



# Should Surrogacy Be Legally Regulated in Romania?

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**Abstract.** Maternity surrogacy aims to provide a child for one or more adults. This consists in the deliberate conception of a child, who is without a family of origin, by manipulating his/her birth and his/her biological mother to satisfy the desire of the beneficiary adults. Therefore, the legitimacy of surrogacy is at least debatable. However, considering the old realities of the current Romanian society, in the present study we proposed by lege ferenda the possible implementation in the legislation of maternity-altruistic surrogate, under certain conditions.

**Keywords:** surrogacy, beneficiary parents, biological father, infertility, human rights

## 1. Preliminary Remarks

The desire to have children has led numerous infertile couples, as well as single men and women, to resort to one of the most controversial legal and moral measures: surrogacy. The institution of *surrogate pregnancy*<sup>1</sup> is in growth. The

<sup>1</sup> A surrogate mother is a woman who, following an agreement, accepts to carry a pregnancy with the purpose of giving birth to a child who will be raised by a different family or person as his/her own. In such cases, surrogacy is based on a contract or surrogacy agreement. The embryo or foetus that is carried by the surrogate can be a biological one or can result from a previously fertilized egg, obtained from another woman. In the latter case, the surrogate mother has no genetic connection to the child she is carrying. Usually, surrogate mothers agree to the surrogacy in exchange for a sum of money. There are also surrogate mothers who do this for altruistic reasons, especially for a sister or daughter who cannot carry a pregnancy to term, is infertile or suffers from an illness that, if associated with pregnancy, could endanger her life.

first cases of surrogacy have been documented in the 1970s in the USA. In order to better understand the reason why it is such a sensitive legal institution and biological process, we must first analyse what the term ‘surrogate mother’ means in the legal and medical sense and what the relationship is between the surrogate and the people who are in close contact with her.

At least six persons participate during surrogacy, namely:

1. the biological mother, who is the egg donor;
2. the surrogate mother, who carries the child;
3. the ‘beneficiary’ mother, who becomes the parent of the child upon birth;
4. the biological father, who is the sperm donor;
5. the possible life partner of the surrogate mother, who is legally presumed to be the father of the child;
6. the ‘beneficiary’ father, who will become the parent of the new-born.

The subject in question raises unanswered questions not only in the field of law but also in the field of health and psychology. The analysis of the institution of surrogacy in the Romanian legal system is tightly connected to the case-law of the European Court of Human Rights<sup>2</sup> as well as the case-law of courts in other jurisdictions. Surrogacy is not regulated in our country,<sup>3</sup> according to the provisions of our Civil Code (art-s 441–447); only medically assisted human reproduction using third party donors is allowed. Before the implementation of the present Civil Code, surrogacy was not regulated in Romania. The law did not expressly prohibit it, and according to legal literature,<sup>4</sup> the procedure was indirectly tolerated in Romania. Romanian laws in force confirm the presumption of maternity in favour of the woman who gave birth to the child, Art. 408(1) of the Civil Code stating that ‘the mother becomes a parent as a result of having given birth’.

In the silence of the law, but taking general regulations into consideration, the interested parties may choose between traditional maternity, surrogacy, and gestational surrogacy, but only in the case of an altruistic surrogacy. The reasoning

2 See the following cases: *Mennesson v France*, *Labassee v France*, *D. and Others v Belgium* (no 29176/13), *Paradiso and Campanelli v Italy*, *C. and E. v France* (nos 1462/18 and 17348/18), *D. v France* (no 11288/18), *Valdís Fjölnisdóttir and Others v Iceland*. See also the Advisory Opinion concerning the recognition in domestic law of a legal parent–child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation (Request No P16-2018-001). For a short description of the above, see: *Gestational Surrogacy*. [https://www.echr.coe.int/Documents/FS\\_Surrogacy\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Surrogacy_ENG.pdf) (accessed on: 15.04.2021).

3 Romanian law does not regulate surrogacy as such. However, the term ‘surrogate mother’ is used in a ministerial order, excluding medically assisted human reproduction from the *in vitro* fertilization programme, which is financed by public funds – see Part IV. 3.3. *In vitro* and embryo transfer programme, letter C, pt. 3 from the addendum to Order No. 377/2017 issued by the Minister for Public Health, regarding the approval of the technical norms governing national public health programmes for 2017–2018, with later amendments (published in the *Monitorul Oficial* [the Official Journal of Romania] No 223 of 31 March 2017).

