LIBERALISM OF SURROGACY LEGISLATION IN THE RUSSIAN FEDERATION: A PARADOXICAL DEVELOPMENT IN A PATERNALISTIC SOCIETY

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Abstract

The year 1995 marked a new chapter in Russian family law. Following a chain of political events that shook the young Russian state's legal landscape, the Family Code 1995 was enacted. The new progressive law codified certain aspects of assisted reproduction, more specifically, surrogacy. Despite the Soviet Union's intrusiveness into private life, its successor state, Russia, seems to have attempted to shift 'from paternalism to "rights-based" approach.'[1] Russia[2] became one of the most liberal states as regards to procreation. Not only has the state proactively legalised surrogacy, its attitude towards the parties' reproductive arrangements may be described as almost a *laissez-faire*. The Code explicitly allowed the intended parents to legally enter into a surrogacy arrangement, with minimum oversight from the government. This development was followed by further liberalisation in the area of surrogacy in 2012 when commercial surrogacy was legalised. Considered against the tendency of the state policies to interfere with private decision-making, these developments are at their best paradoxical. The research seeks to critically appraise the Russian surrogacy law and uncover the influences that could have shaped such a liberal approach considering the factors, such as increasing availability of assisted reproductive technology, the state's biopolitical agenda and the view of the media.

[1] Maria Antokolskaia, 'The New Aspects of Russian Family Law' (2000-1) 31 Californian Western Law International Journal 23, 23.

[2] 'The Russian Federation' and 'Russia' will be used interchangeably throughout the thesis.

1. INTRODUCTION

Surrogacy itself means "substitution" and may be defined as an "agreement by which a woman…agrees to bear a child for another person or couple".[1] Generally, surrogacy arrangements are chosen by couples where women are unable to carry a child due to a health condition or age.[2] Warnock describes it as "a practice [where] one woman carries a child for another with the intention that the child should be handed over after birth".[3] Surrogacy's functions are twofold. It recognises "… that not all women who bear children (or who have the capacity to bear children) need to be thought of as mothers" and allows "women who cannot bear children to assume the responsibilities of parenthood."[4] Surrogacy is a multi-stakeholder arrangement, whereby a surrogate would act as a 'replacement' of the biological mother for the duration of the pregnancy[5] and the couple would be the future legal parents. The majority of the arrangements are facilitated by a third-party agency that guides the parties throughout the journey. The term "surrogacy" may be seen as an umbrella-term generally encompassing four types of such practice: traditional and gestational, altruistic and commercial.[6] Traditional surrogacy implies artificial insemination of a woman by a potential father or sperm donor. In this arrangement a surrogate would be the provider of eggs, which means the child would be related to the father and the surrogate mother. Gestational surrogacy, by contrast, usually involves the insemination of a woman with sperm and eggs of a commissioning couple so that both intended parents would be biologically related to the child. The embryo is created through in vitro fertilisation and implanted into the surrogate's womb for development. In some gestational surrogacies only donor genetic material would be used to create an embryo which means that either one or none of the parents would be genetically related to the child. Similarly to adoption, the intended parent(s) will obtain parental rights. However, unlike in adoption scenario, where parental rights are transferred post-birth/ after adoption order is made, in gestational surrogacy the child could be considered to "belong to the commissioning parents from the outset as they do not at any stage relinquish their rights and duties in respect of

[1] Derek Morgan and Robert Lee, *Birthrights: Law and Ethics at the Beginnings of Life* (Routledge 1990) 56.
[2] Martha Field, Surrogate Motherhood: the Legal and Human Issues (Harvard University Press 1988) 17.
[3] Mary Warnock, Report of the Inquiry into Human Fertilisation and Embryology Cm 9314, London, Department of Health and Social Security, 1984, para 8.1.
[4] Mary Lyndon Shanley, Making Babies, Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption, and Same-Sex Couples, and Unwed Parents (Beacon Press 2001) 106.
[5] Nataliia Pytetska, Dmitro Molodan and Esha Saini, 'Surrogacy: Blessing or Curse to the Society in India' (2021) Health, Medicine and Philosophy: the Strategies of Survival 14, 14.
[6] Grubb by contrast differentiates between seventeen types of surrogacies – see Andrew Grubb, *Principles of Medical Law* (Oxford University Press 2004) 722-723.

it."[7]

Altruistic surrogacy is usually referred to in cases where a surrogate mother receives no other payment except strict compensation for reasonable expenses incurred during pregnancy. This may be for travel, food and medical bills. It was suggested that even a payment for weekly recording the development of pregnancy in a diary would also be deemed to be within the scope of reasonable expenses.[8] In commercial surrogacies, however, the compensation is usually above all reasonable expenses and costs are payable to a surrogate mother and to a third-party agent that introduced the commissioning couple.[9] The payment may be either in the form of a lump sum or periodic salary-type payment which would come to an end after the child's birth.

Although studies show that surrogacy, in its traditional form, has already been widely performed in the United States before the Civil War,[10] nowadays due to technological advancement, it is seen as an alternative to adoption and the number of arrangements entered into have drastically increased. For example, the United States reports a sharp increase in surrogacy births,[11] the trend broadly aligned with other permissive states, such as Russia and Ukraine.[12] Until the 2020 COVID-19 pandemic severely limiting free movement, surrogacy was claimed to be an "emerging global market" with the potential of generating more than $27.5 billion within the next four years.[13] Its increasing popularity did not go unnoticed for various schools of thought, attracting, amongst others, liberal, feminist and conservative debates.

Whilst some theories defend or at least partially defend surrogacy, others make it a subject of

[7] For further discussion see Edgar Page, 'Donation, Surrogacy and Adoption' (1985) 2 *Journal of Applied Philosophy* 161, 167. Blyth and others suggest that another difference between donor assisted conception and adoption is related to the 'number of offspring' a donor might have as well as "the potential implications for kinship networks, especially in the event of contact between the parties involved. Whereas birth parents are likely to have relinquished for adoption only one child or a small sibling group, gamete donors may have numerous genetic children, each with different other genetic parents." See Eric Blyth, Marilyn Crawshaw, Jean Haase and Jennifer Spears, 'The implications of adoption for donor offspring following donor-assisted conception' (2001) 6 *Child and Family Social Work* 295, 298-299.

[8] See e.g. Freeman in Eric Blyth and Claire Potter, 'Paying for it? Surrogacy, Market Forces and Assisted Conception' in Rachel Cook, Shelley Day Slater and Felicity Kaganas, Surrogate Motherhood: International Perspectives (Bloomsbury 2003) 228.

[9] Amy Larkey, 'Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements' (2003) 51 *Drake Law Review* 605, 608.

[10] Carla Spivack, 'The Law of Surrogate Motherhood in the United States' (2010) 58 *The American Journal of Comparative Law* 97, 97.

[11] See e.g. Alicia Gonzalez, 'Commercial Surrogacy in the United States' (2019) Georgetown Law at <https://www.law.georgetown.edu/gender-journal/wp-content/uploads/sites/20/2019/11/Alicia_Surrogacy-6.pdf> accessed 31 Dec 2019.

[12] Kevin Ponniah, 'In search of surrogates, foreign couples descend on Ukraine' (13 Feb 2018) *BBC News* at <https://www.bbc.co.uk/news/world-europe-42845602> accessed 20 Feb 2018.

[13] Roman A. Maydanyk, Kateryna V. Moskalenko, 'Towards the Creation of Unified Regulation of Surrogacy in Europe: Recent Trends and Future Perspectives' (2020) *LXXIII Wiadomości Lekarskie* 2865, 2865.

undeserved criticism. The liberal view, based on the notions of individual autonomy and freedom to contract, asserts that surrogacy arrangements should be allowed, as this would provide for the women's right to self-determination.[14] Andrews, for example, sees surrogacy being the very result of women's liberation movement,[15] which culminated in the perception of surrogacy not only as a reproductive right but also as economic choice.[16] Feminist discourse also relies on the freedom of choice premise. Yet, by contrast to the liberal theory, it found itself at the crossroads: on the one hand, feminism strongly opposes the exploitation of women and their subordination to what it sees as the wealthy commissioning parents. On the other, however, it rejects the idea that women's reproductive choice should be a matter for the state's concern.[17] Rather, it argues that women should be treated as rational beings, capable of realising their wishes to assist a childless family and financially support a family of their own.[18] These two trends simultaneously seeing surrogacy as "a tool for patriarchy"[19] and empowerment are hardly reconcilable, thereby exposing the imperfection of this theory in the surrogacy context. Radical feminists bring their discontent about surrogacy a step further and contend that, by entering into surrogacy, women unconsciously promote patriarchy, by allowing the use of their bodies.[20] Yet, the most negative view seems to be attributable to conservative theorists. They reject surrogacy as it severs the bond between the surrogate, who is deemed to be the mother, and the child.[21] By relying on religious premises, they also perceive surrogacy as an unnatural way of reproduction seeking to do nothing else than undermine the traditional family and social values.[22]

The public perception of surrogacy is also far from being uniform. While some see

[14] Liezl van Zyl and Anton van Niekerk, 'Interpretations, Perspectives and Intentions in Surrogate Motherhood' (2000) 26 Journal of Medical Ethics 404, 404.
[15] Lori Andrews, 'Surrogate Motherhood: The Challenge for Feminists' in Larry Gostin, Surrogate Motherhood: Politics and Privacy (Indiana University Press 1990) 168.
[16] Janice G. Raymond, 'The International Traffic in Women, Women used in Systems of Surrogacy and Reproduction' (1989) 2 Reproductive and Genetic Engineering 51, 51-57.
[17] Joan Mahoney, 'An Essay on Surrogacy and Feminist Thought' (1988) 16 The Journal of Law, Medicine and Ethics 81, 81.
[18] Jennifer A. Parks, 'Gestational Surrogacy and Feminist Perspective' in E. Scott-Sills (ed.) Handbook of Gestational Surrogacy: International Clinical Practice and Policy (Cambridge University Press 2016) 26
[19] See Daniela Bandelli, 'Feminism and Gestational Surrogacy. Theoretical Reconsiderations in the Name of the Child and the Woman' where she discussed French and Italian feminist view on surrogacy in (2019) 9 *Italian Sociological Review* 345, 350.
[20] Jana Sawicki in Elizabeth F. Roberts, 'Examining Surrogacy Discourses: Between Feminine Power and Exploitation' in Nancy Scheper-Hughes, Carolyn F. Sargent (eds.) Small Wars: the Cultural Politics of Childhood (University of California Press 1998) 95.
[21] ibid 97.
[22] Janice C. Cicarelli and Linda J. Beckman, 'Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy' (2005) 61 Journal of Social Issues 21, 23.

surrogacy as an opportunity for single and same-sex couples to become parents,[23] others proclaim it to be the "evil"[24] devoid of any sense of morality. For the advocates, surrogacy is a win-win arrangement: with the assistance of technology an infertile couple or single parent would be able to have genetically-related offspring, whereas the surrogate mother "could satisfy a personal motivation to help… have a baby."[25] The opponents flag out the possibility of an imperfect arrangement, where a surrogate would decide to keep the child[26] or the intended parents would fail to compensate her. The opinion on specific types of surrogacy is also fragmented. Although altruistic surrogacy is generally deemed acceptable, the social perception of commercial surrogacy tends to be negative –it is even equated to "reproductive prostitution"[27] allegedly imposing undue influence on women from lower social class. Field argues that it is the payment that puts 'poor single women' at risk of being treated as a 'breeding stock.'[28] A variety of moral objections to monetary payment in exchange for a baby led to illegalisation of commercial surrogacy in the majority of the European countries, for example Spain, France, Germany and Portugal amongst others.[29] Similarly, Canada, New Zealand and Denmark only allow altruistic surrogacies.[30] In 2015 Thailand banned for-profit surrogacy shutting one of the most rapidly expanding industries. Previously a very permissive and popular reproductive destination, Thailand was forced to re-consider its legislative stance following the controversial *Baby Gammy* case[31] and some other child-related scandals. In *Baby Gammy*, for example, the healthy child was accepted by the commissioning couple, whereas Gammy, the twin with the Down's syndrome, was left in Thailand with the surrogate mother. The case led to a public outcry, and the human rights organisations blamed surrogacy for "preying on poor and vulnerable women in developing countries."[32] Thus, the Protection for Children Born through Assisted Reproductive Technologies Act 2015 narrows surrogacy arrangements to the members of the same

[23] Alison Bailey, 'Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy' (2011) 26 Hypatia 715, 719.
[24] See e.g. Janet Dolgin referring to Baby M case in 'Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate' (1990) 38 Buffalo Law Review 516, 542.
[25] Gregory L. Weiss, 'Public Attitudes About Surrogate Motherhood' (1992) 6 Michigan Sociological Review 15, 16.
[26] Ibid.
[27] Andrews (n15) 74.
[28] Field (n2) 17.
[29] Roli Srivastava, 'Factbox: Which countries allow commercial surrogacy?' (19 Jan 2017) *Reuters* at https://www.reuters.com/article/us-india-women-surrogacy-factbox/fatcbox-which-countries-allow- commercial-surrogacy-idUSKBN1530FP accessed 5th Feb 2017.
[30] Ibid.
[31] *Farnell & Anor v. Chanbua* [2016] FCWA 17. See Ron Corben, 'New Thai surrogacy law bans foreigners' (31 July 2015) at https://www.news.com.au/world/breaking-news/new-thai-surrogacy-law-bans-foreigners/news- story/eee539697c2864ecb71342df5fca0235 For further discussion of Baby Gammy see Andrea Whittaker, 'From 'Mung Ming' to 'Baby Gammy': a local history of assisted reproduction in Thailand' (2016) 2 *Reproductive Biomedicine Online* 71, 71-78.
[32] Luna Dolezal, 'Phenomenology and Corporeality in the Case of Commercial Surrogacy' in Luna Dolezal and Danielle Petherbridge (eds.) *Body/Self/Other: The Phenomenology of Social Encounters* (SUNY Press 2017) 311

family,[33] acquaintances or friends.[34] A year later, India, also known as one of the most attractive surrogacy destinations, followed the Thai footsteps by closing its doors to foreign intended parents.[35] In 2018, more restrictions were introduced by the Surrogacy (Regulation) Bill 2016, which prohibited commercial surrogacy altogether. S.37 of the Bill imposes a harsh penalty for those illegally attempting to enter into a surrogacy arrangement – a five-year imprisonment and a five lakh rupees penalty for the first offence; and a ten-year imprisonment and a ten lakh fine for a repeated offence.[36]

The rationale underlying prohibition covers a broad range of matters: from the inability of a booming industry to be carefully regulated, the possibility for a surrogate mother to be exploited and psychologically traumatised to the transformation of the baby into commodity and his statelessness. As Singer and Wells argue: "once money enters the arrangement the possibility of exploitation is everywhere."[37] The media further fuels the states' concerns by willingly highlighting the cases where the child was deemed to be "an object for sale," was abandoned by the genetic parents and the surrogate, ultimately ending up in a state institution waiting to be adopted. It is argued that surrogacy is highly detrimental: apart from "putting a price tag on a child"[38] and "treating women as f[o]etal containers"[39] it may have other potentially harmful consequences brought about by the lack of clarity in the contract enforcement. Agnafors further explains that the harm in the context of surrogacy may be twofold. He emphasises the importance of attachment. This is related to the well-known idea that the child and the surrogate develop a bond and vice-versa, the severance of which would be traumatising for both.[40] The prohibition, in turn, would seek to eliminate the harm that is suffered by the surrogates, who work as "production horses"[41] in deplorable living conditions completely alienated from their own families. It is also acknowledged that surrogacy could be an inherently risky arrangement, causing emotional difficulties along the way, sometimes making it hard for the parties to avoid tensions or, even worse, conflicts at the point where the agreement cannot be reversed. This view, however, is myopic to the goal that surrogacy

[33] Yuri Hibino, 'Non-commercial Surrogacy in Thailand: Ethical, Legal, and Social Implications in Local and Global Contexts' (2020) 12 Asian Bioethics Review 135, 136.
[34] Ibid 144.
[35] The Surrogacy (Regulation) Act 2016.
[36] See JSRG Saran and Jagadish Rao Padubidri, 'New laws ban commercial surrogacy in India' (2020) 88 *Medico-Legal Journal* 148, 149.
[37] Peter Singer and Diane Wells, The Reproductive Revolution: the New Way of Making Babies (Oxford Paperbacks 1984) 125.
[38] Larry Gostin, *Surrogate Motherhood: Politics and Privacy* (Indiana University Press 1990) xii.
[39] Ibid.
[40] Marcus Agnafors, 'The Harm Argument against Surrogacy Revisited: two Versions not to Forget' (2014) 17 Medical Health Care and Philosophy 357, 359.
[41] Saran and Padubidri (n36) 149.

seeks to achieve. It overlooks the fact that surrogacy is an agreement that all the parties involved perceive to be in their best interests. As Gostin rightly argues, surrogacy seems to account for other "important social values, such as personal autonomy, happiness and privacy," which are balanced against the possible disadvantages to surrogates.[42] Ultimately, it is a "poignant response to [one of the most natural] human needs"[43] – reproduction, providing a unique opportunity for those wishing to have their own children to be able to have biologically-related offspring.[44]

However, ethical problems that might be caused by surrogacy did not prompt unanimous global prohibition of the practice. Unlike many states, Russia's approach to surrogacy, since it was firstly mentioned in the Family Code in 1995, has always been very favourable. The Code contains the provisions that explicitly allowed surrogacy, albeit without specifying the legal position of commercial surrogacy at the time. The Code clarified the conditions of legal parenthood of the intended parents, namely that it is contingent upon the surrogate mother's consent.[45] Despite this restriction, the state's interference in the arrangement is very minimal. For example, the procedure of child registration is quite straightforward – there is no need for the surrogate to give up her parental rights. The procedure simply follows the same rules as for children born via a traditional method. Since the first surrogacy case in 1996, Russia experienced a reproductive boom[46] and became one of the international leaders in the practice. This development sits uneasily within the state's conservative ideological trajectory within the familial sphere. In 2022, following mass popularisation of familial values in various public events and information campaigns,[47] it was concluded that protection traditional family should be cemented in the Family Code.[48] Despite the increasing prominence of traditional familial values, actively supported by the government,[49] the alternative forms of procreation seem to be rapidly re-surfacing in contemporary Russia.

