



Igor V. Ponkin\*, Alexandra A. Ponkina\*\*

(\* Director and \*\* Deputy Director of the Institute of relations between the State and religious denominations and Law)

### On the legal, bioethical, and moral assessment of commercial “surrogacy”<sup>1</sup>

**SUMMARY:** 1. Problem description - 2. Business based on commercial “surrogacy” is immoral and inhuman in nature, can be defined as the organisation and implementation of hidden child trafficking and mediation in such trade - 3. Illegal presumption and positioning of a child (whose birth “surrogacy” is aimed at) as an object of a commercial transaction, which is endowed with the characteristics of a product and consumer commodity properties, in “surrogacy” transactions - 4. Ideologically motivated, manipulative substitution of the concepts of the mother of the child and a woman-donor of an ovum, claiming to have a child born as a result of the “surrogacy” technologies use - 5. The practice of “surrogacy” is a gross violation of the child's rights, first of all, the child's right to his/her natural mother - 6. Legal and actual inconsistency and defectiveness of classifying commercially motivated “surrogacy” as an assisted reproductive technology and a form of high-tech or other medical care - 7. Reduction of the value and role of a woman as the mother to the value and role of a paid, commercially exploited living “human incubator”, a means of production by technology and the industry of “surrogacy” - 8. Risks of using children “obtained” as a result of “surrogacy” for criminal purposes - 9. Conclusions.

#### 1 - Problem description

This opinion provides a legal and bioethical analysis and moral assessment of the legal grounds and practical application of the technology of “surrogacy”, which means

*“carrying and giving birth to a child (including premature birth) under an agreement concluded between a surrogate mother (a woman who carries a foetus after transferring a donor embryo) and potential parents whose germ cells were used for fertilisation, or a single woman for whom carrying and giving birth to a child is impossible for medical reasons”*

(in accordance with the text of Part 9 of Article 55 of Russian Federal Law No. 323-FZ dated November 21, 2011 (as amended on July 31, 2020) “On

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<sup>1</sup> Article not peer evaluated.



Fundamental Healthcare Principles in the Russian Federation”), or conclusion and implementation of an agreement on carrying and giving birth to a child by a woman (from a fertilised donor ovum transferred to her uterus) as a service provided in favour of a third party (customers, third parties) with the subsequent transfer (“alienation”) of this child to the customer of such a service. In the vast majority of cases, such agreements are concluded on a reimbursable (in fact, commercial) basis.

The issue of “surrogacy” cannot be reduced to the topic of rights, subjective private interests, and moral distress of foreign persons who are customers of such services (especially of those coming from those states where it is prohibited by law), who claim to “get” children born by the means of “surrogacy” in Russia. Such a reduction is unsubstantiated and is the evidence of a manipulative method of substituting a thesis. Otherwise, a direct analogue would be, for example, an emphasis solely on discussing the importance of saving the life and health of a person (for example, a child) in desperate need of a human donor organ, and not on the brutal murder of another person in order to obtain this organ. We should discuss the dignity, rights, and legitimate interests of a “surrogate” mother, the critically relevant damage caused (as a result of the implementation of the technology of “surrogacy” or directly related to it) to her physical and mental health, the rights and legitimate interests of a child, conceived, carried, and born using the technology of “surrogacy”, we should discuss the medical and legal, bioethical, and moral features and aspects of “surrogacy”.

Moreover, the complex of legal, bioethical, and other problems directly related to the use of the technology of “surrogacy” cannot be reduced to the issues of ensuring the private entrepreneurial interests of persons implementing and/or protecting commercial “surrogacy” in Russia, who make profit from “surrogacy”, including intermediary agencies and agents of international business, which actually has signs of child trafficking and illegal (similar to slavery) exploitation of women. The issues of protecting the commercial interests of entrepreneurs (including intermediary agencies) in this area are not important at all, especially in the context of the principles of equality of entrepreneurial opportunities, freedom of economic activity, which are generally not applicable to this area of relations. When improving the legislative regulation of the relations under consideration, the interests of business should not be taken into account as a significant factor in law project activity (a similar reverse situation would be to prioritise the “interests of business” when legalising, for example, the free circulation of human organs, or drugs).



In this opinion, we address legal issues related to the attitude of the state, society, and individual to commercial “surrogacy” (including that in the interests of foreign customers of children, or for the “adoption” of children by homosexual couples or individual homosexuals, or for other illegal purposes), we provide an assessment of the degree of legal justification for the organisation and implementation of “surrogacy”, as well as an assessment of the transfer of a child born as a result of commercial “surrogacy” to customers (with commercial remuneration to intermediaries and the “surrogate” mother) from the standpoint of protection and securing the fundamental natural rights of the child.

It is necessary to answer these questions in order to develop the position of the Russian state, defending its sovereign interests in the field of protecting traditional spiritual and moral values, public morals, protecting the moral, mental, and reproductive health of the nation, while observing the generally recognised international legal principle of ensuring the priority of the rights and legitimate interests of children, taking into account the new constitutional provision on children as the most important priority of the state policy of Russia (Part 4 of Article 67.1 of the Constitution of the Russian Federation).

