for women adopting a child under 3 months old. A woman who has had infertility treatment has a right to a medical certificate and to leave, but a surrogate mother is not explicitly mentioned.

So much has been said about the principle of equality on the one side of the contract, that of the intended parents. The other side – the surrogate mother – deserves attention as a discriminated subject too.

There are some further legal issues that this paper does not deal with. The life of a person starts with conception, notes former

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<sup>121</sup> A. Levushkin, I. Saveljev, *Trebovaniya predjavlyаемые zakonodatelem k budushim roditel'ym rebenka, rozhdenного s primeneniem technologii surrogatного materinstva* [Требования, предъявляемые законодателем к будущим родителям ребенка, рожденного с применением технологии суррогатного материнства] // Современное право. 2015. N 9. С. 92 - 96.

<sup>122</sup> E. Mitryakova, *Trebovaniya k potentsial'nym roditel'ym pri ispol'zovanii metoda surrogatного materinstva* Требования к потенциальным родителям при использовании метода суррогатного материнства (Митрякова Е.С.) ("Семейное и жилищное право", 2018, N 6).

<sup>123</sup> Decree of the Ministry of Social Development N 624n On the issue of medical certificates of disability [Приказ Минздравсоцразвития России] от 29.06.2011 N 624н "Об утверждении Порядка выдачи листков нетрудоспособности".

Russian Judge at the European Court of Human Rights Anatolij Kovler, so the legal regulation of the position of an embryo is another pressing issue.<sup>124</sup> A legal framework for possible decisions about the future of cryoconserved embryos in cases of potential conflict between the genetic parents is another gap in Russian law.<sup>125</sup> There is much potential for conflict here, as, for example, the decision of the European Court of Human Rights in *Evans v. the United Kingdom* shows.<sup>126</sup> Further areas which are not effectively regulated in Russian law are the inheritance rights of a child born with assisted reproduction, the inheritance rights of those born from cryoconserved embryos, donor rights in relation to children, and the collision between the regime of secrecy in relation to surrogacy and assisted reproduction and the right of a child to his own identity, which includes a right to know one's parents.

### 3. Ethical issues and the 'morality' of surrogacy

Finally, I would like to touch upon the issue of the morality of surrogacy and new reproduction technologies and their clash with traditional values.

At the policy-making level in Russia, a lot of attention is being traditionally paid to motherhood, childhood and family-support measures.<sup>127</sup>

For many women, entering into surrogacy contracts surely offers the possibility of resolving financial and social problems. Resolution of the Constitutional Court of the Russian Federation

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<sup>124</sup>A.I. Kovler, *Antologija prava* [Антропология права]. Moscow, 2002. P. 428.

<sup>125</sup> Gendernaja perspektiva rossijskogo zakonodatel'stva [Гендерная экспертиза российского законодательства]. Moscow, 2001.

<sup>126</sup> The European Court of Human Rights, case of *Evans v. the United Kingdom*, App. No(s).6339/05. 10/04/2007. Available at: <http://hudoc.echr.coe.int/eng#%7B%22dmdocnumber%22:%5B%22815166%22%2C%22itemid%22:%5B%22001-80046%22%5D%7D>.

<sup>127</sup> The National Strategy in the Interests of Children 2012-2017 [Национальная стратегия действий в интересах детей на 2012-2017 гг.]; Десятилетие детства. Available at: <http://government.ru/news/33171/>; The National Strategy of Children Education and Training till 2025 [Стратегия развития воспитания в Российской Федерации на период до 2025 года] (утв. распоряжением Правительства Российской Федерации от 29.05.2015 N 996-р) // СЗ РФ. 2015. N 23.

N 2318-O,<sup>128</sup> which has been discussed earlier, uncovers to a certain extent a realistic underpinning of surrogacy practice in Russia. Possible manipulations in surrogacy arrangements are linked to the right to social benefits, especially with regard to housing that families with many children have in Russia. Thus, one of the main motives for entering into surrogacy contracts is surely material benefit.

Some authors speak about a non-altruistic motivation of surrogates and an immorality of surrogacy in general.<sup>129</sup> In March 2017, a draft law prohibiting surrogacy was brought before the Russian State Duma.<sup>130</sup> Some of the motives for the draft were the developing surrogacy tourism to Russia, the transfer of children born through surrogacy arrangements abroad, and the regulation of surrogacy by a civil law contract. The draft received negative responses from the Russian Government and the Committees and in October 2018 was finally rejected. The Government in particular stated that prohibition of surrogacy would limit the right of Russian citizens to medical assistance in the case of infertility, would lead to a development of the black market and would force Russian citizens to travel abroad for infertility treatment.