Research on surrogacy might not seem to be at all new. Indeed, there are numerous studies,

[42] Larry Gostin (n38).
[43] Peter H. Schuck, 'The Social Utility Surrogacy' (1990) 13 *Harvard Journal of Law and Public Policy* 132, 132.
[44] Janet Dolgin, *Defining the Family Law: Law, Technology, and Reproduction in an Uneasy Age* (New York 1997) 14.
[45] Art 51 of the Family Code discussed in chapter 4 below.
[46] See Ekaterina Mouliarova, 'The Legal Regulation of Surrogacy in Russia' (2019) 11 *Italian Journal of Public Law* 393, 407-408.
[47] 'Campaign for Popularisation of Familial values and Family Protection' (1 Mar 2022) News at https://news.myseldon.com/ru/news/index/267879859.
[48] Legislative proposal №157281-8. The details of the proposal are not publicly available yet.
[49] See, for example, the Public Project "The Conception of Family Policies of the Russian Federation Until the Period of 2025" from 2013.

exploring surrogacy in various contexts. Most studies tend to focus on ethical,[50] comparative[51] and economic[52] perspectives. The authors mostly rely on theoretical underpinning or market analysis of surrogacy. Some works examine surrogacy in a social context by focusing on the experiences of the stakeholders involved: the intended parents, the surrogate mothers, the surrogate children, the third-party agencies and other parties engaging with surrogacy.[53] The existing legal research is primarily dogmatic, explaining the legislation and the practical approaches of the permissive or partially permissive states. There is a plethora of literature from partially permissive states, such as the UK.[54] The most recent legal analyses tend to focus on the countries that began to restrict the access to surrogacy, that is the Southeastern Asian states, such as India[55] and Thailand.[56]

The research on Russia, however, is not extensive. This is surprising, taking into account the fact that Russia has a long-standing practice of altruistic and commercial surrogacies, a rather relaxed approach to the eligibility of the intended parents. Until December 2022 it also used to be a transnational surrogacy hub with a well-established international reputation. There have been some inquiries into the Russian regime on surrogacy, mostly by Dr Olga Khazova, Tatiana Borisova and Dr Christina Weis. For example, back in 1995, Dr Khazova explored surrogacy in the context of the newly enacted Family Code and concluded that the legislation remains imperfect. She revisited the issue three years later, discussing surrogacy in light of other developments in the sphere of assisted reproduction and the rights of the child. Borisova is the author of the most up-to-date monograph on

[50] For example, Donna Dickenson, *Property in the Body: a Feminist Perspective* (CUP 2017), Kalindi Vora, *Reimagining Reproduction: Essays on Surrogacy, Labor, and Technologies of Human Reproduction* (Routledge 2022), Shivanghi Singh and Anu Johnson, *Surrogacy: Acceptability from Socio-Legal Perspective* (LAP LAMBERT Academic Publishing 2014).

[51] For example, Claire Fenton-Glynn, Jens M Scherpe and Terry Kaan (eds.) *Eastern and Western Perspectives on Surrogacy* (Intersentia 2019), Katarina Trimmings and Paul Beaumont (eds) *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013). For a comparative approach of the USA, Mexico and Italy see Daniela Bandelli, *Sociological Debates on Gestational Surrogacy: Between Legitimation and International Abolition* (Springer 2021).

[52] For example, the work of Szusza Berend, *The Online World of Surrogacy* (Bergahn 2018).

[53] For example, Damien Riggs and Clemence Due, *A Critical Approach to Surrogacy: Reproductive Desires and Demands* (Routledge 2018), Bianca Smith, *My Ukrainian Surrogacy Journey: A Personal Account of my Mission to Motherhood in Kiev* (Independent Publishers 2018). Smith shares her own experience of engaging with surrogacy in Ukraine.

[54] Some examples would include Andrew Powell, *A Practical Guide to the Law in Relation to Surrogacy* (Law Brief Publishing 2020), Ruth Cabeza, Victoria Flowers, Eirwen Pierrot, Anita Rao, Barry O'Leary, *Surrogacy: Law, Practice and Policy in England and Wales* (Family Law Publishing 2018). See also Kirsty Horsey, *Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues* (CUP 2016).

[55] Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India (South Asia Across the Disciplines)* (Columbia University Press 2014). Pande focuses on ethnographic research on surrogacy. See also Sharmila Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (NYU 2015).

[56] Andrea Whittaker, *International Surrogacy as Disruptive Industry in Southeast Asia* (Rutgers University Press 2019). Whittaker details the background to legal prohibition of surrogacy in Thailand.

surrogacy legislation.[57] So far, the most recent research on surrogacy in Russia may be attributed to Dr Christina Weis. Dr Weis conducted an extensive study on the social organization and cultural framing of surrogacy in Russia based on empirical research. Weis' ethnographic research sought to reveal the experiences of surrogate mothers from Russia and other former Soviet republics.[58]

The thesis responds to this gap in the literature which provides a unique opportunity to explore the Russian liberal legal approach to surrogate motherhood in detail and evaluate the factors that could have influenced its development in a such direction. Shifting from a purely dogmatic approach, the thesis will offer a fresh perspective on surrogacy by exploring the interaction between the law and social context. The aims of the thesis and its methodology will be discussed below.

1.1 Aims of the thesis and methodology

The thesis examines the legislative response to surrogacy provided by the Russian Federation. Russia takes an unusual *laissez-faire* approach by placing only limited constraints on an individual's reproductive rights, especially in the controversial matter of surrogate motherhood. Unlike some other (partially) permissive states, [59] allowing surrogacy via a court order, in Russia "[not even] specific preliminary permission from any regulatory board or court is required"[60] prior to the arrangement. The law also does not require a parental order[61] to be made after the child's birth – following a rather straightforward administrative procedure, an entry is automatically made on a birth certificate, recording the genetic parents as the legal parents. This stance is paradoxical in light of the generally overly controlling attitude of the state and the limited understanding of liberalism by the Russian society itself.[62] The actions of the totalitarian government in the Soviet Russia from the inception of the latter in 1922 to its downfall in 1991, culminated in the almost complete destruction of a civil society – the space separating the state from an individual became almost completely blurred. The state was getting excessively involved in its citizens' private lives in a manner reminiscent of

[57] Татьяна Борисова, *Суррогатное материнство в Российской Федерации. Проблемы теории и практики. Монография* (Москва Проспект 2016) 152. Tat'jana Borisova, *Surrogatnoe materinstvo v Rossijskoj Federacii. Problemy teorii i praktiki. Monografija* (Moskva Prospekt 2016) 152. Tatiana Borisova, *Surrogate Motherhood in the Russian Federation: Problems in Theory and Practice* (Moscow Prospekt 2016)

[58] Christina Weis, *Surrogacy in Russia: An Ethnography of Reproductive Labour, Stratification and Migration* (Emerald Publishing Limited 2021)

[59] For example, Greece allows altruistic surrogacy via a court order. See Aristides N. Hatzis, The Regulation of Surrogate Motherhood in Greece available at http://users.uoa.gr/~ahatzis/Surrogacy.pdf.

[60] Konstantin Svitnev, 'Legal control of surrogacy – international perspectives' 155 at http://claradoc.gpa.free.fr/doc/441.pdf.

[61] For example, a parental order is required in the UK – see s.54 of the Human Fertilisation and Embryology Act 2008.

[62] Ibid.

Orwell's 1984 antiutopia. Even after the Union's collapse, the government remained in control of many aspects of individuals' life from clamping down on freedom of speech[63] to blocking social media messengers for encrypting their users' messages.[64] Yet, when it comes to procreation, Russia's approach may be described as a liberal one. The government admits that "in the modern world, the decision is up to the [individual himself]."[65] Although not yet on offer as a routine infertility treatment, assisted reproductive technology is widely available to the public, with some methods, e.g. IVF being sponsored by the government.[66] In relation to surrogacy, Russia is one of the leading states where not only is surrogacy allowed but also widely practiced. The state offers a rather comprehensive legal framework, explicitly allowing surrogacies on altruistic and commercial bases.

Based on a survey of practices worldwide the following theoretical approaches to surrogacy may be identified:

i. Complete legalisation of both altruistic and commercial surrogacies – available to the state's nationals and foreigners. The former Soviet countries, such as Ukraine and Georgia, are amongst the ones that not only regulate surrogacy but also make it available to those living beyond their borders. These states seek to strike a balance between the surrogate's right to make autonomous choices and the intended parents' right to procreate.

ii. Complete legalisation of both altruistic and commercial surrogacies – available to the state's nationals only. As of 2016 India made it illegal to engage in surrogacy with foreign nationals. Currently it allows either commercial or altruistic surrogacy to heterosexual Indian couples only.[67] Russia is an example of a state that permits commercial surrogacy with eligibility restricted to the Russian citizens and spouses of Russian citizens. As of December 2022, Russia banned surrogacy for foreign nationals, unless they are also dual nationals possessing Russian citizenship or are married to a Russian citizen.[68] This constitutes the first restriction

[63] 'Online and on All Fronts – Russia's Assault on Freedom of Expression' (2017) https://www.hrw.org/report/2017/07/18/online-and-all-fronts/russias-assault-freedom-expression.
[64] A big privacy issue that received public resonance for blocking the "Telegram" messenger in May 2018. https://www.vedomosti.ru/technology/articles/2017/05/16/690045-roskomnadzor-ugrozhaet-zakrit-telegram.
[65] 'Guess What? Vladimir Putin Is a Pro-Choice Champion' at <http://fortune.com/2017/12/14/vladimir-putin- russia-abortion-pro-choice-press-conference/> accessed 7 Jun 2018.
[66] 'On the Problem of Assisted Reproductive Technology' (do date) All Russian Movement "For Life" at < https://rusprolife.ru/o-probleme-vspomogatelnyih-reproduktivnyih-tehnologiy/ >.
[67] The Surrogacy (Regulation) Bill 2016 highlights at <https://prsindia.org/billtrack/the-surrogacy-regulation- bill-2016> accessed 11 Jan 2018.
[68] The Federal Statute №538-FL "On the Introduction of the Changes into Separate Legislative Acts of the Russian Federation" from 19 Dec 2022.

imposed on surrogacy since the prohibition of traditional surrogacy in 1995.

iii. Legalisation of altruistic surrogacy, which is available to nationals and foreign citizens. Portugal is one of the countries that allow nationals as well as foreigners to engage in altruistic surrogacy.[69]

iv. Legalisation of altruistic surrogacy available to the state's nationals only. For example, since 2015, Thailand has imposed a strict ban on surrogacy tourism and now offers altruistic surrogacy to Thai nationals only.[70]

v. Lack of any legislative regulation of surrogacy. Thus, Latvia, the former Soviet State, does not have any legislation governing surrogate motherhood. In the absence of explicit criminalisation of surrogacy, it is assumed that "the use of gametes of the donor or the embryo" is prohibited by art.146 of the Civil Law.[71]

vi. Complete prohibition of both altruistic and commercial surrogacies but recognition of the arrangements legally entered abroad. For example, Germany bans altruistic and commercial surrogacies but recognises surrogate children born out of the arrangement lawfully concluded abroad. The domestic restrictive approach forces a significant fraction of German citizens to travel abroad to more permissive states.[72]

vii. Complete prohibition of both altruistic and commercial surrogacies and non- recognition of the arrangements legally entered abroad. This is the most extreme position as surrogate motherhood is deemed to be illegal within the territory of the state. Advertisement, facilitation, acting as a surrogate or even attempting to enter into a surrogacy arrangement may be severely sanctioned, with the punishment including imprisonment.[73] Thus, France's has completely banned what they call '*Gestation Pour Autrui*'[74] since 1991. The Court of Cassation

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[69] Alice Cuddy, 'Where in Europe is surrogacy legal?' (13 Sep 2019) *Euronews* at <https://www.euronews.com/2018/09/13/where-in-europe-is-surrogacy-legal> accessed 5 Jan 2019.

[70] Yuri Hibino, 'Non-commercial surrogacy in Thailand: ethical, legal, and social implications in local and global contexts' (2020) 12 *Asian Bioethics Review* 135, 135.

[71] 'Response of the Government of Latvia' at <https://www.ohchr.org/Documents/Issues/Children/SR/Surrogacy/States/Latvia.pdf.

[72] Sayani Mitra, Silke Schicktanz and Tulsi Patel, 'Introduction: Why Compare the Practice and Norms of Surrogacy and Egg Donation? A Brief Overview of a Comparative and Interdisciplinary Journey' in Sayani Mitra, Silke Schicktanz and Tulsi Patel (eds.) *Cross-Cultural Comparisons on Surrogacy and Egg Donation Interdisciplinary Perspectives from India, Germany and Israel* (Palgrave Macmillan 2018) 5.

[73] А. Бережная, Ю. Яцышина и Д. Юсифадзе, «Модели Правового Регулирования Суррогатного Материнства В России И За Рубежом» (2020) 6 Дневник Науки 1, 4. A. Berezhnaja, Ju. Jacyshina i D. Jusifadze, «Modeli Pravovogo Regulirovanija Surrogatnogo Materinstva V Rossii I Za Rubezhom» (2020) 6 Dnevnik Nauki 1, 4. A. Berezhnaia, Y. Yatsyshina and D. Yusifadze, 'Models of Regulation of Surrogate Motherhood in Russia and Abroad' (2020) 6 Electornic Scientific Journal: The Diary of Science 1, 4.

[74] Martine T Segalen, 'Deconstructing social anthropology discourses in their support of surrogacy: The case of France' (2021) 69 *Current Sociology Monograph* 176, 176.

has categorically stated that "only merchandise can be the object of contracts."[75] The arrangements concluded abroad are also illegal in France. Recently, however, France has changed the legislation to recognise "the parental ties which unite a French father with a child born abroad through a surrogacy arrangement."[76]

In this context, the primary research question is as follows: "what factor(s) could have influenced Russian liberal surrogacy law?" In addressing this question and probing its premise that Russian surrogacy law exhibits liberal features, the thesis will also provide a critical appraisal of the current legislative framework; this evaluative exercise will identify areas where the regulation of surrogacy is unsatisfactory and consider recommendations for reform.

The research seeks to explore the potential influences on Russian surrogacy law which could explain its evolution in a liberal direction. This direction within the context of reproduction is paradoxical in light of the state's conservative, even borderline intrusive stance to other spheres of private life, for example, within the context of same-sex relationships[77] and personal communication.[78] It should be noted that the thesis does not purport to come to a definite conclusion but to merely explore the possible candidates that might have shaped the surrogacy law. The thesis will also critically examine the surrogacy regime.