The institution of surrogacy is declared to have a great positive social significance for Russian families, since it enables women who cannot have children to become mothers, but at the same time it is suppressed that the share of surrogacy services provided to Russian citizens is negligible in comparison with the volume of such services provided by Russian women to foreign customers (commonly, from states where “surrogacy” is prohibited). The real negative aspects, consequences, and side effects of such practices, shown below, are also hushed up.

## **2 - Business based on commercial “surrogacy” is immoral and inhuman in nature, can be defined as the organisation and implementation of hidden child trafficking and mediation in such trade**

With rare exceptions, the relationship within “surrogacy” is actually positioned and perceived as a paid “service”. And even if in some particular agreements for provision of such services, the relationship within “surrogacy” is declared as non-commercial, it is almost one hundred percent likely that the commercial component is hidden (with the exception of such relationships between relatives). It is widely known that “surrogacy” is massively advertised as a paid service and that there are



already national and transnational “gestation markets”, that is, markets for “surrogacy” services.

With regard to commercial relations<sup>2</sup> arising in relation to and regarding “surrogacy” (especially regarding the use of third-party donor germ cells purchased by the customer), it is legally and actually justified to use the concept of “child trafficking” within the meaning as provided in Paragraph “a” of Article 2 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography<sup>3</sup>: “Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”.

The argument provided by the advocates of commercial “surrogacy” to substantiate its social acceptability, that the payment to a “surrogate” mother only reimburses the costs incurred by her during the period of gestation and in connection with carrying another's child, is untenable, since the payment to a “surrogate” mother and, accordingly, the receipt by her of the so-called “reimbursement of expenses”, “remuneration”, or other benefit (which is, in essence, income from such activities) is almost indistinguishable from direct payment for such actions and has features of payment for the provision (rendering) of civil services.

This is especially obvious in relation to the unemployed and / or women in an extremely difficult financial situation who decide to become “surrogate mothers” (in Russia and in other states, such women are the absolute majority among those who agree to “surrogacy” deals).

Absolutely nothing can substantiate and justify the intermediary “surrogacy” business, especially focused on foreign customers, using women as a “means of profit”, commercialising their reproductive abilities.

Such assessments are confirmed by a considerable number of decisions of courts in foreign states in cases related to surrogacy. For instance, in the Decision of the Michigan Court of Appeals of 1992 in case

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<sup>2</sup> We believe that it is no coincidence that the possibility of commercial “surrogacy” is not even mentioned, or considered in the part of Resolution of the Plenum of the Supreme Court of the Russian Federation dated May 16, 2017 No. 16 “On the Application of Legislation by Courts when Considering Cases Related to Establishing the Parentage of Children” related to “surrogacy”.

<sup>3</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography / Adopted by Resolution No. 54/263 of the United Nations General Assembly dated May 25, 2000 // <[https://www.un.org/ru/documents/decl\\_conv/conventions/rightschild\\_protocol2.shtml](https://www.un.org/ru/documents/decl_conv/conventions/rightschild_protocol2.shtml)>.



No. 487 N.W.2d 484 *Doe vs. Michigan Attorney General* <sup>4</sup>, in which several potential parties to “surrogacy” agreements attempted to challenge Michigan law prohibiting the conclusion of such agreements, it was emphasised that the ban on “surrogacy” was aimed at ensuring several vital interests of the state at once: first, preventing children from becoming a commodity; secondly, respecting the best interests of children; and third, preventing the exploitation of women.

**3 - Illegal presumption and positioning of a child (whose birth “surrogacy” is aimed at) as an object of a commercial transaction, which is endowed with the characteristics of a product and consumer commodity properties, in “surrogacy” transactions**

The legislation of the Russian Federation and international legal acts do not enshrine any “rights” to a child positioning him/her as a property item (to “possess” a child as a thing), that is, a child is not considered as an object of real, property relations

However, in the legal institution (a set of legislative regulations) and in the practice of commercial “surrogacy”, the process of conceiving, carrying, and giving birth to a child has actually been “instrumentalised”, linked with the terms of the concluded agreement on actions that have features of a civil transaction, and thus the process of implementing “surrogacy” is endowed with the qualities of a paid service with the features of goods/money relations. Commercial “surrogacy” is based on the presumption and positioning of a child not as a person, but as an object of law, a certain object of the transaction, essentially, as an inanimate object, which is attributed the features of a product and consumer commodity properties.

The commercial substance of surrogacy relations is particularly clearly expressed when customers of “surrogacy” services use purchased donor ova and spermatozoa from third parties. Moreover, the rights of such customers are embodied in law: “when using donor germ cells and embryos, citizens have the right to receive information about the results of medical, medico-genetic examination of the donor, about his/her race and nationality, as well as **about physical appearance**” (Part 8 of Article 55 of

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<sup>4</sup> *Doe vs. Attorney General* / Decision of the Michigan Court of Appeals of 1992 N<sup>o</sup> 487 N.W.2d 484 // <<http://www.hrc.org/laws-and-legislation/entry/michigan-surrogacy-law>>.