4 Florian 2018. 123.

of the present statement can be found in the provisions of Art. 60 of the Civil Code, according to which a natural person has the right to freely dispose of oneself if by doing so he or she does not infringe the rights and freedoms of others or public order or morals. (The provisions are identical to Art. 26(2) of the Romanian Constitution).<sup>5</sup> Public order sums up all principles and rules of public order and morals that the lawmaker thinks are essential to society at a certain point in time. All public norms governing public order are imperative. When signing a surrogacy contract, the imperative norms that protect the interests of the society are not being breached, which means that public order is not infringed upon.

The purpose of providing these services is mentioned in the provisions of Art. 66 of the Civil Code, with the marginal title *The Prohibition of Certain Patrimonial Acts*: ‘Any act with the object to give a monetizable value to the human body or certain parts and products of the human body shall be null and void, with the exceptions mentioned by Law.’ Consequently, even though a woman may provide a service as a surrogate, she cannot ask to be paid because that would mean giving a monetizable value to her body. A surrogate mother may – at least taking only the text of the law in consideration – carry a pregnancy for someone else, for altruistic reasons. More precisely, a surrogate ‘sacrifices’ herself out of generosity and good will, exposing herself to serious risks that can affect her health, and sometimes even her life, without asking for anything in exchange, out of the desire to help an infertile couple or a person unable to give birth for other reasons. Moreover, the surrogate is not allowed to ask for or even accept any remuneration because it would affect her human dignity<sup>6</sup> as indirectly imposed by the law.

However, things are different in reality. In Romania, there is a ‘market for surrogate mothers, ruled by the economic laws of offer and demand [...] the prices can come up to 50,000 euros’.<sup>7</sup> In a court ruling, the judge’s approach was different, meaning that a woman cannot be a surrogate because ‘renting one’s uterus contradicts the general principle according to which the human body cannot be disposed of, and surrogacy agreements that benefit a third party are null and void, even in the absence of an explicit legal provision, stating [...] that such conventions aim at trading certain values that are related to public order and morals (civil status, public health)’.<sup>8</sup> In our opinion, if the surrogate mother agrees to the surrogacy for altruistic reasons, she can sign a contract with the beneficiary parents as long as the contract is gratuitous.

5 For further details, see: Ungureanu 2019a. 9 et seq.; Cercel 2009. 7 et seq.; Irinescu 2019. 208 et seq.

6 Walker–van Zyl 2017. 165.

7 Nicolescu 2018. 1081. Translation by the authors. Unless otherwise specified in the footnotes, all translations from non-English source materials are from the authors.

8 Craiova Court of Appeal, Civil Section No I, Civil Decision No 1048/2016. <https://legeaz.net/spete-civil-curtea-de-apel-craiova-2016/stabilire-maternitate-decizia-1048-17-02-2016-4iy> (accessed on: 21.12.2020).

## 2. Traditional and Gestational Surrogacy

A surrogate pregnancy is ‘a procedure through which a woman becomes pregnant with the intention of giving the child to someone else after birth’.<sup>9</sup> This is a basic definition that can be applied to two situations: *traditional or gratuitous surrogacy*, when a woman accepts to carry out a pregnancy for the recipient parents without receiving any kind of compensation, and *gestational surrogacy*, where a woman receives compensation for carrying the child.

From the standpoint of the genetic connection between the surrogate mother and the child, *two forms of surrogacy*<sup>10</sup> can again be identified:

- *traditional surrogacy* (partial surrogacy), where the surrogate mother is also the biological mother of the child born through surrogacy;

- *gestational surrogacy* (complete surrogacy), where the surrogate mother is not genetically connected to the child born through surrogacy.

Traditional surrogacy ‘is a method for assisted reproduction, where a woman consents to becoming pregnant with the purpose of carrying and giving birth to a child that will later be raised by someone else’.<sup>11</sup> Because it is a non-commercial procedure, it occurs more frequently in rich families. It is about ‘renting a uterus’ through which a baby is ‘acquired’ without needing to pay any money. It is without doubt that the financial element – expressed in money – is not only present in commercial surrogacy, because the woman who is carrying another family’s baby receives some kind of remuneration for taking care of the foetus; however, in the case of traditional surrogacy, the compensation is not immediately apparent.