In order to answer the primary research question, the following substantive issues will be looked at:

1) The historical background to the establishment of the institution of surrogate motherhood. The inquiry is inspired by the contrast between the relatively liberal approach to surrogacy deferring to private arrangements and recognising the autonomy in reproduction and family formation on the one hand, and the socialist ideology, pervading the Russian society even

[75] Jérôme Courduriès, 'At the nation's doorstep: the fate of children in France born via surrogacy' (2018) 7 *Reproductive Biomedicine and Society Online* 47, 47.
[76] 'France recognises family ties of parents of surrogate children' at < https://www.coe.int/en/web/impact- convention-human-rights/-/france-recognises-family-ties-of-parents-of-surrogate-children >.
[77] Homosexuality is not illegal in Russia, but it is subject to the state's disapproval which is evident from the recent ban on the access to LGBT information for minors – see art 6.21 of the Federal Statute №195-FL from 14 Apr 2023. Same-sex couples do not have any legal protection for e.g. discrimination.
[78] For example, in 2022 Russia sought to oversee the chats of Whatsapp users. Whatsapp was fined for refusing to disclose personal data of its users residing on the territory of the Russian Federation. See 'Whatsapp was fined for 18 million roubles for refusing to localise the data of Russians' (28 Jul 2022) *Izvestiya* at < https://iz.ru/1371436/2022-07-28/whatsapp-oshtrafovan-na-18-mln-rublei-za-otkaz-ot-lokalizatcii-dannykh-rossiian>.

nowadays, on the other. Russia retained the legacy of the USSR – the state's ideological focus continues to permeate into familial relationships. After a short shift away from the Soviet paternalistic approach in the late 1990s, Russia returned to traditionalism in family model, glorifying traditional gender roles, including motherhood. The state itself seems to be oriented towards neo-traditional concept of a family which adheres to communist morality by "[framing the family policy] within paternalistic approach,"[79] and seemingly "exclud[ing] or shadow[ing] non-conventional and alternative family formations, parenting practices and kinship formations that do not correspond to officially promoted ideal."[80] In 2012 the government recognised the return to traditional values to be a part of a state strategy. It created the "National Strategy of Action in the Interest of Children for 2012–2017"[81] which was followed by the Public Project on "The Conception of Family Policies of the Russian Federation Until the Period of 2025,"[82] that outlined the action plan for the state's approach to the re-establishment of a traditional family model. For example, it states that "values of marriage [are] understood solely as a union *between a man and a woman.*"[83] The Public Project also places children, motherhood and intergenerational links at the heart of the state's policies. Thus, it is clear that the orthodox approach to family, based on child-centrism and, importantly, procreation, is becoming as prominent as ever. At the same time, the state does not oppose the parties' choice to create a family and procreate in a non-traditional way by legally allowing them to enter into a surrogacy arrangement. This is also evident from the Public Project's approach to assisted reproduction. Interestingly, instead of proposing to ban surrogacy as a practice and encourage parenthood via natural birth, the Project makes "perfection of the regulation of assisted reproduction *including* surrogate motherhood" one of the state's tasks for the nearest future.[84] Although the Project makes some suggestions for a more restricted access to surrogacy,[85] there seems to be no intention to ban commercial surrogacy, the most controversial type of the arrangement.[86] Surrogacy appears to be the sphere where the traditional post-Soviet ideologies

[79] Zhanna Kravchenko and Irina Grigoryeva, 'Family Policy in Russia: Folkways Versus Stateways Revisited' in Mihaela Robela, *Handbook of Family Policies Across the Globe* (Springer 2013) 226.
[80] Antu Sorainen, Olga Isupova, Anna Avdeeva and Alisa Zhabenko, 'Strategies of non-normative families, parenting and reproduction in neo-traditional Russia: An Open Space Roundtable' (2017) 6 Families, Relationships and Societies 471, 471.
[81] The Order of the President of the Russian Federation №761 "On National Strategy of Action in the Interest of Children for 2012–2017" from 1 Jun 2012. For the discussion see Svetlana Russkikh, 'The Role of the Russian Orthodox Church in the State's Promotion of the "Traditional" Family as Part of Family Policy' (2022) 31 *Mir Rossii* 183, 185.
[82] Public Project "The Conception of Family Policies of the Russian Federation Until the Period of 2025" from 2013.
[83] Ibid 4.
[84] Ibid 14.
[85] The paper does not clarify the extent of the restrictions, but it can be assumed that back in 2012 the state *might* have already intended to ban surrogacy for foreign nationals.
[86] Discussed in chapter 2 below.

paradoxically meet capitalism.[87]

2) The evolution of the law on surrogate motherhood and its current position. The thesis will demonstrate the underlying assumption that Russian surrogacy laws exhibit an uncharacteristically liberal trend by examining the regulation of surrogacy arrangements. This assumption will be viewed in its evolution and assessed against the spectrum of possible theoretical approaches described above. To prove this assumption the thesis will look at the following liberal features: it will examine the relationship between the individual and the Russian state. It will also explore the law giving effect to the intention of the parties to the arrangement, that is the surrogate mother, her husband if she is married, the intended parents and the role of the surrogacy agency that facilitates the agreement. The thesis will also examine the issue of personal autonomy: the surrogate's autonomy over her body as well as the commissioning parents' autonomy in founding a family through third-party assistance. The fairly straightforward approach to post-birth registration of the child, based solely on the parties' agreement to the transfer of parenthood, without the intervention of the court, will also be examined.

In order to evaluate key aspects of Russian regulation of surrogacy, so as to test my working hypothesis that it occupies a liberal position, a contrast will be made between the solutions adopted by the Russian legislator with the approaches of other traditionally related countries from the former Soviet bloc (e.g. Ukraine and Latvia). The key aspects will include, for example, the conditions of transfer of parenthood and enforceability of the surrogacy contract. For example, I will look at the Ukrainian approach to the surrogate's right to keep the child as well as the Latvian position on postmortem reproduction will be examined. The thesis will also look at the need for a prenatal/ postnatal court order as well as the lawfulness of payment. Whilst Ukraine, a partially democratically-free state in terms of access to political rights and civil liberties,[88] adopts an 'ultraliberal' approach, the Baltic state, which is deemed to be the most democratic out of the former USSR republics, on the contrary, prohibits surrogacy. It should be noted that a systematic comparative analysis of these jurisdictions is not a core part of the methodology. The thesis seeks to locate the Russian position within the legal spectrum of possible approaches: a completely permissive stance on the one hand, and the most restrictive on the other.

[87] Natalia Khvorostyanov and Daphna Yeshua-Katz, 'Bad, Pathetic and Greedy Women: Expressions of Surrogate Motherhood Stigma in a Russian Online Forum' (2020) 83 *Sex Roles* 474, 482.
[88] Ukraine is 'partly free' scoring 60 points on Freedom House at < https://freedomhouse.org/countries/freedom-world/scores >.

3) Consider the extent to which, if at all, Russian legislation could have been influenced by any of the following factors:

i) The freedom to have access to ART as developed by the European Court of Human Rights. The question is whether the Strasbourg jurisprudence has contributed to the development of Russian surrogacy law. A plethora of case-law on assisted reproduction has been considered under article 8 of the ECHR, the provision that protects the right to respect private and family life. In *Mennesson and Labassee v. France,*[89] the Court focused on the best interests of the child and refrained from recognising the right to surrogacy and the rights of the parents, by stating that the states have "an ample margin of appreciation, concerning not only the decision on whether or not to authorise this method of procreation but also on whether or not to recognise the line of kinship between children who are legally conceived by surrogacy abroad and the intended parents."[90] The cases of *Paradiso*[91] and *Fjolnisdottir*,[92] also follow the "best interests of the child" approach. Whilst these cases have crucial differences, e.g. there was no genetic relationship between the intended parents and the children, they also illustrate the limitations contained in art 8(2) which allow a legitimate aim to restrict the scope of art 8.

ii) The relationship between Russia and Strasbourg more generally. Although Russia is no longer a party to the ECHR since March 2022, it is useful to look at the two legal systems' past relationship as the main liberalising changes to surrogacy legislation were introduced during Russia's membership in the Council of Europe. Despite Russia's ratification of the ECHR clearly being a positive development, "the government is [still] widely criticised for its human rights record."[93]

iii) The view of the media. The media tends to be highly reactive to legislative changes and sometimes even prompts the legislator to respond to alarming cases. The thesis will look into the media's treatment of surrogate motherhood and its reaction to the increasing liberalism of surrogacy legislation.

iv) Reproduction being used as means of improving the demographics as well as a tool in pursuing the state's nationalist agenda. From the Soviet times reproduction was seen as a 'tool' for the replenishment of the population. This, in turn, would have facilitated the cementing of the

[89] App. nos 65192/11 and 65941/11 (ECtHR, 2014)
[90] Ibid para 79.
[91] *Paradiso and Campanelli v. Italy* (app. no. 25358/12 ECtHR 24 Jan 2017).
[92] *Fjölnisdóttir and Others v. Iceland* App. no. 71552/17 (ECtHR, 2021).
[93] Marina Agaltsova and Maria Issaeva, 'Overview: Russia and the European Court of Human Rights' *Wilson Centre* at <https://www.wilsoncenter.org/event/russia-and-the-european-court-human-rights-after-20-years> accessed 5 Jun 2018.

communist ideology. Nowadays, the state's approach seems to be very similar – the government encourages reproduction in order to increase nationalist sentiment. The state seems to focus on reproduction for ideological purposes by allowing the Russian nationals to reproduce by all means that are available. The abovementioned Federal Statute №583-FL, restricting the access to surrogacy for foreign nationals, unless one of the intended parents is also a holder of Russian citizenship, is a prime example of this.

In order to reveal the possible underlying reasons for the state's *laissez-faire* approach regarding surrogacy, the doctrinal methodology will be used. Doctrinal methodology constitutes the core of legal research.[94] Salter defines doctrinal research as "a detailed and highly technical commentary upon, and systematic exposition of, the context of legal doctrine."[95] By 'doctrine' it is meant "synthesis of various rules, principles, norms, interpretive guidelines and values."[96] Duncan and Hutchinson observe that doctrinal research consists of two steps: firstly it is necessary to locate the law and then to analyse and interpret it.[97] This methodology is employed in chapters 4 and 5. These chapters will locate the sources of liberal developments in Russian surrogacy law. They will also analyse the statutes on surrogacy, the case-law that supplements it[98] as well as the relevant Decrees and judicial Orders to first of all, establish the claim that it is an uncharacteristically liberal system and, secondly, to investigate the key moments in the legalisation of surrogacy and prompts for reform. In order to locate the relevant law, the desktop search will be used, mostly searching through the Russian search engines, online libraries and legal databases. The thesis will enquire into the legal framework and the application of Russian surrogacy laws, such as the Family Code 1995, the supplementary Federal Statutes and Healthcare legislation, as well as the judicial decisions on surrogacy cases, in order to determine whether they protect and adequately reconcile the best interests of the parties; namely the interest of a surrogate mother to receive the payment, the interest of the baby born out of the arrangement to have a family, the interest of the intended parents to have a baby and the interest of the husband of the surrogate mother (if she is married) to be implicated in the arrangement. Thus, chapters 4 and 5 also focus on evaluation of the law. Since Russian is my first language, I am well-equipped to carry out a bilingual translation of the statutes. Occasionally there will be reliance on

[94] Terry Hutchinson and Nigel Duncan, 'Defining And Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 85.
[95] Michael Salter and Julie Manson, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson 2007) 31.
[96] Trischa Mann (ed.), *Australian Law Dictionary* (Oxford University Press 2010) 197.
[97] Hutchinson and Duncan above (n80) 110.
[98] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds) *Research Methods in Law* (Routledge 2017) 13.

translation made by third parties. This will be correctly acknowledged within the work. In chapter 6 the thesis incorporates the decisions made by the ECtHR as well as the international instruments. It also contains some 'reform-oriented' elements, "evaluating the adequacy of existing rules."[99] For example, as discussed in chapter 5, the rules governing complications arising in surrogacy arrangements are not entirely satisfactory and call for a reform. It appears that for the legislator the interests of the surrogate mother should take a priority over the interests of other parties, including the best interests of the child. This is most evident from the legislator's position lack of enforceability of the contract which allows the surrogate to keep the child.

The research question cannot be answered through the doctrinal method only. Therefore, the thesis is not only doctrinal in methodology. As law exists within sociological and historical context,[100] a part of the study will draw upon the existing socio-legal research. As Wheeler and Thomas define: the term "socio" in socio-legal studies means to us an interface with a context within which law exists, be that a sociological, historical, economic, geographical or other context."[101] Harris, by contrast, refers to socio-legal approach as the "to the study of the law and legal institutions from the perspectives of the social sciences (viz all the social sciences – not only sociology)."[102] Socio-legal approach recognises that the law is a social phenomenon, distinguished from positivism, the analysis of which is "directly linked to the analysis of the social situation to which the law should be put into the perspective of that situation by seeing the part the law plays in the creation, maintenance and/or change of the situation."[103] An inquiry into the interaction of the Russian law with social environment[104] is useful for the understanding of the external factors that could have shaped and developed the Russian liberal approach to surrogacy, these factors being the social, political and economic ones.

Banakar and Travers identify three types of socio-legal research – empirical, the research conducted for government departments and the research engaging with central issues in social

[99] Terry Hutchinson, 'Defining and describing what we do: doctrinal legal research' (2012) 17 *Deakin Law Review* 83, 101.
[100] Sally Wheeler and Phil Thomas, 'Socio-Legal Studies' in David Hayton (ed.) *Law's Futures* (Hart Publishing 2000) 271.
[101] Ibid.
[102] D. R. Harris, 'The development of socio-legal studies in the United Kingdom' (1983) 3 *Legal Studies* 315, 315.
[103] David N. Schiff, 'Socio-Legal Theory: Social Structure and Law' (1976) 39 *Modern Law Review* 287, 287.
[104] For further discussion of the benefits and disadvantages of socio-legal method see Naomi Creutzfeldt, Marc Mason, Kirsten McConnachie (eds.) *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2020).

theory.[105] The thesis, however, will rely on the existing empirical studies only. For example, chapter 2 will be incorporating the qualitative data documenting the experiences of surrogate mothers. In order to illuminate the extent to which the surrogate mothers were confronted by practical and ethical issues during the pregnancy as well as the motivating factors for entering into the arrangement, the interviews with the surrogate mothers will be relied upon. The qualitative element is also included in sub-chapter 4.2, where the interview with a prospective adoptive father is relied upon as an illustration of the treatment faced by single fathers during the adoption process. This illustrates the state's generally unfavourable approach to single fatherhood in general. The thesis will also rely on the existing quantitative studies to explain where the surrogacy regime has its limitations. Thus, it will examine public opinion in order to understand to what extent, if at all, the public supports the eligibility of same-sex couples for a surrogacy arrangement. For this purpose, secondary literature, such as academic journals and journalistic investigations that conducted social surveys will be consulted.

In chapter 3 the thesis will also include the historical analysis of the context in which the Russian family laws were created and developed. While the thesis focuses on the current legislative framework, it is not possible to ignore "the past that [might] continue to permeate"[106] the approach to family life. Historical contextualisation is useful for the purposes of "[interpretation of] the past not for its own sake but rather to allow the significance and implications of current events to be more adequately understood than would otherwise be the case."[107] Therefore, the thesis will look at "internal" and "external" legal history. "Internal" legal history may be defined as "the study of the legal doctrine and its processes."[108] "External" legal history, by contrast, places the legal history "onto the political, intellectual and social realm."[109] The thesis will examine the law on reproduction in its evolution by considering it in the context of a traditionally powerful views of the Church and the Soviet political leaders. This will allow to consider the current approach in a more adequate way. The historical research will date back to the late 19th -early 20th century. This period signifies expansion of the available legislative provisions on reproduction. In sub-chapters 3.1- 3.4 the statutes, scholarly articles, empirical data conducted by other scholars will be looked at. This is essential in order to establish

[105] Reza Banakar and Max Travers, 'Socio-Legal Research in the UK' in Reza Banakar and Max Travers (eds.) *Theory and Method in Socio-Legal Research* (Bloomsbury 2005) section 6 (no page).
[106] Lorie Charlesworth, 'On Historical Contextualisation: Some Critical Socio-Legal Reflections' (2007) 1 *Crimes & Misdemeanours* 1, 11.
[107] Ibid 9.
[108] Philip Handler, 'Legal History' in Dawn Watkins and Mandy Burton (eds) *Research Methods in Law* (Routledge 2017) 104.
[109] Ibid.

how historical, social and political changes prompted legal evolution in family law and how they have shaped surrogacy law as it currently is.[110]

Finally, the thesis will also incorporate comparative elements from other jurisdictions, e.g. the US (sub-chapter 1.2) and the post-Soviet states, such as Ukraine (2.2.4, 4.4.1, 4.4.2, 5.2, 6.1 and 6.2) and Latvia (4.3). Although comparative law "provides a new perspective allowing to critically illuminate a legal system,"[111] the thesis will not be relying comparative methodology focusing on a systematic comparison between these legal systems. Yet, the incorporation of comparative elements will show different approaches to surrogacy, in order to situate Russia's position within the spectrum of the responses to surrogacy. For this purpose, I will rely on secondary sources.

The thesis is comprised of seven chapters. Chapter 1 contains the introductory background. It familiarises the reader with the concept of surrogacy and provides the foundation for the research. The chapter sets out the focus and direction for the thesis as well as the methodology that will be used. It provides the context for the research by explaining the historical emergence of surrogacy and its legal development in light of social and technological evolution. The chapter traces the development of surrogacy as a practice from Biblical times to the current days, when surrogacy became a valuable instrument pushing the boundaries of procreation and transforming familial relationships.

Having established the historical context in which surrogacy emerged and developed and the aims of the research, chapter 2 offers a discussion of the justifications for the practice and considers common objections to surrogacy. The purpose of the chapter is to highlight ethical and practical problems that make legal regulation and even acceptance of surrogacy rather difficult for some states. Some of these arguments also shape the public perception of surrogacy and assisted reproduction in general. The chapter discusses the objections based on physical and moral exploitation, the risks of child commodification and trafficking, the problems of reproductive tourism caused by fragmented approach to surrogacy within the world. The chapter is based on the premise that not all arrangements that carry the risks of being either unethical or imperfect should be illegal or discouraged. Instead, they should be closely regulated to ensure that the interests of all parties are protected.

[110] Generally, ibid.
[111] Pierre Legrand in Geoffrey Samuel, 'Comparative law and its methodology' in Watkins and Burton above (n108) 122.

Chapter 3 explores the historical evolution of the law and the proposals, seeking to restrict surrogacy and considers the reasons behind the failure of the Church as well as the reactionaries to obstruct the development of permissive surrogacy legislation. This chapter discusses the traditionally powerful views of the Russian Orthodox Church (the "ROC") as well as the unsuccessful proposals, introduced by the members of the State Duma, to ban surrogacy. While the family discourse of the state and the ROC are aligned in relation to traditional familial institutions, such as heterosexual marriage, in relation to procreation, their views seem to diverge. Although procreation is seen as a constituent element of a "traditional family" for the state,[112] it does not prescribe that families should only be confined to natural methods of reproduction. The ROC, however, expectedly rejects the idea of family formation outside natural procreation.