Federal Law No. 323-FZ dated November 21, 2011 “On Fundamental Healthcare Principles in the Russian Federation”).

Legally and practically grounded and fair position regarding the commercial essence of “surrogacy” and attributing the properties of a product to a child has already been repeatedly expressed earlier. For example, in 2009, the Standing Committee of Attorneys-General of Australia declared that commercial “surrogacy” “commodifies the child” and carries the risks of “exploitation of poor families for the benefit of rich ones”<sup>5</sup>. Because of such understanding of the legal, social, and moral substance of “surrogacy”, in many states surrogacy is completely prohibited or significantly limited only to its use in relations between relatives.

In “surrogacy” agreements (both commercial or non-commercial, although, of course, in the commercial version this is clearly articulated), a child is the object of an agreement aimed at meeting the needs of the “customers”, which is a gross disrespect for the dignity of the child, regardless of the method of conceiving or the source of its original genetic material. But a child cannot be a property object, a commodity (for sale), in respect of which the contract, in fact, specifies the commodity expectations and preferences of the customers of “surrogacy”, a child should not be presumed, positioned or recognised as such. A child is a holder of rights, not an object.

No adult's independent right to get a child or the right to a child arise, exist, or may be presumed outside the context of parental relations (“father - mother - child”, “father - child” or “mother - child”). The only exception is the right of one of his/her parents to get a child due to a divorce, but even here it is not literally a “right to get”, but the right to determine the child's place of residence with the parent and the right to priority communication with the child and his/her upbringing. In the context of parent-child relations (in the child's native, blood family), we talk not about the right to a child as a “right to have a child”, but about the right to a child as the right to take care of a child in his/her interests, to educate him/her, based on his/her natural rights and legitimate interests.

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<sup>5</sup> *A Proposal for a National Model to Harmonise Regulation of Surrogacy*, January 2009 / Standing Committee of Attorneys-General Joint Working Group // <[https://justice.nt.gov.au/\\_data/assets/pdf\\_file/0005/171797/polcoord-surrogacy-consultation-paper.pdf](https://justice.nt.gov.au/_data/assets/pdf_file/0005/171797/polcoord-surrogacy-consultation-paper.pdf)>; <<https://justice.nt.gov.au/attorney-general-and-justice/law-reform-reviews/published-reports-outcomes-and-historical-consultations/historical/2009/a-proposal-for-a-national-model-to-harmonise-regulation-of-surrogacy-january-2009>>. – P. 4-5.





It is emphasised in paragraph 6 of *Recommendation of the Parliamentary Assembly of the Council of Europe No. 1121 (1990) dated 01.02.1990 "Rights of children"*<sup>6</sup> that the parental powers (including foster parents, be it noted) on the child exist "only as long as they are necessary for the protection of the person and property of the child". So, the purpose of parental authority is to ensure, secure, and protect the rights and interests of the child, but not to exercise parental authority per se, as well as not the intention to exercise it.

With regard to the persons who are not the parents of a particular child or the persons who, in accordance with the law, are responsible for parenting of the child, there are no legal grounds and legal conditions for creation and recognition of the right of such persons to parent a particular child (the right to "get a child"). The desire or interest of a person (including the interest recognised by law) "to get" the child cannot, should not prevail and cannot be assessed as prevailing over the rights and legitimate interests of the child, otherwise the principle of priority of the rights and legitimate interests of the child upon adoption guaranteed by international law and national legislation is violated.

It should be noted that international legal documents generally do not use the concepts of "the right to get a child", "the right to a child" (in the meaning of obtaining, acquiring) in the context of adoption, establishing guardianship over children, etc.

In the relationship of "surrogacy", the child, his/her right and legitimate interests to have a mother and father, the interests for providing conditions for his/her normal and full development and upbringing actually acquire a third-rate importance. They are overshadowed by the goal of providing commercially and ideologically motivated requirements for the implementation of the claims of certain persons to "have" a child. At the same time, the positioning of the child as an exchangeable market product surely entails negative consequences for the self-awareness and self-esteem of this child as a person in the future.

The state is completely incapable of changing the human nature, the nature of the family; it has no right to distort and pervert by any of its decisions, including through legislation, the concept of the family at its core and, above all, the concept of mother. From a legal point of view, the essence of such actions of the state can reasonably be qualified as actions

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<sup>6</sup> Recommendation de l'Assemblée parlementaire du Conseil de l'Europe N° 1121 (1990) du 01.02.1990 "Droits des enfants" // <<http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=15155&lang=FR>>.



actually directed against the fundamental natural human rights resulting from our nature, and against traditional social institutions that consolidate society and ensure its viability.

Since in “surrogacy” the child (clearly contrary to his/her best interests) is considered and positioned, in essence, not as a person (moreover, it is an active denial of the child as a person) and not as a subject of birth (or adoption) relations with his/her own rights, but as an object of right, as a certain object of a transaction, in essence - as an inanimate object with the characteristics of a commodity (in fact, consumer commodity properties), the opportunity provided by the law to acquire (in fact - to buy) germ cells from donors and a fertilised human embryo to “obtain a child” through the technology of “surrogacy” means exactly the above attitude to human life and the child, which is incompatible with traditional ideas about the family and moral values.