In order to define the terms of surrogacy, a contract is concluded between the parties. The surrogate mother has the obligation to carry the pregnancy to term and hand over the new-born. *The object of the surrogacy contract* is the conceived child – therefore, the child is considered to be a commodity, as in commercial transactions.<sup>12</sup> The commercial aspect is expressed by a sum of money; more precisely, the woman carries the child and gives birth to the child in exchange for a sum of money. There are countries where surrogacy for commercial purposes is not prohibited by law. Ukrainian law does not forbid commercial surrogacy. In this country, the law is exhaustive regarding the legal status of the surrogate mother and the beneficiary parents. Ukraine has a complex legislation regarding

9 Brunet–Carruthers–Davaki–King–Marzo–McCandless 2013. 12.

10 *The 7 “Pros” and Cons of Surrogacy*. <https://www.hli.org/resources/surrogacy-pros-and-cons/04.02.2019> (accessed on: 21.12.2020).

11 Kumar–Sharma 2013. 65–70.

12 *Studiu. Maternitatea surogat și drepturile omului. Analiză a problemelor umane, legale și etice (de Claire de La Hougue și Caroline Roux)*. <http://www.culturavietii.ro/2017/01/24/studiu-maternitatea-surogat-si-drepturile-omului-analiza-a-problemelor-umane-legale-si-etice-i/> (accessed on: 16.12.2020).

the surrogate mother, the fertilization and usage of sperm and ovules.<sup>13</sup> This way, surrogacy is permitted in the Ukraine, the latter becoming a lucrative industry.

The only resemblance between traditional and gestational surrogacy is the fact that in both cases an egg is implanted into the woman's uterus, which was fertilized beforehand by a man known or unknown to her. If we compare traditional and gestational surrogacy, we can say that in the case of the first institution, the woman carries the foetus out of a simple favour, and in the case of the latter, the woman carries the foetus in exchange for a sum of money.<sup>14</sup>

Countries can be divided into five categories with respect to the institution of surrogacy: countries where surrogacy is prohibited by law;<sup>15</sup> most EU jurisdictions such as Greece, Spain, the Czech Republic, or Portugal,<sup>16</sup> where only traditional surrogacy is allowed; jurisdictions such as Ukraine, Venezuela, Mexico, and a few US states; states that allow both traditional and gestational surrogacy;<sup>17</sup> states such as Romania that have chosen not to regulate this institution. *Fertility tourism is therefore being encouraged by Romania*, resulting in the export of ethical, religious, and legal issues regarding surrogacy outside the borders of the country. By allowing fertility tourism, countries have found a pragmatic solution<sup>18</sup> towards the admission of the transformations that occur mainly due to recent advancements in biotechnology. This is also the reason why these cases

13 In Ukraine, the field of human reproduction is regulated by the Family Code. In accordance with the provisions of Art. 123 of the said code, in case of human procreation via a surrogate and through IVF, if the woman is fertilized with an ovum conceived by the biological father, the spouses who opt for this procedure shall be the parents of the child. In this case, the interested parties must submit the document that confirms the birth of the child through a surrogate and the notarized consent of the surrogate in order for the spouses to be noted in the child's birth certificate as the parents. Regarding ovum donations, the donor must sign a written consent for voluntary donation. In essence, like with other types of donations, Ordinance no. 787/2013 issued by the Health Ministry of Ukraine contains a detailed description of the non-legal aspects in the field of medically assisted human reproduction. These include guidelines for surrogacy and IVF with a donated ovum, a list of compulsory medical tests and investigations, the requirements the surrogate mother and the ovum donor must fulfil, laws and regulations and aspects that involve the confidentiality of these procedures. *Ukrainian Surrogacy Laws*. <https://www.hg.org/legal-articles/ukrainian-surrogacy-laws-28807> (accessed on: 16.12.2020).

14 Even though in the past the interested parties could use this institution in numerous countries around the world, today some of these countries have shut their door to surrogacy – for example, India. *The tourism for surrogacy has ended*. <https://epochtimes-romania.com/news/turismul-pentru-maternitatea-surogat-in-india-sfarsit---252796> (accessed on: 16.12.2020).

15 Austria, Belgium, Bulgaria, Canada (Québec), France, Germany, Italy, Island, Norway, Sweden, Switzerland, Saudi Arabia, Turkey, Pakistan, China, Japan, and a few US States (Arizona, Indiana, Michigan, and North Dakota) also fall into this category. Mohapatra 2015. 33.