In light of the above, chapter 4 analyses the current regulation of surrogacy as provided by the Family Code 1995, the Federal Statutes, the Healthcare Orders as well as the judicial decisions. The purpose of this chapter is to critically appraise the law and to demonstrate the liberal nature of Russian surrogacy law. This chapter is based on the assumption that the law exhibits certain liberal features. First of all, the Russian state explicitly legalised commercial surrogacy, unlike the majority of permissive or partially permissive states which mostly allow an altruistic one. Secondly, the legislator made surrogacy rather accessible: married couples and single women are eligible to enter into the arrangement. Despite the fact that the law does not mention the eligibility of single fathers, there are instances where a single father was entered on a birth certificate. The position of same-sex couples remains more complicated as the registry would be less inclined to register homosexual couples as the legal parents of the child, the approach that is determined by the state's overall negative attitude to homosexuality. The state's *laissez-faire* approach is also apparent from the relatively straightforward process of child registration, which does not require the surrogate to surrender parental rights or a transfer of parental rights from the surrogate to the intended parents. The law also normalises surrogacy by treating it as a service, requiring paying tax on a surrogate's income. Yet so far there have been no instances where the state would have enforced this requirement.

Chapter 5 builds on chapter 4. It seeks to reveal the extent of the state's intervention in the situations where the surrogacy arrangement fails. The chapter looks at the unfortunate cases of deaths of the surrogate mother, the surrogate child or the intended parents, involuntary loss and termination

[112] See e.g. the Public Project above (n82) 5-7.

of pregnancy by the surrogate mother, or her decision to keep the child. Unfortunately, the legislation determining the consequences of failed arrangements is very patchy, often requiring the parties to fall back on general legal provisions. The chapter assumes that the state mostly treats surrogacy as a private arrangement and hardly interferes even when they do not work out as the parties initially intended. However, in the situations when it does interfere, it appears that it prioritises the interests of a surrogate mother over the interests of other parties. It should be noted that the instances where the arrangements fail are very rare which means that some conclusions are reached with the assistance of speculations made by the academic body. For example, there are no known cases of the deaths of either of the parties to surrogacy or a surrogate child. There is also no data available on infanticide committed by a surrogate mother.

Chapter 6 flags out the possible reasons for the Russian liberal legislative choice. First of all, it analyses to what extent, if at all, the legislator could have been influenced by external factors, such as the increased recognition of the access to assisted reproductive technology as provided by the European Court of Human Rights. The research found that the advancements of Strasbourg jurisprudence in the sphere of surrogacy are rather limited. Firstly, art 8 which embraces the right to the access the assisted reproductive technology is a qualified right. Art 8(2) provides that the right may be interfered with if such interference is "accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[113] Secondly, the Court has not recognised the access of surrogacy as a right. The cases of *Mennesson,*[114] *Paradiso*[115] and *Fjolnisdottir*[116] are concerned with the rights of children already born out of the surrogacy arrangement, rather than the rights of parents who wished to use surrogacy as a way of procreation. The chapter contends that the relationship between Russia and ECtHR also cannot offer a plausible explanation for Russia's approach to surrogacy. Despite the fact that Russia was a signatory to the European Convention on Human Rights, Russia saw the Convention as a product of the Western world, the relationship with which became and remained very strained until Russia's expulsion from the Council of Europe in September 2022. The media also seems to be unable to influence the legal development in surrogacy law. Although the media has some interest in surrogacy as a topic, it is mostly concerned with attention-seeking. For example, talk-shows tend to send alarming messages about surrogacy in order

[113] Art 8(2) of the ECHR.
[114] *Mennesson and Others v. France; Labassee v. France* (app. no. 65192/11 & no 65941/11 ECthR 26 Jun 2014).
[115] *Paradiso and Campanelli v. Italy* (app. no. 25358/12 ECtHR 24 Jan 2017).
[116] *Fjölnisdóttir and Others v. Iceland* (app. no. 71552/17 ECtHR 18 Aug 2021).

to captivate the viewers' attention whereas the newspapers are mostly reactive to legislative changes. The chapter concludes that the most possible cause of liberal approach to surrogacy is rooted in state's attempts to boost nationalism. Reproduction is the only way of boosting demographics and surrogacy is one of the facilitators of reproduction. Therefore, it appears that the Russian state encourages procreation by every possible means. Russian nationalistic tendencies are apparent in the recent legislation prohibiting surrogacy for foreign intended parents yet allowing it on both commercial and altruistic bases for Russian nationals. The law also grants automatic Russian citizenship to surrogate children born on the Russian territory and reserves the right to oversee their treatment, if taken to reside abroad.

Chapter 7 provides the concluding remarks.

1.2 Historical milestones in the development of surrogacy

Surrogacy, as a practice, is not at all novel. Despite the 20th century clearly being the era of advancement in assisted reproduction technology, surrogacy appears to be a long-standing response to childlessness. As infertility was already recognised as a medical condition 2000 years ago,[117] it is likely that surrogacy has already been practiced for several centuries albeit being unrecorded in medical books.[118] There is evidence that it may have existed as far as 4000 years ago.[119] However, the most common reference to surrogacy is mainly found in early Judeo- Christian discourse:[120] "historically, from Babylon to the Bible, there have been laws and customs allowing a substitute woman, or surrogate, to act in the place of a barren wife, thus avoiding the inevitability of divorce in a childless marriage."[121] The cases of traditional surrogacy and emotional issues surrounding infertility are widely referred to in the Old Testament. The first one tells the story of Abraham and Sarah, who had unimaginable wealth, yet could not have children: "… now [Abraham] was very rich in cattle, silver, and gold… they have not known the blessings of a child, never mind several

[117] Ahmet Berkiz Turp, Ismail Guler, Nuray Bozkurt, Aysel Uysal, Bulent Yilmaz, Mustafa Demir and Onur Karabacak, 'Infertility and surrogacy first mentioned on a 4000-year-old Assyrian clay tablet of marriage contract in Turkey' (2018) 34 Gynecological Endocrinology 25, 25.
[118] Peter R.Brinsden, 'Gestational Surrogacy' (2003) 9 *Human Reproduction Update* 483, 483.
[119] Turp (n117) 26.
[120] Viveca Soderstrom-Antilla, Ulla-Britt Wennerholm, Anne Loft, Anja Pinborg, Kristiina Aittomaki, Liv-Bente Bente Romundstad, Christina Bergh, 'Surrogacy: outcomes for surrogate mothers, children and the resulting families—a systematic review' (2016) 22 Human Reproduction Update 260, 261.
[121] Sharon Covington and Patrizio Pasquale, 'Gestational Carriers and Surrogacy', Principles of Oocytes and Embryo Donation (Springer 2013) 277.

children…"[122] It is presumed that it was Sarah's infertility to blame for the family's childlessness: "…and Sarai was barren; she had no child."[123] Inability to have a child meant there would be no heir for Abraham's property. Thus, Sarah's maid Hagar, became their surrogate upon Sarah's order: "surrogate motherhood allowed a barren woman to regularize her status in a world in which children were a woman's status and in which childlessness was regarded as a virtual sign of divine disfavour."[124] Thus, Sarah's inability to conceive while Hagar was pregnant made Sarah feel inferior and as a revenge she turned against Hagar: "...Hagar [had to flee] from her (Sarah's) face."[125] Hagar gave birth to Ishmael. Later, by God's gift, Sarah conceived a child, Isaac, and gave birth at the age of 90. Hagar, meanwhile, "was forced into wilderness."[126]

The Biblical story of Abraham and Sarah is far from being unique. There are other almost identical examples of surrogacy arrangements between an infertile wife and the family's maid in the Book of Genesis. The Book tells the story of Bilhah, a maid of Rachel and Jacob that also acted as a traditional surrogate mother for them. Having found out about her infertility, Rachel stated: "… I obtain children by her."[127] Bilhah had two sons for Rachel and Jacob which were named as Dan and Naphtali.[128] Leah, Rachel's sister, followed Rachel's example and her maid Zilpah also bore two children for Jacob.[129] In all stories the maids' own eggs were used and therefore, they became "biological, genetic, and gestational mother[s]"[130] to the children of their superiors. These arrangements also implied that the children would be adopted by the intended (foster) parents with the maids surrendering their rights to the children. In these stories the desperate wives relied on surrogacy as a foundation for their own families: both Sarah and Rachel observed that "perhaps [they] would build a family through [their servants]."[131] Despite the absence of the genetic link with the mothers, the children were not deemed illegitimate. Surrogacy has cemented the familial ties in these families

[122] Genesis 13:2 in David J. Zucker and Moshe Reiss, 'Abraham, Sarah, and Hagar as a Blended Family: Problems, Partings, and Possibilities' (2009) 6 Women in Judaism: A Multidisciplinary Journal 1, 2.
[123] Genesis 11:30 in Liubov Ben-Nun, Surrogate Motherhood: Hagar and Sarah. Medical Research in Biblical Times from the Viewpoint of Contemporary Perspective (B. N. Publication House, Israel 2014) 11.
[124] Genesis 16:2, 30:1-2 in Zucker and Reiss (n108) 3.
[125] Genesis 16:6 in Ben-Nun (n123) 11.
[126] Marianne Bjelland Kartzow, 'Navigating the Womb: Surrogacy, Slavery, Fertility—and Biblical Discourses' (2012) 2 *Journal of Early Christian History* 38, 39.
[127] Genesis 30:3-4 in Pinhas Shifman, 'The Right to Parenthood and the Best Interests of the Child: A Perspective on Surrogate Motherhood in Jewish and Israeli Law' (1987) 4 *New York Law School Human Rights Annual* 555, 557.
[128] Genesis 30:6-8 in ibid 557.
[129] Ibid.
[130] Magdalina Gugucheva in Vanessa Nahigian, 'Procreative Autonomy in Gestational Surrogacy Contracts' (2019) 53 *Loyola of Los Angeles Law Review* 235, 239.
[131] Genesis 16:2 and 30:3 in Teresa Donaldson, 'Whole Foods for the Whole Pregnancy: Regulating Surrogate Mother Behaviour during Pregnancy' (2016-2017) 23 *William and Mary Journal of Women and the Law* 367, 371.

by allowing them to welcome more than twelve surrogate children.[132]

At first glance, the Bible seemed to 'legitimate' the practice of surrogacy. Indeed, in the Scripture a child is seen as a "gift of God,"[133] and a blessing brought into the family to the joy of the family members.[134] Similarly, in the Book of Genesis children are treated as the "hope" of the family for the better future in terms of both economic and social improvement.[135] Thus, the Bible itself does not appear to discriminate children based on the ways they were brought about into this world. Yet, the general Biblical standpoint on surrogacy does not seem to be positive. It was even argued that it was the surrogacy arrangements that caused the rivalry between the abovementioned families as well as the fact that one of them fell into the idolatry: "the use of a surrogate mother was taking matters into their own hands rather than trusting in God: it lead to disordered family and social relationships".[136] The Biblical discourse is also said to highlight a marginal position held by a surrogate mother,[137] aligning with a widely accepted claim that surrogacy equates to exploitation. Hagar, Bilhah and Zilpah were all coerced into becoming 'slave bodies' where their reproduction in reality belonged to another.[138] The enslaved maids were not compensated for their pregnancies[139] and had to give the children away. Women's bodies appear to be reduced to 'carriers' meaning that those superior by social status and wealth could use them to satisfy their own needs. It is claimed that surrogacy created an "imbalance of power that is… class-based. … For at least 9 months [their maids'] bodies exist solely to serve rich women."[140] Kartzow notes that "the reproductive industry creates structures of slavery, whereby the female body is degenerated into a market product and prized according to age, health, and race. Several poor women are forced into surrogacy or to be egg donors as this is their only possibility to survive, and they prefer selling their reproductive bodies."[141] It is further suggested that the foreign background also exacerbates vulnerability.[142]

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[132] Ibid 371.
[133] Roland Chia, 'Surrogacy violates the Christian understanding of marriage and family' (29 Jan 2015) *Ethos Institute for Public Christianity* at <https://ethosinstitute.sg/surrogacy-violates-the-christian-understanding-of- marriage-and-family/> accessed 1 Mar 2017.
[134] Jack Wellman, '5 Great Bible Verses about Children Being A Blessing' (15 Mar 2016) Patheos at <https://www.patheos.com/blogs/christiancrier/2016/03/15/5-great-bible-verses-about-children-being-a- blessing/> accessed 24 Aug 2020.
[135] John T. Carrol, 'Children in the Bible' (2001) 55 *Interpretation* 121, 124.
[136] Jim Paul in Philippa Taylor 'Surrogacy cfm file 47' (2012) Christian Medical Fellowship at <https://www.cmf.org.uk/resources/publications/content/?context=article&id=25772> accessed 6 Mar 2017.
[137] Kartzow (n126) 47.
[138] ibid 45.
[139] Angie Godwin McEwen, 'So You're Having Another Women's Baby: Economics and Exploitation in Gestational Surrogacy Notes' (1999) 32 *Vanderbilt Journal of International Law* 271, 275.
[140] Autumn Reinhardt-Simpson, 'My Sister, My Enemy: Using Intersectional Readings of Hagar, Sarah, Leah, and Rachel to Heal Distorted Relationships in Contemporary Reproductive Justice Activism' (2020) 28 *Feminist Theology* 251, 255.
[141] Kartzow (n126) 47.

While Sarah would be further glorified when she receives the child Hagar, an Egyptian with no place to live, would be humbled again by Sarah's power after she gives birth.[143]

Traditional surrogacy remained the only way to have children for wealthy infertile couples until a proper milestone in modern assisted reproduction was reached a few thousand years later.[144] The first artificial insemination case is said to be successfully performed firstly in England, then in France in the late 18th century.[145] Further successful attempts were allegedly made in Russia and in the US in the early 19th century. Although it is suggested that the procedure was then widely perceived as immoral[146] it was also relatively well-welcomed by infertile couples. Only during the 19th century, the US has recorded approximately 1,000-1,200 artificial insemination births each year.[147] Despite the initial success, the procedure remained limited until the 1970s when the alternative methods of procreation were required to balance the decline in adoption numbers.[148] 1970s-1980s were another landmark period for the progress in assisted reproduction. The first successful IVF attempt of modern time was performed in Australia in 1973 by Carl Wood and John Leeton from Melbourne. The embryo, which was around a week old, unfortunately did not survive.[149] Following the revolutionary progress in assisted reproduction technology ('ART') Louise Brown, a first test-tube baby was born in Oldham, UK in 1978. The tireless efforts of Robert Edwards and Patrick Steptoe resulted in the birth of more than a million test-tube babies within the next few decades.[150] The rising popularity of IVF amongst childless families became apparent, with more couples undergoing the procedure despite the risks, social judgment[151] and religious skepticism. As Fauser and Edwards claim, initially "ethical opposition to culturing human embryos was intense, and concepts of IVF… were rejected derisively."[152] However, the 'wheel of progress' has already started running with "the strong currents driving medical technology forward

[142] Marianne Bjelland Kartzow, 'Reproductive Salvation and Slavery: Reading 1 Timothy 2:15 with Hagar and Mary' (2016) 50 *Neotestamentica* 89, 94.
[143] Reinhardt-Simpson (n126) 254.
[144] Brinsden (n118) 483.
[145] George P. Smith, 'Through a Test Tube Darkly: Artificial Insemination and the Law' (1968) *67 Michigan Law Review* 127, 129.
[146] Ibid.
[147] Ibid.
[148] Pavel Kuchař, 'Entrepreneurship and Institutional Change: The Case of Surrogate Motherhood' (2016) 26 Journal of Evolutionary Economics 349, 362.
[149] Remah Moustafa Kamel, 'Assisted Reproductive Technology after the Birth of Louise Brown' (2013) 14 *Journal of Reproductive Infertility* 96, 97.
[150] Joseph Goldstein, 'Laskers for 2001: Knockout mice and test-tube babies' (2001) 7 *Nature Medicine* 1079, 1080.
[151] Carolyn Sapideen, 'The Surrogate Mother: a Growing Problem' (1983) 6 University of New South Wales Law Journal 79, 80.
[152] Bart C. Fauser and Robert G. Edwards, 'The Early Days of IVF' (2005) 11 *Human Reproduction Update* 437, 437

make [IVF] an inevitable part of our society now and in the future."[153]