However, discourse on moral values very often appears in Russia where there is a lack of long-term social policies and social responsibility also related to social and health policies, access to quality health care and medicine, especially for the health of women and children, the improvement of living conditions, the reduction of poverty and a proper balance between justice and

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<sup>128</sup> The Constitutional Court of the Russian Federation Ruling from the 27<sup>th</sup> of September 2018 N 2318-O Конституционный Суд Российской Федерации. Определение от 27 сентября 2018 г. N 2318-O "Об отказе в принятии к рассмотрению жалобы граждан С.Д. и С.Т. на нарушение их конституционных прав пунктом 4 статьи 51, пунктом 3 статьи 52 Семейного Кодекса Российской Федерации, пунктом 5 статьи 16 Федерального Закона "Об актах гражданского состояния", частью 9 статьи 55 Федерального Закона "Об основах охраны здоровья граждан в Российской Федерации".

<sup>129</sup> E.V. Isakova, V.S. Korsak, J.A. Gromyko, *Opyt realizatsii programmy "Surrogatnoje materinstvo"* [Опыт реализации программы "Суррогатное материнство"] // *Problemy reprodukzii* [Проблемы репродукции]. 2001. N 3. С. 27.

<sup>130</sup> All the materials on the draft law to be found in the official archive of the State Duma at: <http://sozd.duma.gov.ru>.

equity principles. Thus, emphasis on the traditional family seeks – intentionally or not – to shift discussion from real problems. As in many similar cases in Russia, moral values are brought into the discourse where there is a lack of legal certainty and the freedom and dignity of people are not effectively protected. Very often, traditional values are used to compensate for deficits of regulation and to divert attention from real issues of social responsibility.

Divergent approaches to surrogacy in Europe and worldwide along with the position of Russia within a global reproductive market urge us to pay more attention to the relationship between national practices and supranational regulation.<sup>131</sup>

Surrogacy is legally recognized and widely practiced in Russia. In this regard, there is a clear contradiction between the existing legal framework and medical practices to assist reproduction in Russia. No matter what the reasons are for surrogate mothers to enter into surrogacy arrangements, if Russian law permits assisted reproduction and surrogacy, the solid protection of all the parties and an adequate level of legal certainty should be guaranteed.

There is a second point I would like to make concerning the ‘unnaturalness of surrogacy.’ I believe the best argument in the moral discussion about surrogacy is the existence of non-commercial surrogacy: family surrogacy when a mother bears a child for her daughter, or when a woman preserves donor material (sperm) from male members of the family before or shortly after their death to have her own child. As blood donation is being promoted to become a non-commercial activity only rewarded with social benefits and recognition, the same should happen with surrogacy.

When considering the discussion on the ‘unnaturalness of surrogacy’ and its contradiction with the moral values of society

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<sup>131</sup> According to ex-senator Belyakov, in a year more than 70.000 foreigners travel to Russia for medical purposes, 80% of those become services in reproductive technologies. “За этот год в Россию приехало за оказанием медицинских услуг 70 тысяч иностранцев. Из них 80% приехало за оказанием услуг в области репродуктивных технологий. Мы очень дешевые по сравнению с Европой.” Торговля детьми или спасение от бесплодия: запрещать ли в России платное суррогатное материнство. Available at: <https://www.irk.kp.ru/daily/26930/3980714/>.

and the traditional family, it is interesting to recall quite a widespread tradition in Russia of fostering a child from a poor family or caring for a child whose parents have died. This happened at quite a different level of technological development, but the motivation and social roles of foster parents were – in my opinion – the same.

#### **4. Conclusion**

In summary, surrogacy treatment in the Russian Federation is bound up with several legal problems. First of all, there is no legal certainty for a couple that they will receive the child after he is born since the law protects the interests of the surrogate mother, who after the birth has to consent to the couple being registered as the parents of the child. Second, there is no legal certainty for a surrogate mother that the couple will take the child, if, for example, the child is handicapped or the couple have their own children in the meantime, or if the couple die or become incapable. Third, there is no certainty about financial and damage issues related to surrogacy treatment, as the law does not provide a standard contractual form for surrogacy treatments. Many problems relate to the rights of the child. The law protects the secrecy of surrogacy and donorship. However, a child has the right to know his parents. Russian law does not properly regulate these essential issues.

Surrogacy practices lead to several human rights issues. They affect some sensitive bioethical and moral issues too. However, surrogacy is nowadays the reality in Russia. Adequate and detailed legal regulation of new reproduction technologies will allow human rights violations to be avoided. This is the appropriate way consistent with international norms to overcome legal uncertainty, and it will protect the rights and interests of all the parties involved.