Legislative regulation of such relations (in a permissive or allowing manner) means that such practices are justified by the state, recognised by it as a norm of social life, but this contradicts the public order based on the traditional spiritual and moral values of the people.

It is important to note that when a “surrogate” mother gives birth to a sick child (with physical defects, pathologies, serious internal diseases, etc.), **customers of “surrogacy” services usually have the right to abandon such a child** (usually this is a typical condition of a “surrogacy” agreement and even if it is not stipulated, it will be very problematic and difficult to force the customers to take such a child) as a kind of “defective product” that does not meet the terms of the agreement, which is a gross violation of the rights of this child and humiliation of his/her dignity. In such a situation, the “surrogate” mother is also completely unprotected and rightless: the customers not only do not accept the child, but, again, according to the standard provisions of the contract, they have the right to claim “compensation” from her, stating that the child was born sick because of her (“surrogate” mother's) non-compliance with the behaviour prescribed by the contract. At the same time, the “surrogate” mother (taking into account her lower social status in comparison with the customers of her services) will find it extremely difficult (almost impossible) to prove that she is not guilty in such a situation. Such an outcome is positioned as inappropriate provision of a service or provision of a service of unacceptably low quality, and this again confirms the presumption and positioning of the child in the “surrogacy” agreement as a property object: not as a living person, but as an inanimate object, a thing, as a kind of product. Such attitude towards children born as a result of cross-border “surrogacy” business determines the high mortality rate of





such children during their transportation across the border (in the world, there are many cases of even group deaths of such children).

From a constitutional and legal point of view, under no circumstances the rights of the child can be ignored or reduced (curtailed) for the sake of and in favour of the claims of third parties, whose rights, in turn, cannot be considered priority over the rights of the child.

#### **4 - Ideologically motivated, manipulative substitution of the concepts of the mother of the child and a woman-donor of an ovum, claiming to have a child born as a result of the “surrogacy” technologies use**

In the industry of “surrogacy”, the value and role of the mother of the child is critically and destructively reduced, belittled, which has a destructive effect on the social institution of motherhood.

In reality, the woman who did not carry the child and did not give birth to the child cannot be called the mother<sup>7</sup> only because of her claim to “have” the child (and a fortiori, we cannot call so a member of a homosexual couple, whose claims of “homosexual adoption” in many cases stimulate “surrogacy” “for export” to be organised).

There can be no artificial motivated (ideologically or commercially) substitution, no replacement - at least such that can be at least minimally legally and ethically recognised.

In the industry and practices of “surrogacy”, there is such a substitution that was carried out for manipulative purposes: the real mother of the child, carrying and giving birth to the child, is arbitrarily named a “surrogate” mother. As commonly defined, a surrogate is an object that is only partially (for some real or imaginary attributed properties) positioned as a substitute for another, usually it is presumed to be of lower quality. Although, in fact, a “surrogate” mother, in the fullest sense, is exactly the woman who engages the services (in the imposed sense) of “surrogacy” using a donor ovum from a third party (another woman, a donor).

Moreover, it is morally impossible to call a woman who turns to the services of “surrogacy” in order to get a child suitable for organ or tissue donation for her other already existing child (born by her) a mother (there is a known court practice confirming such cases).

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<sup>7</sup> Calling an adopted boy or adopted girl his/her adoptive mother as a mother has nothing to do with the issues discussed.



On the other hand, it is defective and incorrect to call a woman customer, who gives her ovum (she is solely and precisely a donor of the ovum), a biological mother of the child conceived, carried, and born by technology and in the process of “surrogacy”; the more reason why we cannot call so a woman who uses a donor ovum (for implantation into the “gestational carrier”) of a third person (another donor woman).

Generally, commercial “surrogacy” agreements (on a reimbursable basis) with a “gestational carrier” assume the child's DNA as originating from the mother's donor ovum (or from another woman who is an ovum donor) and from the sperm of the biological father (or from a sperm donor).

This approach ignores the fact that a woman carrying a child is not a kind of “plastic incubator”, but, on the contrary, she influences the formation of the genome and the biological development of the child she carries.

To date, there are no scientific studies that conclusively prove that the cells of a “surrogate” mother (a “gestational carrier”) for sure cannot overcome the placental barrier and influence the child at the cellular level, although the selective permeability of the blood-placental barrier is known, for example, to infectious disease specialists and pharmacologists. So, the absence of the genetic influence of the “surrogate” mother on the child she carries was presumed artificially and arbitrarily, without sufficient and convincing scientific evidence, it is based solely on commercial interests and ideological motives.

##### **5 - The practice of “surrogacy” is a gross violation of the child's rights, first of all, the child's right to his/her natural mother**

“Surrogacy” is a gross violation of the child's rights, first of all, to personal and family identity and the specific communication with his/her real mother, associated with such identity. The application of the “surrogacy” technology and the resulting specific relationships unlawfully and grossly distort and destroy the nature of parental relationship between mother and child.