The rapid development in ART made the arrangements more nuanced. Sometimes they create a multi-partied relationship in a childbearing arrangement which required more parties to be involved compared to a usual pregnancy. Not only would the intended parents and a surrogate be involved, but also a facilitating agent, as well as a donor of either sperm or eggs. This prompted a plethora of inevitable legal concerns stemming from the parties' not always very clear positions. For example, inheritance, child custody as well as the enforceability of the contract needed to be decided on.[154] Surrogacy was deemed to be a risky arrangement, calling for explicitly codified burden allocation in case of a miscarriage, surrogate's injury or a child's genetic or other defects.[155] Surrogate's activities during pregnancy also required careful regulation through specific provisions, prohibiting, for instance, alcohol consumption and tobacco use.[156] Thus, in order to provide the parties with legal protection, Noel Keane, a US lawyer and proponent of surrogacy drafted the first contract in 1976. The parties to the contract entered into a traditional surrogacy arrangement whereby the surrogate would also be related to the child – she was the egg donor. Their positions were slightly simplified by the fact that the surrogate mother was supposed to receive no financial compensation.[157] Afterwards, Keane started a Michigan-based surrogacy clinic and some other states followed his example.[158] At the time, there was no well-formed public opinion on surrogacy in the US[159] and it only began to "intermittently' appear in the newspapers."[160] Keane noted that despite surrogacy already having the potential to become fairly widespread, its legal implications still remained underestimated. The legal regulation remained rudimentary at the time – the intended parents were offered "technically feasible but legally unrecognised solutions to marital or reproductive difficulties often must [have acted] without being certain of the legal consequences."[161]

In 1980 a first 'legal' surrogacy arrangement was created. Elizabeth Kane was the first

[153] Donaldson (n131) 371.
[154] Sharon M. Steeves, 'Artificial Human Reproduction: Legal Problems Presented by the Test Tube Baby Comments' (1979) 28 *Emory Law Journal* 1045, 1046.
[155] Noel Keane, 'The Surrogate Parenting Contract' (1983) 2 *Adelphia Law Journal* 45, 46.
[156] Ibid 51.
[157] 'About Surrogacy: from the Bible to Today, a History of Surrogacy' at <https://surrogate.com/about-surrogacy/surrogacy-101/history-of-surrogacy/> accessed 18th Aug 2020.
[158] Kuchař (n148) 365.
[159] Courtney G. Joslin, '(Not) Just Surrogacy' (2021) 109 *California Law Review* 401, 410.
[160] Susan Markens, Surrogate Motherhood and the Politics of Reproduction (University of California Press 2007) 20.
[161] Noel P. Keane, 'Legal Problems of Surrogate Motherhood' (1980) 5 *South Illinois University Law Journal* 147, 147.

surrogate mother to be financially compensated.[162] An infertile couple from the US offered her $10,000 for carrying a child.[163] Initially, Kane, a devout Christian, decided to carry a baby for the family for altruistic rather than financial purposes.[164] She was also driven by the ultimate goal to reduce the social stigma attached to infertility.[165] Although Kane firstly thought that "this was an act of sisterhood,"[166] during the course of pregnancy she felt that the arrangement was becoming a burden. Kane claimed she was 'distraught,' pointed at, and her children were shamed at school.[167] She also became the "object of [strangers'] mean-spirited gibes."[168] Her pregnancy was exhibited to the public by her own doctor, who invited a few people to the birthing room.[169] She was allegedly treated as "a healthy uterus with no heart or brain" by her attorney, constantly threatening her with the consequences of a breach of the contract.[170] Yet it was the post-birth period has been particularly traumatic for Kane. She agreed for the child to be handed over to the intended parents. Having realised the effect of the 'trade off' of the right to see the child after birth, Kane became severely depressed and developed suicidal thoughts "as the only way to release [her] family from the shame they had suffered during [her] pregnancy."[171] Kane seems to have popularised the inaccurate assumption that *all* surrogacy arrangements create the unbreakable bond between the surrogate mother and the child.[172] While her story was highly publicised in the media as an example of what was called an exploitative surrogacy arrangement that left severe psychological scars, it is argued that there were other factors contributing to the stressful situation Kane found herself in. The shift in her lifestyle from a lay housewife and a mother of three children to a media celebrity that symbolised her as an exemplar "good Samaritan" took an emotional toll. As Cateforis rightly notes: "ironically, Kane may have helped to create the very problems she condemned in surrogacy."[173] She has voluntarily agreed to become a media persona and participate in a variety of TV shows as well as magazines, "heralding

[162] The fact that Kane was truly the first 'legal' surrogate mother is subject to debate. Some claim that it is Kane who 'considers' herself to be so. Elizabeth Seale Cateforis, 'Surrogate Motherhood: An Argument for Regulation and a Blueprint for Legislation in Kansas' (1995) 4 *Kansas Journal of Law & Public* Policy 101, 103.
[163] Elisabeth Bumiller, 'Mothers for Others' (9 Mar 1983) The Washington Post at <https://www.washingtonpost.com/archive/lifestyle/1983/03/09/mothers-for-others/e6944450-f0ff-4174-a5c4-9e5ce916fbb4/> accessed 23 Aug 2020.
[164] Robert Cole, 'So, you Fell in Love with Your Baby' (26 Jun 1988) The New York Times at https://www.nytimes.com/1988/06/26/books/so-you-fell-in-love-with-your-baby.html accessed 24 Aug 2020.
[165] Elizabeth Kane, 'Surrogate Parenting: a Division of Families not Creation' (1989) 2 *Reproductive and Genetic Engineering: Journal of International Feminist Analysis* 1, 1.
[166] Ibid 2.
[167] Cole (n164).
[168] Ibid.
[169] Kane (n161) 3.
[170] Ibid.
[171] Ibid.
[172] Maurice T Moore, Martha Fineman, Martha T. McCluskey (eds.) *Feminism, Media, and the Law* (OUP 1997) 194
[173] See Cateforis (n162) 103.

the value of surrogate motherhood."[174] However, being unable to cope with the psychological pressure of fame, she made a U-turn from surrogacy advocate into an ardent antagonist attempting to persuade the legislators to ban the commercially-based practice.[175]

A parallel development occurred in the UK when Edwards' and Steptoe's ART methods started to be applied to surrogacy.[176] In 1985 the first UK case involving surrogacy came into the spotlight. Kim Cotton agreed to bear a child for a Swedish couple.[177] The arrangement was facilitated by a US-based agency whereby Cotton would be paid £6,500 and hand over the baby to the intended parents after birth. For the first time the embryo was implanted into a third party and the surrogate mother was not to be put on the birth certificate.[178] Following the birth, the father applied for the court order that would make the baby the ward of the court and leave to remove the baby from jurisdiction was granted to the father.[179] At the time there was no legislation governing surrogacy, although the Warnock Committee had already made some discouraging recommendations that "all surrogacy contracts are illegal contracts and therefore unenforceable in courts."[180] The court, however, granted the application on the basis of the best interests of the child. Similar to Elizabeth Kane, Kim Cotton's circumstances also stirred up the public. Her story has also become widely publicised in the media. The situation seemed so extraordinary at the time, one of the newspapers even offered an astronomical £20,000 to the surrogate mother for the story to be published.[181] However, the media reception was not always positive: even three decades later, Cotton still remembers that some headlines were "shocking and hurtful."[182] Unlike Kane, however, she proudly embraced her role as a surrogate mother despite being 'vilified' by the press: "… I genuinely always thought I have done a good thing… Robert Edwards and Patrick Steptoe [also] received a lot of abuse when Louise Brown was born in 1978… all pioneers seem to get it in the neck."[183] Cotton was not afraid to come to the frontline and provide a powerful defence to surrogacy. She described it as "the most rewarding experience… like a ripple effect in the water… not only do you create a mother and a father but also

[174] Ibid.
[175] Kane above (n161) 1.
[176] Kuchař (n148) 363.
[177] *Re C (A Minor)* [1985] FLR 846.
[178] Kuchař (n148) 369.
[179] MD Kirby, 'From Hagar to Baby Cotton' (1985) 25 *The Australian and New Zealand Journal of Obstetrics and Gynaecology* 113, 152.
[180] Lord Craigmyle, 'Surrogacy Arrangements Bill' (14 June 1985) *The Hansard HL Deb* vol 464 cc1518-38 §1529.
[181] Diana Brahams, 'The Hasty British Ban on Commercial Surrogacy' (1987) 17 *The Hastings Center Report* 16, 16.
[182] Kim Cotton, 'The UK Antiquated Laws on Surrogacy: a Personal and Professional Perspective' (2016) 3 *Journal of Medical Law and Ethics* 229, 230.
[183] Ibid.

grandparents… siblings in some cases…"[184]

Expectedly, the more widespread the surrogacy became, the more legal quagmires it caused. One of the main issues faced by the parties and their lawyers was the legal enforceability of a surrogacy contract.[185] In 1987 *Baby M* famously exposed a plethora of difficulties caused by the latter's unclear legal status.[186] The case concerned the validity of a contract governing a traditional surrogacy arrangement between William Stern and Richard and Mary Whitehead. William's wife, Elizabeth, was suffering from multiple sclerosis, which rendered pregnancy potentially fatal. The arrangement provided that Mary Whitehead would be impregnated with William's sperm and would surrender the child to be adopted by Elizabeth Stern. In return, Whitehead would have been remunerated with $10,000 with further $7,500 to be paid to the surrogacy clinic for facilitating the arrangement.[187] At first, all went according to the plan. Whitehead had a successful pregnancy and gave birth to a baby girl. The Whiteheads were also recorded as the parents on the birth certificate.[188] Mrs. Whitehead relinquished the baby to the Sterns upon discharge from the hospital. Yet, before she gave up her parental rights Whitehead became severely distressed and wanted to take the baby for a week, which later turned into four months.[189] The intended parents brought a claim for the contract to be enforced that would require Whitehead to give up her parental rights, thereby allowing Mrs. Stern to adopt the girl. The New Jersey Superior Court decided that the contract was enforceable and valid: the doctrine of contractual intent has overridden the doctrines of gestational and genetic motherhood.[190] Judge Sorkow observed that "surrogacy contract had to be protected as an exercise of constitutional right to procreate" and the enforcement of the contract would be in the child's best interests.[191] On the one hand, it might be argued the decision is "filled with contradictions" and "[favours] the rich over the poor"[192] – the interests of the Sterns, wealthy doctors, were prioritised over the ones of Mary Whitehead, the wife of a former garbage collector.[193] It sought to encourage

[184] Ibid 231.
[185] Martha Field, 'Reproductive Technologies and Surrogacy: Legal Issues' (1991-1992) 25 *Creighton Law Review* 1589, 1589.
[186] *In the Matter of Baby M* (1987) 537 A.2d 1227.
[187] Spivack (n10) 99.
[188] Terry Price, 'The Future of Compensated Surrogacy in Washington State: Anytime Soon?' (2014) 89 *Washington Law Review* 1311, 1313.
[189] Spivack (n10) 99.
[190] Kuchař (n148) 370.
[191] *In re Matter of Baby M* para 1164. See also Barbara Stark, 'Constitutional Analysis of Baby M Decision' (1988) 11 *Harvard Women's Law Journal* 19, 19.
[192] George J. Annas, 'At Law: Death without Dignity for Commercial Surrogacy: The Case of Baby M' (1988) 18 The Hastings Center Report 21, 21.
[193] Donald P. Myers, 'After Baby M : Mary Beth Whitehead Has a New Storybook Life, and Some Tough Talk About Surrogate Motherhood' (6 Mar 1989) LA Times at https://www.latimes.com/archives/la-xpm-1989-03-06-vw-65-story.html accessed 4 Apr 2020.

the bloom of surrogacy industry and "prioritised the profit over [Whitehead's] suffering."[194] Nevertheless, the Court's decision to enforce the contract appears to be correct. The contract constituted the crux of a surrogacy arrangement which Mrs. Whitehead has entered into having full knowledge of the fact that she would have to surrender the child after birth. It recognises that her decision to become a surrogate was deliberate and devoid of any pressure.[195] The lack of enforceability, on the contrary, would have implied that the law itself was "tilted towards allowing [Whitehead] to keep the child."[196]

The matter ultimately reached the New Jersey Supreme Court. The issue before the Court, therefore, was whether the contract would be enforceable. In the absence of specific legislation regulating surrogacy and contractual surrender of parental rights,[197] the Court had to decide whether the Sterns could proceed with adoption of their biological daughter under the New Jersey adoption legislation. The Court found that the contract was in breach of i) the legislation that prohibits payments for adoption; ii) legislation that provides that proof of "parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted must be sought; iii) legislation that provides for revocability of surrender of custody and consent to adoption in the sphere of private adoptions."[198] It commented that "one of the surrogacy contract's basic purposes, to achieve the adoption of a child through private placement, though permitted in New Jersey 'is [generally] very much disfavored."[199] The compensation, in the Courts' eyes was deemed to be a coercive inducement, as not only was Whitehead not offered counselling but also because she signed the agreement before the child's conception. In theory, such an agreement could be valid but only if it occurs *after* the child's birth.[200] The monetary compensation paid by the Sterns was also deemed to be borderline criminal under the New Jersey Revised Statute,[201] which provides that "no person shall pay, give, or agree to give any money in connection with a placement for adoption." The Court also decided that Whitehead's parental rights have not been correctly terminated. Under the New Jersey

[194] Annas (n192) 22.
[195] Some sources suggest that Whitehead asserted that "she did not know what she was signing." N. Hackensack, 'Baby M's Father Awarded Custody; Contract Upheld: Judge Bars Whitehead From Visits' (31 Mar 1987) LA Times at <https://www.latimes.com/archives/la-xpm-1987-03-31-mn-1609-story.html>. The fact that she signed the contract makes it legally binding nonetheless, unless it was entered into by fraudulent means or due to Whitehead's lack of capacity. None of these were applicable in the case.
[196] Craig Purshouse and Kate Bracegirdle, 'The Problem of Unenforceable Surrogacy Contracts: Can Unjust Enrichment Provide a Solution?' 12 at <https://eprints.whiterose.ac.uk/136161/3/UE%20and%20Surrogacy%20-%20Med%20L%20Rev%2028%20December%20%281%29.pdf>.
[197] *In the Matter of Baby M* para 433.
[198] Ibid para 423.
[199] Ibid para 422.
[200] 74 New Jersey Statute 212-214.
[201] 9:3-54.1.

Revised Statutes 9:2[202] and 9:3,[203] in order for termination to be valid, it must be done either voluntarily or where the parent was deemed to be unfit. In the instant case, however, Whitehead's termination of parental rights was obtained by reference to the 'benefit' obtained under the contract rather than satisfaction of the relevant statutory provisions, thereby unenforceable by the Court.[204] Since the termination was invalid, the Sterns could not have proceeded with adoption.[205] The Court also referred to public policy considerations: the consideration that a child should be brought up by his natural parents, the objective underlying the existing adoption legislation. The transaction was said to amount to the 'sale of the child' with "the only mitigating circumstance being that one of the purchasers [was] the father of the child."[206] The Court concluded that "there are, in a civilized society, some things that the money cannot buy."[207] Yet, the Court concurred with the trial judge by deciding that it would be in the child's best interests if custody was granted to Mr. Stern. It compared the families' living conditions and personalities. Whilst the Whiteheads managed to raise two children of their own, their standard of living was unstable and the employment was at risk and Mr Whitehead was also prone to alcoholism.[208] The Sterns, however, would have been able to provide a solid foundation for her upbringing. They were in a happy marriage, with a relationship that became even stronger during the surrogacy journey.[209] They were capable of providing the baby girl with a healthy and loving environment.[210] Whitehead, in turn, was awarded the right of visitation.[211]

This decision appears to be inherently paternalistic. Although the courts sought to refrain from certain family matters such as marriage and divorce at the time, the court re-emphasised that this was not the case in the sphere of assisted reproduction. Despite ultimately deciding in favour of the Sterns, the Court seemingly based its decision on the importance of traditional family values, rather than respecting Whitehead's autonomous decision-making.[212] Instead of acknowledging that Whitehead voluntarily entered into a surrogacy arrangement, having appreciated the fact that she would have to terminate her parental rights and surrender the child to the Sterns, the Court has seemingly denied her right to self-determination. Munyon has also correctly found a sexist element in the Court's rationale. She compares the current situation with the one of sperm donation whereby a man would be allowed to

[202] Ibid 16.
[203] Ibid 17.
[204] *In the Matter of Baby M* (n183) para 429.
[205] Ibid.
[206] Ibid 437-38.
[207] Ibid 440.
[208] Ibid 457.
[209] Ibid 458.
[210] Ibid.
[211] Ibid 466.
[212] Gary N Sokoloff and Edward J. O'Donnell 'Baby M: a Disquieting Decision' (1988) 18 Seton Hall Law Review 827, 829

"determine pre-conception, that they will cut ties with their biological offspring and such an intent is legally enforceable."[213]

Undeniably *Baby M* left a profound legacy that subsequently influenced social perception of surrogacy and its legal treatment, not just in New Jersey but also in other states. Following the decision, commercial surrogacy became prohibited in the states of Washington and New York.[214] California, by contrast, tried to take a more tolerant approach to surrogacy. In order to avoid the *Baby M* scenario, the state introduced some progressive legislative measures that would explicitly outline the positions of the parties. Yet, the proposed Bill became a dead parrot and it seemed that there would be no watershed moment for surrogacy any time soon. Yet, not only has the decision led to the introduction of anti-surrogacy policies[215] but also "[forced the public] to take sides in a debate."[216] The outcome prompted an outcry amongst the experts in ethics, lawyers, feminists and members of public.[217] Although some sympathised with the commissioning parents, others questioned the moral validity of the arrangement. Amongst the opposition were those who explicitly stated that their disapproval has been the direct consequence of the litigation.[218] The press also added fuel to the fire to already stirred public interest through the catchy headlines.[219]