16 Australia, Canada, Denmark, Greece, Hungary, Israel, Holland, Spain, South Africa, the United Kingdom, and the following US States: New York, New Jersey, New Mexico, Nebraska, Virginia, Oregon, and Washington also fall into this category. Mohapatra 2015. 33.

17 Armenia, Belarus, Cyprus, Georgia, Mexico, the Russian Federation, Ukraine, and the following US States: California, Florida, Illinois, Massachusetts, Texas, Vermont, and Arkansas also fall into this category. Mohapatra 2015. 33.

18 van Beers 2014. 117.

are insignificantly low in the Romanian jurisprudence, even though surrogacy is a growing phenomenon.

### **3. Foetal Rights**

#### **3.1. Personal (Non-Pecuniary) Rights**

*The first and most important fundamental right of a foetus is the right to life.* The foetus has the right to be born from the moment of conception. Consequently, the pregnancy cannot be freely terminated in the absence of a serious medical emergency or unless serious consequences would follow. Such reasons exist when the mother is in danger of dying, and the pregnancy has to be terminated in order to save her life. Also, the foetus's right to life exists if the mother is in clinical death and is being kept alive by artificial means until the birth of the foetus.

The foetus/child, whether outside or inside the womb, has the right to dignity because it is not an object or a thing but a human being in development. This way, it cannot be used for the purposes of any research or experimentation and cannot be subjected to a medical intervention, with the exception of a case when its normal development is in danger. The termination of the pregnancy can be done for genetic reasons or in the case of a serious illness, but only if the foetus is unviable because otherwise there is a risk of taking the life of a healthy foetus.

#### **3.2. Pecuniary Rights**

The right of the foetus to inherit is an undisputed issue. Art. 36 of the Civil Code states that: 'The rights of a child are recognized by law from the moment of conception, but only if the child is born alive.' According to the provisions of Art. 957(1) of the Civil Code, in order to be able to inherit, the person must exist at the moment the succession is opened. The conceived child is considered to be alive in utero, while the child born dead is considered not to have existed.

A pregnant woman carries the foetus inside her womb; this way, the mother has the right to be cared for during pregnancy and to receive certain benefits from the State. Naturally, the fact that the foetus is in the womb of the mother is a condition to receiving these benefits. The right of the conceived child to receive the name of the person who recognizes it fits into the non-patrimonial rights category. The legal provisions of Art. 957 of the Civil Code state that the legal capacity of a person to receive an inheritance exists if the person is alive at the moment of opening the succession, and it is the foundation for the legal principle according to which an unborn child can inherit his ancestor who had died before his/her birth. This implies the determination of the moment of conception

because this is the only way to know if the child can be considered alive at the moment the right he was going to acquire was born. According to the Romanian legal literature,<sup>19</sup> a conceived child can be the object of recognition of paternity, with the condition that at the time of birth s/he is in the same situation as a child born outside of wedlock. A conceived child also has the right to the same respect that is shown towards every human being. The European Court of Human Rights has also ruled in this sense.

The foetus is a human being in development. Before birth, the embryo is not considered a person, its identity is tied to the mother, even though – as we have seen in some cases –, the law attributes it certain patrimonial and non-patrimonial rights. In other words, the human embryo does not have a real legal existence and becomes a subject of law at the moment of birth if it is born alive.

#### 4. The Rights of a Surrogate Mother

Carrying the pregnancy and assuring the healthy development of the foetus play a significant role in shaping a surrogate mother's patrimonial and non-patrimonial rights and obligations. The role of taking care of the foetus is assigned mostly to the surrogate mother due to the fact that she is carrying the foetus inside her body. During the process of surrogacy, we can talk about a clear breach of the woman's right to dignity, because the unborn child is the object of a contract, and the surrogate mother has to take a risk regarding the health of the foetus. This way, ensuring that the foetus is healthy is the main condition for the surrogate mother to fulfil her contractual obligations. With all this being said, the beneficiary parents can ask for an abortion in case serious malformations or illnesses occur during the pregnancy (for example, Down syndrome). Moreover, in most cases, beneficiary parents can have other claims towards the surrogate mother who is carrying the child – for example, ordering the woman to seek regular medical attention during her pregnancy.