The development and presence of a special and strong psychosomatic connection between a child carried by a “surrogate” mother (“gestational carrier”) at the prenatal stage of development (when the child is in the womb of the mother, the one who carries the child) and a woman who carries him/her, is generally recognised and does not require any more evidence. In any case, it was the reason that motivated



numerous court decisions in various countries of the world to give children to their “surrogate” mothers (in the event of disputes).

It is well known that the disruption of the above connection entails significant stress and other negative consequences for the child, it does not require additional proof. When the child is separated from his/her mother, when the connection is broken, formed during the period of intrauterine development between the child and the woman who carried the child and gave birth to him/her (in essence and by nature - his/her mother), the child faces severe negative influences, and this does not pass without a trace (it can be proven by many examples of children abandoned by their mothers).

References to the opposite conclusions of other studies are unsubstantiated, as they are not sufficiently scientifically proven due to the fragmentation of the research, the small number of the sample cases used as their basis, and often due to ideologically motivated bias (fitting) of the results. Today, even the most objective studies of the consequences of giving up a child born as a result of the use of the “surrogacy” technology do not provide and, technically, are not able to provide a complete picture of the consequences and complications for the health and development of a child arising in connection with his/her birth with the use of “surrogacy”. In the absence of convincing scientific data on the immediate and delayed consequences of the use of technology of “surrogacy”, such practices are cruel inhuman social experimentation on such children.

It is important to note that the relationship between the child and the woman who carried and gave birth to him/her is in the scope of the constitutionally and internationally guaranteed right of the child to the mother, enshrined in Paragraph 1 of Article 7 of the Convention on the Rights of the Child dated November 20, 1989<sup>8</sup>, in Paragraph 1 of Article 4 of the Convention on Contact concerning Children dated May 15, 2003<sup>9</sup>, and in Principle 6 of the UN Declaration of the Rights of the Child dated November 20, 1959<sup>10</sup>.

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<sup>8</sup> Convention on the Rights of the Child / Adopted by Resolution No. 44/25 of the United Nations General Assembly dated November 20, 1989 // <[http://www.un.org/ru/documents/decl\\_conv/conventions/childcon.shtml](http://www.un.org/ru/documents/decl_conv/conventions/childcon.shtml)>.

<sup>9</sup> Convention on Contact concerning Children dated May 15, 2003 // <<http://conventions.coe.int/Treaty/RUS/Treaties/Html/192.htm>>.

<sup>10</sup> Declaration on the Rights of the Child / Adopted by Resolution No. 1386 (XIV) of the United Nations General Assembly dated November 20, 1989 // <[http://www.un.org/ru/documents/decl\\_conv/declarations/childdec.shtml](http://www.un.org/ru/documents/decl_conv/declarations/childdec.shtml)>.



A child at this age is not able to understand and accept (and he/she should not be put in such a position without good reasons aimed at ensuring his/her best interests) that his/her “real mother” “assigned” to him/her is a woman donor who gave an ovum (or used a third-party donor ovum) to implant into the one that carried the child and gave birth to him/her, that is, the “surrogate” mother. But the child establishes a psychosomatic connection exclusively with the woman who carries him/her (carried and gave birth), it is she who becomes the mother for the child during the period of intrauterine development. This fact cannot be cancelled by the arbitrary, forced calling a woman who did not carry this child and did not give birth to him/her a mother (especially calling so one of the members of a homosexual couple).

The abusive breaking of these relations as a result of the transfer of the child to the customer of “surrogacy” services is a direct and immediate infringement on the child's right to the mother. Making the child suffer due to forced separation from his/her real biological (“surrogate”) mother directly results in a gross violation of his/her other fundamental natural rights and legitimate interests. In this sense, legislative regulation (in a permissive or admitting manner) of the use of surrogacy technologies and relations directly related to it would mean that this is justified by society and the state. It would legislatively contribute to the normalisation and encouragement of such practices, which would be grossly contrary to (which is contrary to) public order.

When a “single” man is a customer of having a child through “surrogacy”, it is an obvious violation of the child’s right to the natural mother. In reality, the constitutional principle of equality of rights of citizens regardless of gender is not applicable to such a situation (despite the dubious judicial practice in Russia, determined by the defectiveness of Russian legislation in this field).

From a point of view of constitutional law, under no circumstances can the rights of the child be ignored or reduced (curtailed) for the sake of and in favour of the claims of a “single” man, whose rights, in turn, cannot be considered priority over the rights of the child (especially if this single man is homosexual<sup>11</sup>). The cases when homosexual women in “traditional” societies use “surrogacy” technologies to simulate their own pregnancy and childbirth (as a response to pressure from their families)

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<sup>11</sup> See: **I.V. PONKIN, N.A. MIKHALEVA, M.N. KOUZNETSOV**, *Legal bases of protection of the society against aggressive pressure of subversive ideology of amorality / Institute of State-Confessional Relations and Law*. – Moscow: Buki-Vedi, 2016. – 232 p. – P. 12–54. <[http://moral-law.ru/files/Legal\\_bases\\_of\\_protection\\_of\\_society.pdf](http://moral-law.ru/files/Legal_bases_of_protection_of_society.pdf)>.



are also known, which also has nothing to do with the best interests of the child.