Despite the ongoing concerns, some positive steps towards the liberalisation of surrogacy were made in the early 1990s.[220] In 1993 in *Johnson v Calvert* the court proclaimed that the contracts providing for gestational surrogacy are neither unconstitutional nor do they breach public policy interests.[221] The intended parents' story is seemingly similar to any other surrogacy case that reaches the court. Mark and Crispina Calvert wanted to have a child, but Crispina was infertile due to an earlier hysterectomy. They were approached by a prospective surrogate mother, Anna Johnson. The

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[213] Jessica H. Munyon, 'Protection and Freedom of Contract: the Erosion of Female Authority in Surrogacy Decision-Making' (2002) 36 *Suffolk University Law Review* 717, 724.
[214] Price (n188) 1311, 1317-18.
[215] Charles Gili, 'Time to Rethink Surrogacy: An Overhaul of New York's Outdated Surrogacy Contract Laws is Long Overdue' (2019) 93 *St John's Law Review* 487, 492.
[216] Karen H Rothenberg, 'Baby M, the Surrogacy Contract, and the Health Care Professional: Unanswered Questions' (1988) 16 *Law, Medicine and Health Care* 113, 113.
[217] Carol Sanger, 'Developing Markets in Baby-Making: In the Matter of Baby M' (2007) 30 *Harvard Journal of Law & Gender* 67, 69.
[218] James Barron, 'Views on Surrogacy Harden after Baby M Ruling' (2 Apr 1989) *The New York Times* at https://www.nytimes.com/1987/04/02/nyregion/views-on-surrogacy-harden-after-baby-m- ruling.html?auth=login-google accessed 2 Sep 2020.
[219] E.g. Robert Hanley, 'Surrogate Mother Tells of Desire to Keep the Baby' (9 Jan 1987) *The New York Times* at https://www.nytimes.com/1987/01/09/nyregion/surrogate-mother-tells-of-desire-to-keep-baby.html accessed on 2 Sep 2020.
[220] Eric Gordon, 'The Aftermath of Johnson v Calvert: Surrogacy Law Reflects a More Liberal View of Reproductive Technology' (1993-1994) *St Thomas Law Review* 191, 191.
[221] (1993) 851 P2d 776. See Also Gordon ibid 191.

parties agreed that Johnson would be paid $10,000 in return for the surrender of her parental rights upon the baby's birth. They signed a contract codifying the arrangement. During the pregnancy, however, the relationship between the intended parents and the surrogate mother significantly worsened. After the child's birth each side launched a claim before the court: the Calverts – to be declared the parents of the newborn baby, Johnson – to be declared the baby's mother.[222] The California Supreme Court albeit acknowledging that "two women, the egg contributor and the gestational surrogate, had equally plausible claims to biological motherhood,"[223] decided in favour of Calverts. The Court relied on the Uniform Parentage Act ('UPA'), which does not cover surrogacy specifically yet was said to be broadly applicable in the case. Under the UPA Johnson's motherhood was established on the basis of giving birth.[224] At the same time it also allowed the genetic mother, Crispina, to establish her motherhood "permitting actions to establish a mother and child relationship using parts of the UPA "applicable to the father and child relationship."[225] In other words, this meant that the child potentially could have had two mothers – gestational and genetic.[226] Since a father would be able to establish his fatherhood through the DNA testing, there is nothing in the law precluding the genetic mother from proving her motherhood in the same way.[227] Crucially, however, the Court has not based its decision on genetics, but on *intent*, a doctrine that is not mentioned in the legislation. Despite the factual similarities with the *Baby M* case, the court explicitly excluded gestational surrogacy from the application of adoption legislation and emphasised the voluntary nature of the arrangement and the fact that the surrogate was not vulnerable at the time the contract was concluded. Therefore, there was nothing in the arrangement that would render the contract unenforceable. The Court decided that the payment was provided for the pregnancy and birth and was not unconvinced that it was in violation of public policy or that the arrangement amounted to involuntary servitude.[228] Thus, the Court concluded that since the Calverts have never intended Johnson to receive the zygote in order to have her own child, in the eyes of the law Crispina Calvert would be the legal mother. The Court also noted that Johnson had been compensated for her labour rather than surrendering the parental rights and dismissed the claims based on exploitation.[229]

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[222] *Anna J. v Mark C.* (1991) 286 Cal. Rptr.
[223] Evan Rosenman, 'Defining the Mother in the Modern World: An Analysis of Surrogacy-Related Case Law and Its Implications' at http://evanrosenman.com/Surrogacy%20Law.pdf accessed 2 Sep 2020.
[224] § 7003 subd. (1).
[225] §§ 7003 subd. (1), 7015.
[226] See Mark Rose, 'Mothers and Authors: Johnson v. Calvert and the New Children of Our Imaginations' (1996) 22 *Critical Inquiry* 613, 627.
[227] *Johnson v Calvert* (n182) VI.
[228] Ibid.
[229] Ibid 783-785 and Gordon (n206) 199.

The reception of *Johnson v Calvert* has not been uniform. On the one hand, it was assailed by those favouring traditional methods of procreation. Thus, it has been argued that the Court's analysis completely underestimated the role of the surrogate in the arrangement. It seemingly ignored Anna Johnson's feelings and the fact that she could have bonded with the child during the pregnancy. It also overlooked the physiological side of the pregnancy, such as the fact that she was supplying the child with oxygen and other elements essential for the foetal development. Walton observed that "the majority's refusal to consider the quality of the relationship between the gestational mother and the foetus growing inside devalues the gestator."[230] Furthermore, the decision might have negative implications for future surrogacy cases – for example, there will be no obligation on the Court to consider all circumstances of the case, such as whether it would be a surrogate or the intended parents who would be able to provide a suitable environment for the child's upbringing.[231] On the other hand, however, the decision re-emphasises the significance of intent in assisted reproduction. By taking into account that the traditional method of procreation is no longer the only valid one, it seeks to protect the right of infertile couples to become genetic parents[232] while at the same time acknowledging that personal choices in relation to procreation should also be recognised.

Rightfully, the Supreme Court has also appreciated that the absence of a proper legislative response to the rapidly developing medical advancement is not a good enough reason for prohibiting the use of surrogacy. It seems that in the Court's view, the issue was not *whether* the emerging technologies should be accommodated but *how* they should be accommodated.[233] The right to personal autonomy was key - as long as the parties have voluntarily entered the arrangement and the terms of the contract were honoured, their wishes should be respected. Thus, the decision is said to have strengthened the parties' right to self- determination as it allowed them to make economic choices and personal choices as to the preferred method of reproduction.[234] It has been rightly welcomed by the proponents of a liberal approach to reproduction. For example, Shultz strongly argued in favour of the judicial approach in *Johnson* by noting that this would encourage the parties to be responsible for their choices and actions. She claims that "legal rules governing modern procreative arrangements and parental status should recognise the importance and legitimacy of individual efforts to project intentions and decisions into the future. Where such

[230] Timothy Walton, 'Splitting the Baby: a Note on Johnson v Calvert' (1996) 1 *UC Davis Journal of Juvenile Law and Policy* 28, 28.
[231] ibid 28.
[232] Gordon (n206) 200.
[233] Marjorie Maguire Shultz, 'Reproductive technology and intent-based parenthood: an opportunity for gender neutrality' (1990) *Wisconsin Law Review* 297, 301.
[234] Teresa Abell, 'Gestational Surrogacy: Intent-Based Approach to Johnson v Calvert' (1993-94) 45 *Mercer Law Review* 1429, 1436.

intentions are deliberate, explicit and bargained-for, where they are a catalyst for reliance and expectations… they should be honoured."[235] Abell further contends that not only would 'intent-based' approach respect personal autonomy by not "trivialising the arrangements between competent adults"[236] but also provide what she calls a 'bright-line for determining parenthood.'[237]

Since *Johnson,* science allowed the creation of families of various sizes and shapes with the new dimensions of surrogacy emerging. It enabled intra-generational arrangements, where mothers could act as surrogates for their daughters and vice versa, as well as posthumous conception. Intra-generational surrogacy firstly occurred in 1987 when Pat Antony from South Africa gave birth to triplets for her daughter, Karen Ferreira-Jorge, and her husband in a first ever intragenerational surrogacy.[238] Despite the doctors' expectations that only one ovum would prove viable, all three survived. Antony's brave decision to help her daughter has been widely publicised. She appeared in newspapers' headlines as a woman who became 'the mother to her own grandchildren' despite their lack of biological connection.[239] The lawyers agreed that the children would be Ferreira-Jorge's siblings until she and her husband underwent the adoption process. At first glance, familial surrogacies seemed ethically and legally controversial. Some claimed that they may lead to women being pressurised by their more authoritative family members[240] as well as raise the question of the relation between the child and the woman that gave birth to him. Yet, despite raising eyebrows in the past, nowadays intergenerational surrogacy arrangements are becoming more common. More women decide to help their children to overcome infertility. The publicised stories of Kim Conseno[241] and Kristine Casey[242] from the US are identical to the one of Antony. Although some still label these arrangements as a 'tangled web,'[243] others argue that they are justifiable from the

[235] Shultz (n233) 297.
[236] Abell (n234) 1436.
[237] Ibid.
[238] John D. Battersby, 'South Africa Woman Gives Birth To 3 Grandchildren, and History' (2 Oct 1987) *The New York Times* <https://www.nytimes.com/1987/10/02/world/south-africa-woman-gives-birth-to-3- grandchildren-and-history.html> accessed 4 Sep 2020.
[239] 'Surrogate Mother Gives Birth to Her Own Grandchildren' (2 Oct 1987) The Los Angeles Times at https://www.latimes.com/archives/la-xpm-1987-10-02-mn-7570-story.html accessed 4 Sep 2020.
[240] Emily Koert, J Daniluk, 'Psychological and interpersonal factors in gestational Surrogacy' in E. Scott-Sills (ed.) Handbook Gestation Surrogacy International Clinical Practice Policy Issues (CUP 2016) 70.
[241] Jonann Brady, 'Surrogate Grandma Gives Gift of Triplets' (11 Nov 2008) *ABC News* at <https://abcnews.go.com/GMA/Parenting/story?id=6230942> accessed 4 Sep 2020.
[242] Courtney Hutchison, 'Labor of Love: Woman Carries Her Daughter's Baby. Kristine Casey carried her daughter's child and gave birth to her grandson' (14 Feb 2011) ABC News https://abcnews.go.com/Health/WomensHealth/surrogate-grandmother-woman-birth-grandson- 61/story?id=12912270 accessed 3 Sep 2020.
[243] Margaret Somerville, 'The tangled web of surrogacy' (21 Feb 2011) *Mercatornet* at https://mercatornet.com/the_tangled_web_of_surrogacy/11409/ accessed 2 Sep 2020.

position of solidarity with bereaving parents,[244] in cases where the child is deceased and the parent becomes a grandparent through surrogacy.

It is evident that the rapidly advancing assisted reproduction technology has always been making it hard for society to accept its dimensions. The Biblical stories exposed the moral issues arising out of class disparity,[245] potentially providing the current stereotypes with solid foundation. At the same time they highlighted the stark divergence between the ancient and contemporary methods of family creation. As Cateforis argues: "… these stories are used in part to illustrate socio-economic disparities between the surrogate mothers and intended parents… It almost goes without saying that we do not live in a society that resembles the Old Testament era…"[246] Traditional surrogacy, which was fairly popular even a couple of centuries ago, gradually lost its popularity, giving way to gestational surrogacy,[247] advanced by Edwards' and Steptoe. Despite the fact that the IVF procedure sounds ordinary in the everyday language and has become mainstream in the states with progressive healthcare,[248] contradictory opinion will continue to exist. Ironically, Steptoe himself initially strongly opposed the application of their method to surrogacy, contrary to his earlier preparedness to use the technique in surrogacy births in case of certain medical conditions.[249] He later claimed that "…you can't just stick some egg and sperm together in a culture medium. the use of surrogate mothers to carry the child for another couple should not be practiced ... In effect the medical situation is then replaced by a much more complicated medical-legal situation."[250] The future for these situations is yet to be seen.

[244] Generally, Roy Gilbar, Efrat Ram-Tiktin, 'It Takes a Village to Raise a Child: Solidarity in the Courts— Judicial Justification for Posthumous Use of Sperm by Bereaved Parents' (2020) 28 *Medical Law Review* 317, 317- 341.
[245] Cateforis (n148) 103.
[246] Ibid.
[247] 'About surrogacy' at https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-traditional-surrogacy/ accessed on 4 Sep 2020.
[248] Gretchen Vogel, Martin Enserink, 'Honor for Test Tube Baby Pioneer' (8 Oct 2010) *Science* at https://science.sciencemag.org/content/330/6001/158/tab-pdf accessed 17 Aug 2020. However, it is claimed elsewhere that only a small proportion of the population benefits from the IVF, see Willem Ombelet, 'Affordable IVF for Developing Countries' (2007) 15 *Reproductive BioMedicine Online* 257, 258.
[249] 'Surrogate Mothers seen in the Future' (8 Sep 1979) Ottawa Citizen at https://news.google.com/newspapers?nid=QBJtjoHflPwC&dat=19790908&printsec=frontpage&hl=en accessed 18th Aug 2020.
[250] Steptoe in Kuchař (n148) 363.

1.3 The emergence of surrogacy as an alternative to adoption and natural procreation

The last century has re-defined the contours of procreation. Traditionally, procreation involved "a woman bear[ing] the burdens of gestating, carrying and giving birth to the child" as well as rearing him.[254] Until the 1970s, adoption has been considered to be one of the most popular ways of procreation in cases of infertility and one of the oldest ones. Although the earliest records date back to the Babylonian Code of Hammurabi,[255] its popularity is said to have peaked following World War I and the influenza pandemic in the early twentieth century.[256] For years, families that opted for adoption have described this type of procreation as the "second best" compared to those with a biological connection.[257] By allowing adoptive parents to provide care for the children whose biological parents could not, [258] adoption re-emphasised the fact that gestational and social mothering are distinct notions.[259] The last century, however, marks a new departure for families seeking to overcome childlessness. The acceleration in the development of ART provided further options for the infertile, single and same-sex couples. Surrogacy has become a "global phenomenon."[260] Surrogacy has become more widely appreciated, including in the traditionally restrictive Scandinavian countries, where surrogacy has been banned for decades. In Norway, for example, although the practice is still seen as highly 'troublesome,'[261] as of 2010 the term 'surrogacy' received linguistic recognition and was included in the Norwegian dictionary.[262]

Infertility does not discriminate between nationality, religion or social class. Despite the stereotype that famous people are blessed with good genes, over the past few years an increasing number of celebrities have confessed that they have fertility issues.[263] One of the most well-known examples of celebrities that admitted having health issues are Emma Thompson and Hugh Jackman's wife Deborah-Lee who chose to adopt children after unsuccessful conception and IVF

[254] John A. Robertson, 'Procreative Liberty and the Control of Conception, Pregnancy and Childbirth' (1983) 69 *Virginia Law Review* 405, 407.
[255] Lita Linzer Schwartz, *Alternatives to Infertility: Is Surrogacy the Answer?* (Routledge 1991) 45.
[256] David Brodzynsky and Marshall Schechter (eds.) *The Psychology of Adoption* (OUP 1990) 276.
[257] Susan Frelich Appleton, '"Planned Parenthood": Adoption, Assisted Reproduction, and the New Ideal Family' (1999) *Washington University Journal of Law & Policy* 85, 85.
[258] Melanie L Duncan, 'Adoption, History' in *Encyclopedia of Family Studies* (Wiley 2016) abstract.
[259] Glenda Emmerson, 'Surrogacy: Born for Another' *Research Bulletin* 8/96 (Brisbane, Queensland Parliamentary Library 1996) 2.
[260] Claire Fenton-Glynn, 'Surrogacy: Why the world needs rules for 'selling' babies' (26 Apr 2019) B*BC* at https://www.bbc.co.uk/news/health-47826356 accessed on 12th July 2020.
[261] Charlotte Kroløkke, 'From India with Love: Troublesome Citizens of Fertility Travel' (2012) 8 *Cultural Politics* 307, 307-325.
[262] Ingvill Stuvøy, 'Troublesome Reproduction: Surrogacy under Scrutiny' (2018) 7 *Reproductive Biomedicine and Society Online* 33, 33.
[263] Kate Whillsky, 'Infertility In Hollywood – These 6 Celebrities "Came Out" In 2019' at <https://pregnantish.com/infertility-in-hollywood-these-6-celebrities-came-out-in-2019/> accessed on 28 June 2020.

attempts.[264] Whilst some opt for adoption, surrogacy also became an object of the so-called "celebrity effect." The demand for the celebrity-related content remains high, with the information spreading not only via TV channels, but also promoted by Internet users through social media.[265] Although at first glance this type of news might seem to be nothing more than sensationalist gossiping, the trend shows that surrogacy is quickly spreading within the celebrity world.