*The surrogacy procedure is not forbidden in Romania; however, it is not a legal arrangement recognized by law.* Considering that the law does not allow it but also does not prohibit it, we think that this legal and medical institution must not infringe on public order, good morals, the rights and freedoms of others, and it must not have an illicit cause. Surrogacy must be based on the written agreement of the parties and must be moral and licit.

Medically assisted human reproduction is a procedure that is being used in our country, too.

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19 Bacaci–Dumitrache–Hageanu 2006. 199.

## 5. Medically Assisted Human Reproduction

Medically assisted human reproduction (abbreviated as MAHR) consists of clinical and biological techniques and practices that allow for procreation to take place in a different way (without a sexual act), through the intervention of a doctor. MAHR is used when regular, hormonal, or drug infertility treatment is ineffective.

There are different MAHR methods and practices (artificial insemination (AI), in vitro fertilization (IVF), embryo transfer (ET), surrogate mother),<sup>20</sup> the differences consisting in the number of people involved and the time and place of the fertilization. These practices have become more and more frequent because there is a growing number of sterile and infertile couples,<sup>21</sup> an estimated 10–15% of the couples being unable to naturally conceive children.

Art. 441 and Art. 447 of the Civil Code contain provisions regarding medically assisted human reproduction. The provisions of Art. 441(1) state that ‘medically assisted human reproduction through a third-party donor does not establish kinship between the child and the donor’, and the provisions of paragraph (2) of the same article specify that ‘in this case, no one can bring an action for liability against the donor’. A restriction is also mentioned, according to which *only a man and a woman or a single woman can become parents*.<sup>22</sup> This way, it is forbidden for the parent/parents to be homosexual or a single man. This way, in analysing surrogacy, we can conclude that a connection will be established between the surrogate mother and the child through surrogacy.<sup>23</sup>

This way, the surrogate mother will be the only legally recognized parent – regardless where the biological material came from –, and if a woman becomes pregnant having received biological material from a donor, she will be regarded the sole parent of the child. The donor will have no rights and legal connection to the child.

As a result, a legal agreement about carrying a child is null and void, and if the contracting parties were to stipulate that the mother is obliged to give the child up for adoption after birth, it would be also null and void. Moreover, it could also be considered a criminal act according to the provisions of Art. 107(1) of Act No 273/4004 regarding adoption procedures, according to which ‘the act by a parent or legal guardian of the child consisting of asking for or receiving

20 *Fertility Treatment Explained*. <https://www.varta.org.au/information-support/assisted-reproductive-treatment/types-assisted-reproductive-treatment> (accessed on: 21.12.2020).

21 Pittman 2013.

22 Art. 441(3) of the Civil Code. In our opinion, the provisions are arguable from the standpoint of equality between women and men; there is no reason why a single man should not be considered a parent.

23 *Mamă surogat în România. Cum poate fi legal?* <http://www.drepturile-omului.eu/news/params/post/1424361/mama-surogat-in-romania-cum-poate-fi-legal> (accessed on: 21.12.2020).



money or other material benefits in exchange for giving up a child for adoption is punishable between 2 to 7 years of imprisonment and the termination of parental rights, regardless whether the money or other benefit served the interest of the perpetrator or of other persons’.

We can find a famous case about surrogacy in the case law of the Timișoara Court of Appeal, from February 2014, where the judges ruled in favour of recognizing a woman as the biological mother of twins even though her sister was the one who gave birth to the children, through surrogacy. The sister was artificially inseminated with the mother’s embryos. After birth, the biological parents filed a case before a court of law in order for them to be recognized as the natural parents of the children. According to Romanian case-law, the biological mother of the child is the one who gave birth to the child. The Timișoara Local Court only recognized the father as a natural parent because ‘kinship could only be established towards the father’. After the appeal before the Court of Appeal, the court held that the mother, whose eggs were harvested should be considered the natural mother. The reasons presented were the following: ‘Resorting to a different procedure – such as surrogacy – undertaken by the parties of the trial, even though not regulated by law, cannot be deemed illegal as long as there is a principle in civil law according to which everything that is not prohibited by law is legal.’ The sentence also underlines the following: for ‘minor applicants, the legal impossibility to recognize their biological mother as their real mother – their real genetic identity – could lead to an infringement of their rights to private life, guaranteed by the provisions of Art. 8 of the European Convention on Human Rights’.<sup>24</sup>

Art. 442(2) of the Civil Code describes the conditions that have to be met for MAHR to be possible. Firstly, the parents must give their prior consent, ‘in conditions that guarantee complete confidentiality, before a notary public who will explain the consequences of their act regarding filiation’. Their consent remains without effect ‘in case of death, of a divorce or separation that took place before the conception of a child through the methods of medically assisted human reproduction’.