## **6 - Legal and actual inconsistency and defectiveness of classifying commercially motivated “surrogacy” as an assisted reproductive technology and a form of high-tech or other medical care**

Legislation of the Russian Federation classifies “surrogacy” as a “method of infertility treatment”<sup>12</sup>, which has no legal, logical, or factual grounds, if we consider the meaning of the concept of “treatment” that is well established in the linguistic consciousness and in law enforcement practice.

The method of “surrogacy” does not treat infertility, because as a result of this method, infertility remains, does not go away (and it is not even assumed that infertility can be cured as a result of this procedure), it is only an artificial “replacement” of the negative consequences of infertility by “having” a child through this technology. After the birth and the transfer of the child to her by the “surrogate” mother, the woman who ordered the services of “surrogacy” remains, from a medical point of view, infertile. Therefore, “surrogacy” is not a method of treating infertility.

As soon as the legal acts “lose” (no longer include) the imperative condition that “surrogacy” is carried out on a non-commercial basis and only in certain exceptional cases (for example, in family relations), and the possibility is provided to use the technology of “surrogacy” by persons claiming a child who are not related to the future “surrogate” mother as a family, as soon as there is a commercial component and the possibility of commercial intermediaries, especially foreign ones, and accompanying medical workers on a commercial basis, which happened in Russian legislation and practice, then there are absolutely no grounds to position such technology (artificial insemination of a woman selected for “surrogacy”, carrying and giving birth to a human foetus - a child, with his/her subsequent transfer to the customers) as related to assisted reproductive technologies.

Moreover, **referring the entire procedure of “surrogacy” to medical care in terms of assisted reproductive technologies has no legal and factual grounds.** Here, the entire medical part is limited to

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<sup>12</sup> See Part 1 of Article 55 of Federal Law No. 323-FZ dated November 21, 2011 “On Fundamental Healthcare Principles in the Russian Federation”.



manipulations on the artificial fertilisation of the donor ovum and its transfer into the uterus of a woman who is ready, according to the agreement, to become a “surrogate” mother, on taking and processing analyses characterising the state of health of the “surrogate” mother and her foetus, on delivering. All this is the fulfilment by medical workers of their obligations and their professional duty, irrespective of whether this pregnancy is “surrogate” or not (possibly, to a somewhat greater extent). Both in terms of time and scope of actions, these actions of a medical worker are only a minor part of total duration and of the total scope of actions within the process of implementing the “surrogacy” agreement, and the main thing is that the essence of the agreement is different.

The very essence of the “surrogacy” agreement is the transfer (“alienation”) of a child born through “surrogacy” to the customer, which has nothing to do with either health or medicine at all. Everything else is carried out in parallel and/or has a provisional auxiliary nature. Moreover, this is clearly expressed when the technology of “surrogacy” is implemented using acquired donor ova and sperm from third parties.

The presence of the above-mentioned limited scope of medical manipulations (actions) does not give any legal and factual grounds to position the entire process of “surrogacy” (or any part of it that is significant in terms of time) as a form and method of health protection or/and the provision of medical care or medical services. Equally, there are no legal and factual grounds to position, recognise the whole process of “surrogacy” (or any part of it that is significant in terms of time) as having at least some (even the most minimal) relation to constitutionally or internationally guaranteed rights to health care or/to receive medical care or medical services.

The above completely excludes (as manipulative and unfounded) any discussion of the rights (and equality of rights) of foreigners (especially from states where it is prohibited by law) to “health care”, to “provision of medical assistance” in relation to the use of technologies of “surrogacy” in Russia, because these technologies have absolutely nothing to do with health protection and the provision of medical care or medical services.

**7 - Reduction of the value and role of a woman as the mother to the value and role of a paid, commercially exploited living “human incubator”, a means of production by technology and the industry of “surrogacy”**





In the base of the commercialised “surrogacy” (with remuneration to a “surrogate” mother and a commercial intermediary, agent), there is an attitude towards a woman as a means of enrichment, completely immoral and grossly infringing on the rights and human dignity of a woman, which is analogous to the attitude towards a slave and treating her like a slave. Consequently, there are good reasons to consider “surrogacy” as, in essence, an institution similar to slavery, including within the meaning of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery dated September 07, 1956<sup>13</sup>, Council of Europe Convention on Action against Trafficking in Human Beings dated May 16, 2005<sup>14</sup>, Subparagraph 21 of Paragraph 3 of Article 10 of the CIS Model Law dated April 03, 2008 “On Action against Trafficking in Human Beings”<sup>15</sup>, and a number of other documents.