The emergence of surrogacy in the current social climate appears to be logical. Its increasing popularity seems to be caused by the procedural and other hurdles posed by the adoption procedure. Domestic and transnational adoption, previously seen as "the primary non- biological ways to create a family,"[266] has been steadily losing its attraction "for those who perceived it as a method to adopt a healthy infant/young child."[267] Posner assumes that it is the unavailability of children that causes the decline in adoption and the corresponding increasing demand in transnational surrogacy.[268] Indeed, transnational and domestic adoption show a fluctuating yet downward trend since the 1990s.[269] Having reached the peak of approximately 45,000 cases in 2004, adoption is now seeing a sharp decline of around 70%.[270] Yet, while the precise estimate of the numbers is hard to make, the UN Report on Child Adoption indicates that "the number of children in care greatly exceeds the number of children who exit care via adoption."[271] Therefore, it seems that the main problem is not the demand exceeding supply for children. Rather, it is the demand for "desirable" children that exceeds supply.[272] So far, Eastern Europe has been one of the largest locations 'sending' for international adoption, with the former Soviet Union and Romania being the most popular countries.[273] There, children live in poor conditions at state institutions and almost always have

[264] Gabbi Shaw, '26 Celebrities who Adopted Kids' (16 Apr 2019) *Insider* at <https://www.insider.com/celebrities-adopted-kids-2018-3> accessed on 28 June 2020.
[265] Lea C. Hellmueller and Nina Aeschbache, 'Media and Celebrity: Production and Consumption of "Well-Knownness" (2010) 29 *Communication Research Trends* 3, 22.
[266] Karen Rotabi, Susan Mapp, Kristen Cheney, Rowena Fong, Ruth McRoy, 'Regulating Commercial Global Surrogacy: The Best Interests of the Child' (2017) 2 *Journal of Human Rights and Social Work* 64, 64.
[267] Ibid.
[268] Richard A. Posner, 'The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood' (1989) 5 *Journal of Contemporary Health Law and Policy* 21, 22.
[269] UN Department of Economic and Social Affairs, 'Child Adoption: Trends and Policies' (2009) 72 available at https://www.un.org/en/development/desa/population/publications/pdf/policy/child-adoption.pdf accessed 2 July 2020.
[270] Peter Selman, 'The Global Decline of Intercountry Adoption: What Lies Ahead?' (2012) 11 *Social Policy & Society* 381, 381.
[271] UN Report above (n269) 132.
[272] Richard Posner and Elisabeth Landes, 'The Economics of the Baby Shortage' (1978) 7 *The Journal of Legal Studies* 323, 323.
[273] Sharon Judge, 'Developmental Recovery and Deficit in Children Adopted from Eastern European Orphanages' (2003) 23 *Child Psychiatry and Human Development* 49, 50.

significant health problems.[274] With the institutional environment having an adverse effect, they also suffer from developmental delays and rudimentary cognitive skills.[275] The parents that adopted post- institutionalised children admit that the experience takes an emotional toll, with some marriages being unable to cope with the strains and ending up in dissolution. One of the adoptive mothers observed that she "was very depressed after [they] adopted [their] two children from Russia and [she] lost over 40 pounds within three years. [She] sought mental health counselling to help [her] cope with [her] depression."[276] A handful of unsuccessful stories concerning adoption of Russian children hit the headlines in international news,[277] leading to the ban on international adoption of Russian children by the US parents in 2012,[278] thereby partially eliminating the country from the adoption market.

For those opting for adoption, the process does not always prove easy. Similar to surrogacy, it is full of legal, financial and emotional hurdles. In the US, for example, independent adoption may cost up to $40,000, adoption through an agency up to $45,000, with the price for intercountry adoption being as high as $50,000.[279] Thus, altruistic surrogacy *might* prove even less expensive, with the compensation for reasonable expenses being as low as $15,000.[280] Complexities could be further exacerbated in situations of intercountry adoption, where the couples might get stuck in a legislative limbo. There is also an abundance of 'spine- breaking' examples involving adoption, such as the story of Iris Botros and Louis Andros, the prospective adoptive parents who ended up in a prison cell that seemed "more suitable for cats and dogs" while seeking to adopt a child from Egypt.[281]

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[274] Selman (n232) 387. On Romania-see e.g 'Romania's Last Orphanage' (7 Aug 2018) *The Economist, Youtube* at https://www.youtube.com/watch?v=PEzTFmiCeks accessed on 19 July 2020.
[275] Judge (n273).
[276] Deanna Linville and Anne Prouty Lyness, 'Twenty American Families' Stories of Adaptation: Adoption of Children from Russian and Romanian Institutions' (2007) 33 *Journal of Marital and Family Therapy* 77, 83.
[277] David Batty, 'US mother sparks outrage after sending adopted child back to Russia alone' (10 Apr 2010) The Guardian at <https://www.theguardian.com/world/2010/apr/10/torry-hansen-artyom-savelyev-adoption> accessed on 17th July 2020.
[278] David M. Herszenhorn and Erik Eckholm, 'Putin Signs Bill That Bars U.S. Adoptions, Upending Families' (27 Dec 2012) *The New York Times* at <https://www.nytimes.com/2012/12/28/world/europe/putin-to-sign-ban- on-us-adoptions-of-russian-children.html> accessed on 17th July 2020. It was, however, suggested that the measure was in fact a retaliation response to the Magnitsky Act 2012 – Tal Kopan, 'Why is everyone talking about Russian adoptions?' (21 July 2017) *CNN* at <https://edition.cnn.com/2017/07/21/politics/russian-adoptions- magnitsky-act/index.html>.
[279] David Dodge, 'What to Know Before Adopting a Child' (18 Apr 2020) *The New York Times* at <https://www.nytimes.com/2020/04/18/parenting/guides/adopting-a-child.html> accessed on 1 July 2020.
[280] The estimate of a 'reasonable expense' in Australia; the overall compensation will depend on the circumstances. See Sarah Jafford, 'Altruistic Surrogacy: How much does it cost?' at <https://sarahjefford.com/altruistic-surrogacy-how-much-will-it-cost/> accessed on 17 July 2020.
[281] Michele Goodwin, *Baby Markets: Money and the New Politics of Creating Families* (CUP 2010) xix.

Nevertheless, it is questionable whether the growth of commercial surrogacy is only attributable to the "adoption market crisis." It may also be explained by the more widely available access to abortion and contraception preventing unwanted pregnancies and child abandonment, as well as the rapidly developing ART which encourages couples to opt for surrogacy. Surrogacy emerges as a preferred route for 'socially infertile' couples, such as same- sex[282] and older couples, as well as single parents, those ineligible for adoption, as well as aspiring parents who passed the reproductive age due to their initial focus on career-building.[283] Intended parents are also being driven abroad by the legal fragmentation across the globe, with the states' responses varying from total bans on surrogacy to explicit permissiveness. Despite the fact that it is hard to estimate the precise number of annual surrogacy arrangements and the birth rates,[284] the trend is said to be steadily inclining, with couples travelling to more permissive states.[285] While so far only a small number of countries allow surrogacy explicitly, it remains a lucrative business. Having legalised commercial surrogacy for both residents and foreigners in 2002, India has been the largest surrogacy provider,[286] generating $400-500 million per annum,[287] until the ban in 2015. Similarly, Thailand has also been an attractive destination for transnational surrogacy: good care facilities and reasonable prices have encouraged reproductive tourism.[288] In 2016, however, the Protection of Children Born through Assisted Reproductive Technologies Act B. E.2558 put an end to international surrogacy by requiring at least one of the commissioning parents to be a Thai citizen.[289] This 'backward' trend is sought to protect the surrogate mothers from exploitation[290] and reduce the number of legal quagmires.

Despite some states retreating from their liberal approaches towards surrogacy,[291] new

[282] E.g. Poland is facing a ban on adoption by same-sex couples, a recent proposal by the newly-elected President Andrzej Duda in 2020 - Wojciech Moskwa and Marek Strzelecki, 'Polish President Proposes Ban on Child Adoption by Gay Couples' (6 July 2020) *Bloomberg* at <https://www.bloomberg.com/news/articles/2020-07- 06/polish-president-proposes-ban-on-child-adoption-by-gay-couples> accessed on 23 July 2020.
[283] Denise Cuthbert and Patricia Fronek, 'Perfecting adoption? Reflections on the rise of commercial offshore surrogacy and family formation in Australia' *Families, Policy and the Law* (Australian Institute of Family Studies, Melbourne, Australia 2014) 58.
[284] Helier Cheung, 'Surrogate babies: Where can you have them, and is it legal?' (6 Aug 2014) *BBC* available at <https://www.bbc.co.uk/news/world-28679020> accessed on 15th July 2020.
[285] Rotabi and others (n191) 67.
[286] Sharmila Rudrappa, 'Reproducing Dystopia: The Politics of Transnational Surrogacy in India, 2002–2015' (2018) 44 *Critical Sociology* 1087, 1087.
[287] Barbara Stark, Transnational Surrogacy and International Human Rights Law (2012) 18 *ILSA Journal of International & Comparative Law* 369, 370.
[288] See generally Soraj Hongladarom, 'Surrogacy Law in Thailand' (2018) 46 *Journal of Cross-Cultural Psychology* 1, 1-7.
[289] Ibid.
[290] Rudrappa (n286).
[291] India, Thailand and Nepal being the most recent states to criminalise commercial surrogacy or surrogacy for non-nationals.

surrogacy hotspots keep emerging.[292] Thus, in 2002 Greece was the first EU country to introduce a comprehensive legal framework and legalise altruistic surrogacy. The development is said to accord with the "general [liberal] spirit that runs through the legislation on assisted human reproduction."[293] The surrogacy arrangement, however, has to be concluded following the court's permission and on the basis of certain medical conditions.[294] Although commercial surrogacy remains illegal, the distinction between the latter and altruistic surrogacy often becomes blurred. It seems that the judges rarely investigate into the commissioning parents-surrogate relationship and their decisions are merely administrative, whereby the courts do not inquire about the payment.[295] However, the law does not place any restrictions either on the nationality of a surrogate mother or of the intended parents. Cyprus followed the Greek steps in 2015 by outlawing commercial surrogacy yet legalising the altruistic one. Similarly to Greece, Cyprus provides that surrogacy should be agreed on a 'compensatory' basis.[296] Also, similarly to Greece, 'altruistic' was deemed to be nothing more than a 'label,' with more calls for explicitly legalising commercial surrogacy being recently made.[297] Explicit legalisation would clarify the parties' legal positions provide more clarity as to whether payment beyond mere compensation is legally allowed. The latest EU country to legalise altruistic surrogacy is Portugal. The state's journey towards legalisation has been rough. Surrogacy has been banned since 2006[298] with the legalisation being proposed some ten years later. The original version of the Bill was vetoed in 2016. It was subsequently revised and voted on by Parliament, ultimately being solidified in 2017. A year later some provisions were deemed unconstitutional and were removed before it finally was accepted by the Constitutional Court.[299]

The recent decade also marks a new era for surrogacy in Nordic countries, that are known for their initially highly antagonistic stance.[300] The conservative attitude towards ART has been based on

[292] Cuddy above (n69).
[293] Παντελής Ραβδάς (Pantelis Ravdas), 'Surrogate Motherhood in Greece: Statistical Data Derived from Court Decisions' (2017) 3 Bioethica 39, 41.
[294] Eleni Zervogianni, 'Lessons Drawn from the Regulation of Surrogacy in Greece, Cyprus, and Portugal, or a Plea for the Regulation of Commercial Gestational Surrogacy' (2019) 33 *International Journal of Law, Policy and The Family* 160, 161.
[295] Ibid 163.
[296] Zervogianni (n294) 164.
[297] Ibid 164.
[298] Teresa Violante, '(Not) Striking Down Surrogate Motherhood in Portugal' (28 Apr 2018) *Verfassungsblog* On Matters Constitutional at https://verfassungsblog.de/not-striking-down-surrogate-motherhood-in-portugal/.
[299] Zervogianni (n294) 161.
[300] Nordic Council of Ministers, Nordic Council of Ministers Secretariat, *Assisted Reproduction in the Nordic Countries, A Comparative Study of Policies and Regulation* (Århus 2006) 68.

'instrumentalisation' and is reflected in the strict prohibitive legislation.[301] The strict law could have been influenced by the Lutheran Church, which seems to oppose surrogacy as a principle by claiming "no person should be treated as means to reach a goal".[302] It may also be argued that the *mater est* doctrine has been acting as a driving force behind procreative tradition across all Nordic states.[303] Thus, surrogacy has been made illegal in Norway (since 1987), Sweden (since 1988) and Denmark (since 1997), with Finland joining the group in 2007.[304] The region, however, has been fragmented in its approach towards ART in general – the majority of countries legalised egg donation and some states started the internal dialogues on legalisation of surrogacy in 2010, with Norway being the exception.[305] Sweden, albeit ultimately deciding the opposite, has considered altruistic surrogacy as a means of overcoming childlessness in 2016. Despite admitting that Sweden is not ready to introduce the practice into the state's healthcare system, the Swedish National Council on Medical Ethics did nevertheless accept surrogacy as being overall advantageous.[306] This seems to resonate with Swedish public opinion. It is claimed that around 89% of Swedes support surrogacy arrangements and think it should be more accessible domestically.[307] Significant support also comes from medical professionals, with some 64% approving altruistic surrogacy and a further 17% favouring commercial one.[308]

Iceland, by contrast, took the debate on surrogacy a step further. Iceland has been explicitly prohibiting surrogacy since 1996.[309] Yet, recent years have prompted heated conversations in Parliament following the increasing numbers of couples travelling abroad for surrogacy arrangements despite the legislative hurdles. Surrogacy prominently came into the spotlight in 2008 when a

[301] Kristin H. Spilker, 'Norwegian Biopolitics in the First Decade of the 2000s: Family Politics and Assisted Reproduction understood through the Concept of Trickster' in Merete Lie and Nina Lykke (eds.) *Assisted Reproduction across Borders, Feminist Perspectives on Normalizations, Disruptions and Transmissions* (Routledge 2017) 103.
[302] Lise Eriksson, 'Finnish Legislation on Assisted Reproductive Technologies: A Comparison of Church Statements' in Anna-Sara Lind, Mia Lövheim, Ulf Zackariasson (eds.) *Reconsidering Religion, Law and Democracy*, *New Challenges for Society and Research* (Nordic Academic Press 2016) 146.
[303] Hrefna Friðriksdóttir, 'Surrogacy in Iceland' in Claire Fenton-Glynn, Jens M Scherpe and Terry Kaan (eds.) *Eastern and Western Perspectives on Surrogacy* (Intersentia 2019) 260. Sara Rintamo, '*Regulation of Cross- Border Surrogacy in Light of the European Convention on Human Rights & Domestic and the European Court of Human Rights Case Law*' (2016) at http://urn.fi/URN:NBN:fi:hulib-201606202486 35.
[304] Friðriksdóttir (n303) 265.
[305] Nora Levold, Marit Svingen and Margrethe Aune, 'Stories of Creation: Governance of Surrogacy through Media' (2019) 7 *Nordic Journal of Science and Technology* 4, 6.
[306] Friðriksdóttir (n303) 265.
[307] Sam Everingham, 'Scandinavian Attitudes to Surrogacy' (5 Oct 2017) at <https://www.ivfbabble.com/2017/10/scandinavian-attitudes-to-surrogacy-by-sam-everingham/> accessed 14 Aug 2020.
[308] Camilla Stenfelt, Gabriela Armuand, Kjell Wånggren, Agneta Skoog, Svanberg and Gunilla Sydsjö, 'Attitudes toward surrogacy among doctors working in reproductive medicine and obstetric care in Sweden' (2018) 97 *Obstetrics and Gynaecology* 1114, 1116.
[309] Sigurður Kristinsson, 'Legalizing altruistic surrogacy in response to evasive travel? An Icelandic proposal' (2016) 3 *Reproductive Biomedicine and Society Online* 109, 110.

relevant working group, commissioned by Guðlaugur Þór Þórðarso, the Health Minister, had to complete a report on ethical concerns which calling for further public consultation. Nevertheless, some 18 members of the Icelandic Parliament promptly proposed to legalise surrogacy in 2010 without the consultation being conducted. The proposal underwent significant changes and was provisionally agreed upon in 2012.[310] Simultaneously, however, surrogacy became the centre of Icelandic media attention and a fairly popular search term in online search engines. Kristinsson noted that the hits on "staðgöngumæðrun" ('surrogate mother') have been consistently showing an upward trend since 2010, compared to 2006 when there were no hits.[311] This is assumed to be caused by some high-profile cases which showed the legal complications that the intended parents found themselves in – stranded in India because of the problems with the baby's citizenship.[312] The public, sympathetic to the couples in a similar situation, showed strong support in the polls.[313] This resulted in the proposal on legalisation of surrogacy in 2015, which provided that only altruistic surrogacy would be allowed, subject to an oversight by the authorities. The Bill was supposed to be re- introduced in 2017 but faced administrative hurdles in Parliament. Despite the fact that the current status of surrogacy debate in Iceland is not entirely clear as of 2020, its 'progressive' stance sends a clear message to the rest of the Nordic counterparts that surrogacy should not be seen as evil. As Friðriksdóttir argues, since the states rely on historical cooperation, especially in family law,[314] "the Bill has the potential to serve as a model for furthering the discussions in the Nordic countries as a region."[315] Not only does the Bill seek to regulate surrogacy, but "actively facilitate" the practice.[316]

Overall, it is clear that surrogacy, as a practice, is not at all new. Having been popular in ancient times in its traditional form, it subsequently became treated with caution due to its ethically controversial nature. Although gestational surrogacy might be more widely accepted, its traditional counterpart is prohibited in many surrogacy-friendly states. Undeniably, nowadays surrogacy has become much more than a biological phenomenon. It offers a unique method of procreation, arguably, it constitutes a more viable choice for reproduction compared to, for example, adoption. The latter may be assailed for the limited pool of children available for adoption and inability to respond to the parents' desires to have genetically related offspring. Surrogacy, by contrast, allows the intended parents to have children who are a genetic continuation of themselves. The practice

[310] Ibid 111.
[311] Ibid.
[312] Ibid.
[313] Ibid.
[314] Friðriksdóttir (n303) 264.
[315] Ibid 276.
[316] Fenton-Glynn, Scherpe in above (n303) 519.

constantly pushes the boundaries of reproduction allowing the deceased parents to have children, in tragic cases where the parent(s) either died from a long-term illness or, sometimes, in a sudden accident. It is also suggested that in the era of globalisation and increasing marketisation, surrogacy has become an 'issue of political economy'[317] similar to a business activity generating significant income for the surrogate mothers and intermediary agencies. In order to oversee the practice, some liberal states accepted 'surrogacy as an infertility problem'[318] and already provide for a comprehensive legislative framework, protecting the parties' rights. Others decided to either completely ban it based on their ethical or religious views or leave the area unregulated. Irrespective of the states' stance, surrogacy, as a practice, has already helped and will continue to help infertile couples to have children. If it is accepted that infertility is indeed a medical problem that needs to be addressed globally, it needs to be acknowledged that surrogacy is the way forward.