Moreover, the legislator specifies that no one, not even the child, can dispute his/her own filiation in reference to medically assisted human reproduction. However, a denial of paternity can be accepted in case ‘the mother’s husband [...] has not given his consent to medically assisted human reproduction through a third donor’ and ‘in case the child was not conceived this way’.<sup>25</sup>

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24 *Un pas înainte spre transformarea României într-o „colonie reproductivă”*. <http://www.culturavietii.ro/2014/02/12/un-pas-inainte-spre-transformarea-romaniei-intr-o-colonie-reproductiva/> (accessed on: 21.12.2020).

25 According to the provisions of Art. 443(2)–(3) of the Civil Code.

## 6. The Main Issues of Surrogacy

### 6.1. The Mother's Dignity in Relation to the Foetus's Right to Life

There seems to be a moral dilemma between the mother's right to autonomy/self-determination and the foetus's right to life. *Who must be prioritized in case of a life-threatening situation?* The case-law has provided examples to both issues over the course time. No one has the right to make decisions regarding the life of the foetus; however, the mother can decide about issues involving her own life. One must consider both legal capacity and the capacity to act. From this standpoint, we can say that the balance slightly inclines towards the mother because she has discernment; in other words, she has full legal capacity and the capacity to act.

What happens if the child is born with a mental disability? When a couple chooses the services of a surrogate mother, they wish to have a child that is born healthy. However, complications can arise during the nine months of pregnancy and during the delivery. A naturally conceived child can be less exposed to health risks than a child conceived through medically assisted human reproduction. Medically assisted human reproduction can cause complications to the foetus (premature birth, low birth weight, foetal death, foetal anomalies, arterial hypertension, etc.) and to the mother (ovarian hyper-stimulation syndrome, chronic pelvic pains, early menopause, infertility, reproductive cancers, blood clots, kidney disease, heart attacks, and hypertension). The mother cannot guarantee that the foetus will be born healthy, the situation being uncertain and unpredictable. The parties cannot stipulate a warranty in the provisions of the surrogacy contract because the child cannot be looked upon as a commodity and cannot be the object of a sales contract.

The presumption of maternity means that the woman who gave birth to the child is considered to be the mother; this way, in the event that the child is not born healthy, the beneficiary parents have the possibility to make a choice, to ask or not to ask to become the parents of the child. In case the answer is negative, the person who gave birth to the child will continue to raise the child as the mother.

### 6.2. May the Surrogate Mother Decide to Keep the Baby?

The surrogate mother is responsible for the foetus from the moment of fertilization until the end of the pregnancy. When the surrogate mother decides to undergo fertilization, she consciously decides to conceive a healthy child whom she will subsequently give birth to. The woman who freely and consciously agrees to this procedure, without any vices of consent – error, fraud, duress – has the right to keep the child after birth. In some cases, a mother who carried the child in her womb for nine months does not want to give up on her biological child easily. A

psychological bond can be formed between mother and child, causing the mother to not want to give up on her child. The negative psychological effects cannot only affect the mother but also the child, when the latter learns the truth about his/her personal and family situation.

### 6.3. The Child as the Object of a Surrogacy Agreement

It is evident that if the mother accepts to receive a sum of money in exchange for the child, the foetus will be the object of a surrogacy agreement from the moment of conception up until the moment of birth, which is followed by handing over the child. Besides the issue of pay, the moment the child becomes unwillingly the object of a contract, s/he will be qualified as a commodity. In the case of *Roe v Wade*,<sup>26</sup> the United States Supreme Court stated a principle according to which the foetus is not recognized as a person.

The beneficiary parents can sometimes not receive the child from the surrogate mother for certain objective or subjective reasons. In exchange for a sum of money, the mother and the beneficiary parents can come to an agreement regarding the health and sex of the baby.