Within the framework of the relationship and the process of “surrogacy”, a woman, a “surrogate” mother, who, as shown in many scientific sources, undergoes very significant negative effects on her body and mental health during the gestation of a genetically alien foetus, undergoes severe moral suffering after the transfer of her child to the “customers”, is reduced to the level of only a commercially exploited (considering that the vast majority of such agreements in Russia are of a commercial nature) living incubator (“human incubator”), that is, in essence, a means of satisfying the interests of the customer (means of achieving the goals of third people), and her own suffering is generally ignored (as no one would pay attention to the “suffering” of a factory machine or an exploited animal in a nursery).

Among other issues, such attitude to a woman grossly violates the principle of the inalienability of the human body.

Inter alia, the aforementioned is confirmed by the fact that in the vast majority of cases, applicants for becoming a “surrogate” mother and

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<sup>13</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery / Adopted by the Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956 and done at Geneva on 7 September 1956 // <[https://www.un.org/ru/documents/decl\\_conv/conventions/supplementconvention\\_slavery.shtml](https://www.un.org/ru/documents/decl_conv/conventions/supplementconvention_slavery.shtml)>.

<sup>14</sup> Council of Europe Convention on Action against Trafficking in Human Beings dated May 16, 2005 // <<https://www.coe.int/ru/web/conventions/full-list/-/conventions/treaty/197>>.

<sup>15</sup> CIS Model Law “On Action against Trafficking in Human Beings” / Adopted at the 30th plenary session of the Interparliamentary Assembly of the CIS Member States (Resolution No. 30-11 dated April 03, 2008) // <http://docs.cntd.ru/document/902124613>.



women involved in the relationship of “surrogacy” are not notified (or are not properly notified in a necessary full and adequate scope) of very serious negative stresses (including significant negative side effects) on their female bodies in connection with and as a result of their involvement in “surrogacy” and about the negative consequences and risks of it for their health, about the insecurity of such practices for them.

Generally, the rights and guarantees of the rights of a “surrogate” mother in a “surrogacy” transaction are radically belittled, overshadowed, or completely (or almost completely) ignored, such as the right to recognition and respect for human dignity, which is completely ignored in commercial “surrogacy”. And in many cases, “surrogate” mothers are totally unaware of their rights and legitimate interests, all the risks of pregnancy and associated medical, emotional, and psychological issues are shifted onto them. They are not able to afford the services of lawyers, as they are usually in poor financial situation.

The status of a surrogate mother is very indicatively reflected in one of the publications of the World Health Organization: a “surrogate” mother is called a “gestational carrier”<sup>16</sup>, and many foreign authors reasonably (although perhaps too figuratively) call “surrogacy” an “exploitation of a woman’s womb”, “leasing of the uterus”, “uterus for rent” technology, “form of prostitution”, “reproductive trade”, “renting a woman's womb with financial compensation”, “pregnancy outsourcing”.

Commercial “surrogacy” is and can be reasonably qualified as one of the types of exploitation of the woman’s body, one of the types of sexual exploitation of women, this activity can reasonably be considered and evaluated as a kind of analogue of prostitution. Accordingly, mediation in such activities can be reasonably assessed as an analogue of organising prostitution, that is, pimping. The validity of this analogy is also supported by the fact that defenders of the woman’s “right to free use of her body” for the purpose of prostitution similarly try to form the public opinion that this is an exclusively voluntary matter of a woman - how to use her body, that this is the same work like other types of work, and she should receive money for such services, as well as for any other.

However, in most cases there is reasonable significant doubt about the woman's free will, her voluntary decision to become a “surrogate”

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<sup>16</sup> Current Practices and Controversies in Assisted Reproduction / Report of a meeting on “Medical, Ethical and Social Aspects of Assisted Reproduction” held at WHO Headquarters in Geneva, Switzerland 17–21 September 2001 / Edited by E. VAYENA, P.J. ROWE, P.D. GRIFFIN. – Geneva: World Health Organization, 2002. – P. xx, xxi. <<http://apps.who.int/iris/bitstream/10665/42576/1/9241590300.pdf>>.



mother. When a woman in dire (hopeless) financial situation, in desperate need, decides to improve the situation by participating in “surrogacy” - this is, in fact, a fictitious choice imposed on her for economic reasons.

Such an attitude towards a woman and such exploitation of a woman is grossly contrary to Articles 3 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms dated November 04, 1950 (with protocols)<sup>17</sup>, Articles 5 and 7 of the Universal Declaration of Human Rights dated December 10, 1948<sup>18</sup>, Article 7 of the International Covenant on Civil and Political Rights dated December 19, 1966<sup>19</sup>, the Convention on the Elimination of All Forms of Discrimination against Women dated December 18, 1979<sup>20</sup>, and a number of other international documents on the rights and dignity of women.

Legislative regulation of the use of surrogacy technology and relations directly related to it (in a permissive or admitting way) would mean that it is justified by the state. It would legislatively contribute to the normalisation and encouragement of such practices, which would be grossly contrary to (is contrary to) public order.