There are situations when the mothers become victim of the surrogacy – for example, in the case of ‘Baby 101’.<sup>27</sup> This landmark case dismantled an illegal network of surrogate mothers and set free a number of young women, who were drawn in by the promise of a decent job but who were later used as surrogate mothers, sometimes after having been raped.<sup>28</sup>

## 7. Conclusions

The commercialization of the human body has been in public attention the last few years, as organ trafficking and sexual slavery have become subjects of public attention. Yet, surrogacy has received comparatively little attention. Surrogacy is, after all, a form of commercializing the human body – the child becomes the subject of a contract, while the surrogate mother is used as a human incubator. Such transformation is in breach of the dignity of the surrogate mother and the child. The provisions of Art. 7 of the UN Convention are apparently breached pertaining to the right of the child to know his/her origins and identity.

26 *Roe v Wade Case (US)*. <http://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e564> (accessed on: 21.12.2020).

27 *Escándalos relacionados con los vientres de alquiler. Niños devueltos, criaderos humanos... la oscura realidad tras los vientres de alquiler*. <http://infocatolica.com/?t=noticia&cod=22828> (accessed on: 22.12.2020).

28 <https://www.provitabucuresti.ro/docs/lobby/ruam2013/mama-purtatoare.pdf> (accessed on: 22.12.2020).

*Surrogacy is being presented as one of the many methods of human-assisted reproduction*, as a treatment for infertility, a generous, altruistic action to help infertile couples conceive a child in order to experience the joys of parenthood. The reality is different from this marketing image. Even in countries where commercial surrogacy is prohibited, women can be coerced to accept it through emotional pressure, threats, and promises.

Often, the contracting parents are older, richer, and better educated than the surrogate mothers, which also adds to the risk of coercion. Also, even where the surrogate mother cannot be legally paid, she can receive a 'compensation', sometimes even a clear financial stimulant for the act of surrogacy. Nonetheless, commercial surrogacy is on the rise in several countries. Many agencies take advantage of the suffering of infertile couples and women's vulnerabilities. These agencies charge excessive fees, and after a highly intrusive recruitment process, can certify that the chosen women are medically fit. Artificial insemination clinics offer genetic diagnosis beforehand, not only to avoid genetic disease but also for couples to be able to choose the sex of the baby.

Surrogacy implies the physical and emotional detachment of the child from the surrogate mother, which has long-lasting effects on both of them. More and more medical and psychological studies underline the importance of this connection for the development of the child. The long-term consequences for the child can be compared to those of children offered for adoption or born through in vitro fertilization from a third-party donor, because surrogacy includes both aspects and also adds to the complexity of the problem.

Besides the difficulties in determining the child's nationality and filiation, other problems can also occur: the life or the health of the surrogate mother is in jeopardy during the pregnancy; the surrogate mother changes her mind and decides to keep the child; the beneficiary parents separate during pregnancy and no longer want the child; the child is born with a disability and neither the surrogate mother nor the beneficiary parents want the child, etc.

On the other hand, the child is being treated as a commodity, the object of a contract. The purpose of surrogacy is not in the best interest of the child; it is all about the fulfilment of the adults' wishes, which is contrary to the recommendations of the Parliamentary Assembly of the Council of Europe No 1443(2000), according to which 'the right to have children' does not exist. Surrogacy is contrary to the provisions of numerous European and international norms, especially those regarding human dignity, adoption, the protection of women and children, and human trafficking.

In conclusion, regarding the subject of discussion in Romania, we can state that concerning the issue of human rights in terms of the right to life and the right to family, the Romanian legislator has a passive attitude. While these aspects are being ignored, many Romanian couples choose to resort to this procedure on the

territory of a different country where the legislation is permissive or illegally resort to such a convention in Romania. While we wait for a regulation that is in favour of surrogacy, we express our conviction that it must follow the best interest of all parties involved in the process of surrogacy and must clarify the legal status of the children, according to the principle of the supreme interest of the child.

As part of 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),<sup>29</sup> also known as the Oviedo Convention, it is stated in the provisions of Art. 12 that the human body and its composing parts cannot give rise to financial gain. Romania cannot enact a law that allows commercial surrogacy. In agreement with an opinion presented in the literature,<sup>30</sup> it is necessary to adopt a model for altruistic surrogacy with authorization from a state agency or a court of law, in the present context of technological development and cyber-commodification of human being.<sup>31</sup>

We believe that in the event the surrogate mother is animated by altruistic beliefs, she could sign a contract with the beneficiary parents as long as the contract does not stipulate a financial gain in favour of the surrogate mother.

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