## **8 - Risks of using children “obtained” as a result of “surrogacy” for criminal purposes**

In contrast to the subsequent control over Russian children adopted by foreign citizens and taken out of the Russian Federation by their adoptive parents, there is no control over actions in relation to children born by Russian “surrogate” mothers after their export outside the Russian Federation. And this also speaks for the attitude towards children born with the use of “surrogacy” as a commodity.

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<sup>17</sup> Convention for the Protection of Human Rights and Fundamental Freedoms dated November 04, 1950 // <<http://conventions.coe.int/treaty/rus/treaties/html/005.htm>>.

<sup>18</sup> Universal Declaration of Human Rights dated December 10, 1948 // <<https://www.un.org/ru/universal-declaration-human-rights/index.html>>.

<sup>19</sup> International Covenant on Civil and Political Rights / Adopted by Resolution No. 2200 A (XXI) of the United Nations General Assembly dated December 16, 1966 // <[https://www.un.org/ru/documents/decl\\_conv/conventions/pactpol.shtml](https://www.un.org/ru/documents/decl_conv/conventions/pactpol.shtml)>.

<sup>20</sup> Convention on the Elimination of All Forms of Discrimination against Women / Adopted by Resolution No. 34/180 of the United Nations General Assembly dated December 18, 1979 // <[https://www.un.org/ru/documents/decl\\_conv/conventions/cedaw.shtml](https://www.un.org/ru/documents/decl_conv/conventions/cedaw.shtml)>.



The existing trend of growing interest among homosexual couples (and individual homosexuals) to the use of the technology of “surrogacy” for the purpose of “acquiring” children raises the issue of significant deficiencies in legislation that make possible gross violations of the rights of the child. Commercially motivated and implemented “surrogacy” in the interests of homosexuals, entailing the “adoption” of a child by a homosexual couple or an individual homosexual, is evidently illegal, contrary to constitutional norms, and it grossly violates the rights of the child<sup>21</sup>.

We also know many cases that testify to the significant criminalisation of the market for “surrogacy” services, in particular, the use of children “obtained” as a result of “surrogacy” for the criminal purpose of mutilating them (leading to death) with the removal of their organs and tissues for the black-market illegal transplantation of human organs, as well as for the purpose of other cruel treatment. By analogy with the “Unclean hands Doctrine” widely used in the United States, the existence of a considerable number of such criminal proceedings in different countries of the world is sufficient to justify the existence of these risks from now on.

## 9 - Conclusions

1. “Surrogacy”(carrying a fertilised ovum of a woman serving as a customer by another woman (or with the use of a donor ovum of a third person female by the customer), with the condition of transferring a carried and born child after childbirth to the customer) is unnatural (even on a non-commercial basis) and (considering a commercial variant) illegal practice, which has clear features of hidden child trafficking, and it is the manifestation of humiliating treatment (similar to slavery) of a woman - a “surrogate” mother, gross infringement of the rights and personal dignity of a woman, her legitimate interests.

2. Commercially motivated and carried out (especially in favour of foreign “customers” of children) “surrogacy” clearly contradicts the traditional spiritual and moral values and foundations of Russian society,

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<sup>21</sup> See the justification for this position here: **I.V.PONKIN, N.A. MIKHALEVA, M.N. KOUZNETSOV**, *Legal bases of protection of society against aggressive pressure of subversive ideology of amorality* / Institute of State-Confessional Relations and Law. – M.: Buki-Vedi, 2016. – 232 p. – P. 12–54. <[http://moral-law.ru/files/Legal\\_bases\\_of\\_protection\\_of\\_society.pdf](http://moral-law.ru/files/Legal_bases_of_protection_of_society.pdf)>.



has a destructive effect on them; it is illegal ignoring and belittling the legitimate interests of the child, neglecting his/her human dignity, his /her rights and freedoms, it entails gross violations of the fundamental natural rights of the child, guaranteed by a number of international legal acts on the rights of the child, and, in fact, it is a specific form of trafficking of people (children).

3. We believe that the aforementioned reasons predetermined the adoption of legislative prohibitions on the organisation and implementation of commercial “surrogacy” and on commercial intermediation (agency activity) in organisation of “surrogacy” in most countries of the world (including many US states), and in many countries of the world any kind of “surrogacy” is prohibited by law.

4. The norms of Russian legislation on “surrogacy” are legally defective, contrary to the public order of the Russian Federation, the constitutional principles of protecting the family, motherhood, paternity, and childhood, as well as the new constitutional provision on recognising children as a top priority of Russian public policy.

5. The legislation of the Russian Federation should establish a legal ban on the possibility of using technologies of “surrogacy” in Russia in the interests of foreign customers, a legal ban on commercial “surrogacy”, and a ban on commercial intermediation, commercial agency, and advertising activities in this area. Currently, the use of technologies of “surrogacy” can be allowed, as an exception, only for couples in a registered marriage who are citizens of the Russian Federation, using exclusively their germ cells (provided that it is impossible for a woman to conceive, carry, and give birth to a child for medical reasons), and the law should set the upper age limit for potential customers and the requirement to support such pregnancies exclusively in public medical organisations.