[317] V. Spike Peterson, *A Critical Rewriting of Global Political Economy. Integrating Reproductive, Productive and Virtual Economies* (Routledge 2003).
[318] Shena Banerjee, 'Emergency of the Surrogacy Industry' (2012) 47 *Economic and Political Weekly* 27, 27.

2 JUSTIFICATIONS FOR AND OBJECTIONS TO SURROGACY: MORAL, PHILOSOPHICAL AND PRACTICAL JUSTIFICATIONS

2.1 Justifications for surrogacy

The widespread illegality of surrogacy has recently become increasingly questioned. The search for justification is arguably exacerbated by the rapidly declining fertility rates[1] and decreasing numbers of children ready for adoption.[2] The trend has been further reinforced by the sharply increasing number of international surrogacy arrangements[3] as well as 'front cover' celebrities engaging in surrogacy arrangements more often.[4] The recognition of surrogacy as 'infertility treatment' has also prompted some workplaces to offer what is called 'surrogacy benefits' to retain or attract the talent.[5] Some families admit that they have dedicated their lives to building a career and becoming financially stable to provide for a child, until they realised it was too late.[6] However, since its emergence surrogacy has seen challenged as a "diversion from traditional life scripts,"[7] blamed for the exploitation of women in states where it is permitted and condemned for negatively affecting children in international transactions. Yet, despite the potential pitfalls, surrogacy recognises the right to procreate as universal and indiscriminatory. It is unique in a sense that it provides infertile and same-sex couples, single parents as well as those who lost their loved ones with the only opportunity to have genetically related offspring. This chapter examines the roots of social demand for access to surrogacy as a procreative method, at the origin of the legislative developments placed into social and historical context, as well as the benefits provided by surrogacy. It will also examine the ethical and practical controversies caused by surrogacy, which are commonly relied upon by the states restricting surrogacy.

Procreative liberty has two facets: a negative one and a positive one. On the one hand, it entails a negative right - the right not to procreate, something that has already received social and legal

[1] For example, in the EU - the data indicates a decline from 2010 to 2013 with a non-significant increase towards 2017. See Fertility Statistics Eurostat available at <https://ec.europa.eu/eurostat/statistics-explained/index.php/Fertility_statistics>. Globally – Max Roser, 'Fertility Rates' (2 Dec 2017) *Our World Data* available at <https://ourworldindata.org/fertility-rate> accessed on 11 April 2020.

[2] Susan Lamb, 'The Ethics of Surrogacy: The Framework for Legal Analysis' (1993) 31 *Family and Conciliation Courts Review* 401, 401.

[3] Kirsty Horsey, 'Not Withered on the Vine: The Need for Surrogacy Law Reform' (2016) 3 *Journal of Medical Law and Ethics* 181, 181.

[4] Alexie Bonavia, 'Babies, Bodies and Borders: The Risks and Rise of Surrogacy' (16 Aug 2019) *Bryan Cave Leighton Paisner* available at <https://www.bclplaw.com/en-GB/thought-leadership/babies-bodies-and-borders- the-risks-and-rise-of-surrogacy.html> accessed on 13 April 2020.

[5] Christine Ro, 'The Workplace that Would Pay for Surrogacy' (13 Sep 2019) BBC Worklife available at <https://www.bbc.com/worklife/article/20190906-the-workplaces-that-will-pay-for-surrogacy> accessed on 14 April 2020

[6] Diana Marre, Beatriz San Román & Diana Guerra 'On Reproductive Work in Spain: Transnational Adoption, Egg Donation, Surrogacy' (2018) 37 Medical Anthropology 158, 161.

[7] Linda Kirkman, 'The Good Sense About Surrogacy' (2010) 2 *Viewpoint* 20, 22.

recognition. Contraception, various types of birth control as well as voluntary termination of pregnancy are widely legally available in the majority of countries. For example, abortions are decriminalised in the majority of states globally[8] including the Republic of Ireland, which has famously been in strong opposition until 2018.[9] An inability to decide on this aspect of reproduction has been severely criticised as outdated and the implemented changes were saluted as a symbol of women's empowerment to be *able to choose* to bring 'the antagonistic relationship with the foetus'[10] to an end. In relation to surrogacy, this position is rather uncontroversial – those who do not wish to enter into a surrogacy arrangement are free to do so.

There are various views on the right to procreate. The proponents argue that "the right to procreate through traditional, coital method is a protected right, then procreation through surrogacy or other medically available options should also be protected."[11] Siegl, for example, contends that not one but the ultimate purpose of surrogacy is to 'promote happiness' which should override any moral considerations.[12] Children are seen as essential for a 'happy' life, and infertility is treated as a disease.[13] If the access to assisted reproduction "is framed as a human right… [r]efusing to allow people with limited reproductive possibilities to become parents… means discrimination… washing out their unique genes from the gene pool of humanity."[14] Some claim that it embraces the right to genetic parenthood and may include child-rearing.[15] This account "enforce[s] a positive duty to provide an individual with the services and support required to have a child. This kind of right would, therefore, necessarily include a right to treatment with reproductive technologies such as in vitro fertilization (IVF)."[16] Bayles observes that "a human right to procreate involves *an obligation on others not to limit* a person's liberty to decide when and how many children he will have."[17] The UN Universal Declaration of Human Rights seems to reflect this account as a matter of policy choice. Art 16 provides that "the United Nations Universal Declaration of Human Rights describes the family as the natural and fundamental unit of society. It follows that any choice and decision with regard to the size of the

[8] Indeed, the conditions are different. 'The World's Abortion Laws' (2020) available at <https://reproductiverights.org/worldabortionlaws> access ed on 21 April 2020.
[9] The Health (Regulation of Termination of Pregnancy) Act 2018 came into force on January 1, 2019.
[10] Barbara Hewson, 'Reproductive Autonomy and the Ethics of Abortion' (2001) 23 Journal of Medical Ethics 10, 10.
[11] Eric A. Gordon, 'The Aftermath of *Johnson v. Calvert*: Surrogacy Law Reflects a More Liberal View of Reproductive Technology' (1993) 6 *St. Thomas Law Review* 191, 200.
[12] Siegl above (n11) 10.
[13] Ibid 15.
[14] Konstantin Svitnev, 'New Russian Legislation on Assisted Reproduction' (2012) Open Access Scientific Reports 1, 1-3.
[15] John Robertson, Children of Choice – Freedom and the New Reproductive Technologies (Princeton; Princeton University Press 1994) 22, 23.
[16] Muireann Quigley, 'A Right to Reproduce?' (2010) 24 *Bioethics* 402, 408
[17] Michael Bayles, 'Limits to the Right to Procreate' in Michael Bayles, (ed.) *Ethics and Population* (Cambridge Schenkman 1976) 42.

family must irrevocably rest with the family itself and cannot be made by anyone else."[18] Robertson, however, favours a wide approach to the right to procreate – he argues that assisted reproductive technology has, in fact, developed the right to procreate and this right should be seen in broad terms, including the right to gamete donation and surrogacy.[19] Underpinned by the freedom of choice,[20] this approach allows commissioning parents to opt for surrogacy if this is their autonomous decision. The states like Russia and Ukraine follow this theoretical approach by almost fully refraining from the parties' private arrangements when it comes to procreation.[21]

However, positive liberties also meet skepticism prompting the states to impose some restrictions procreative practices and to take an "intermediate" position. This position is located between the right to refrain from procreation and the right to procreate. For Conly this approach implies that the right to procreate may be limited. For example, she argues, it is perfectly acceptable to impose a restriction on the number of children one might have as the right is deemed to be exercised once one child is born. [22] In relation to surrogacy, some policymakers might choose not to encourage the practice yet to tolerate it. This means that there is no specific regulation in place that would either permit or prohibit the practice. On the one hand, this approach technically legitimises the action of those seeking to enter into a surrogacy arrangement – the intended parents, the surrogate mother as well as the facilitating agency, if it is involved. At the same time, it also recognises that surrogacy is not a special method of procreation that should call for state protection. Indeed, some argue that [such] minimal state regulation should be preferred: "… legal norms practically inhibit possibilities for those people who see in this [i.e., surrogacy] a solution to their problem."[23] Some states, such as Colombia, appear to tolerate surrogacy. Colombia has no legislative framework governing surrogacy, and the state applies the normal childbirth rules. The child, however, is registered with the surname of the surrogate mother and her partner or husband. The change of parenthood happens via a lawsuit and a part of the process could involve DNA testing.[24]

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[18] Art 16 UNDHR.
[19] Ibid.
[20] Ibid.
[21] The Russian approach will be discussed in chapter 4.
[22] See generally Sarah Conly, 'The Right to Procreation: Merits and Limits' (2005) 42 *American Philosophical Quarterly* 105-115.
[23] An interview with Valeriy Mironov, a doctor, in Veronika Siegl, 'The Ultimate Argument Evoking the Affective Powers of 'Happiness' in Commercial Surrogacy' (2018) 27 *Intimate Uncertainties: Ethnographic Explorations of Moral Economies across Europe* 1, 15.
[24] 'Surrogacy in Columbia' (19 Oct 2022) Alviar Gonzalez Tolosa at < https://www.agtattorneys.com/blog/surrogacy-in-colombia/#:~:text=Currently%2C%20the%20Colombian%20legal%20system%20does%20not%20regulate,the%20way%20on%20how%20to%20achieve%20legal%20surrogacy>

A contrasting approach would be to permit surrogacy but *discourage* it by recognising that there might be *sufficiently weighty* reasons against the practice."[25] Similarly to the model discussed above, the wishes of the parties would be respected, but the state could recognise that there could be moral or religious limitations that could make the arrangement less desirable. South Korea is a state where surrogacy is treated as legal and is rather popular,[26] although no regulations have been put in place.[27] There is no definite provision that would explain parenthood of a child born out of surrogacy arrangement.[28] The intended parents tend to enter into the arrangement following the reassurances provided by the surrogacy agencies that the practice is not illegal.[29] However, despite the state's openness to surrogacy, the latter is also stigmatised on the grounds of public morals. According to the Korean Civil Act, "A justice act which has for its object such matters *that are contrary to good morals and social order shall be null and void*."[30] Some lawyers see the surrogacy contract as going against public policy and morality.[31] It is suggested that this treatment of a surrogacy contract in Korea is based on a variety of well-known ethical objections, such as exploitation of women and commodification of children. [32] The deleterious consequences are also often relied on to reject the benefits of assisted reproduction, such as occasional genetic errors and foetal abnormalities,[33] as well as the psychological and at times legal distortion of the concept of motherhood.[34] Yet, while surrogacy experiences might pose similar dangers, this does not explain the stigmatisation of surrogacy.

Society sees conception and pregnancy as a natural process. Reproduction is crucial to survival, it ensures that the species do not become extinct. The replication of genetic information has rotated the wheel of evolution for millions of years and it will continue to do so in the future. This shaped the understanding of motherhood as being based solely on biology, thereby seeing gestational mothers as

[25] See e.g. Tim Meijers, 'The Value in Procreation: A Pro-tanto Case for a Limited and Conditional Right to Procreate' (2020) 54 *The Journal of Value Inquiry* 627, 628 Conly, for example, observes, that whilst there might be a right to procreate, this does not mean there might also be a right to procreate as much as one wishes. Sarah Conly, 'The Right to Procreation: Merits and Limits' (2005) 42 *American Philosophical Quarterly* 105, 110. Conly provides various justifications for the interference with the right to procreate, such as China's one-child policy. Conly also notes that in some situations the reasons underlying the justifications may be "unjust" – see Conly 110 – 113.
[26] For the discussion of the South Korean approach to surrogacy see Jung-Ok Ha, 'Gestational Surrogacy in Korea' in E. Scott-Sills, *Handbook of Gestational Surrogacy* (CUP 2019) 181-188.
[27] Ibid 181.
[28] Dongjin Lee, 'Aid and Surrogacy in Korean Law' (2019) *International Survey of family Law* 183, 197. It is not clear how the parties are protected in a situation of a broken agreement, but so far there seem to be no such instance.
[29] Ha above (n25) 185.
[30] Art 103 translated by Ha. See ibid 184.
[31] Ha ibid.
[32] See generally Lee above (n27).
[33] On a summary of possible risks, generally, Paul R. Brezina and Yulian Zhao, 'The Ethical, Legal, and Social Issues Impacted by Modern Assisted Reproductive Technologies' (2012) *Obstetrics and Gynecology International* 1, 5.
[34] Paula Abrams, 'The Bad Mother: Stigma, Abortion and Surrogacy' (2015) 43 *The Journal of Law, Medicine & Ethics* 179, 179–91.

'natural nurturers.'[35] As it is argued, "surrogacy and abortion [both] challenge the socially constructed understanding of maternity, separating conception and pregnancy from parenting and disrupting the unity of reproductive work."[36] This separates the concept of 'mother' into two archetypes - a good and bad one.[37] The 'good' mother is usually praised for being a role-model in her children's upbringing, devoted to them and sacrificing her own interests to those of her child. The 'bad' one, on the contrary, is alien to the idea of motherhood, she would sacrifice the childbearing to career. This would transform a woman opting for abortion into a bad mother, condemned for ending the life of her unborn child. Surrogacy, however, is prevalently attacked for similar reasons – a woman 'giving up' her child *a priori* cannot be a 'good' mother. Cockrill and Nack observe that these women are described as "… selfish, irresponsible, heartless or murderous."[38] Similarly, surrogate mothers are often accused of being greedy baby-sellers and not possessing any sense of morality.

These perceptions leading to demarcations of moral disapproval and marginalisation of the practices are,[39] at their best, unfair. It would be hard to rationalise the acceptance of abortion and the deprivation of the choice to opt for surrogacy. Abortion, being mostly legalised, sends a powerful message that might lead, over time, to the acceptance that the practice is not morally repugnant. Conversely, the wide prohibition of surrogacy indicates that it is obnoxious and should be treated as such. The definition of a 'bad' mother is highly reliant on consequentialism – what, if at all, the child will grow into. If the definition of a 'bad' mother also depends on one surrendering her child, then the woman opting for abortion definitely falls within it. Yet, abortion tends to be more acceptable as a procedure.[40] While it may be argued that abortion might be devalued on the basis of causing harm to the unborn, this is certainly not true of surrogacy. By opting for surrogacy, the commissioning parents intend no harm to be caused. On the contrary, they seek to bring a new life into the world. In fact, not only does surrogacy mimic biological procreation,[41] but also seeks to achieve its very same goal: that is, to reward the potential parents with the future unique experience of child-rearing.[42] The modern medical advancement allows families to manage these intimate stages of life, recognising their

[35] Abrams ibid 180 and Helena Ragoné, 'Chasing the Blood Tie: Surrogate Mothers, Adoptive Mothers and Fathers' (1996) 23 *American Ethnologist* 352, 353.
[36] Abrams (n33) 180.
[37] Ibid 180.
[38] Kate Cockrill and Adina Nack, 'I'm Not That Type of Person": Managing the Stigma of Having an Abortion' (2013) 34 Deviant Behavior 973, 979.
[39] Abrams (n33) 181-182.
[40] Ibid 184.
[41] Children are not being 'created' by robots or 'grown' in incubators.
[42] John A. Robertson, 'Procreative Liberty and the Control of Conception, Pregnancy and Childbirth' (1983) 69 *Virginia Law Review* 405, 408.

commitments to it and providing for favourable conditions for procreation.[43] In this sense, third-party reproduction is merely a 'helping hand' that provides 'the freedom to reproduce when, with whom, and by what means one chooses."[44]

The common misconception that, in the *majority* of instances where couples choose surrogacy the arrangement does not end as it should seems to be nothing more than a product of social attitude shaped by the representation of surrogacy in the media. As one of the commissioning mothers admitted in a study conducted by Jerry Mahoney, at the beginning of their parenthood journey, they came across the publications which seeded doubts regarding surrogacy: "… the Los Angeles Times ran a series of articles about a gay couple who invested their life savings trying to have a baby through surrogacy. Their tale had a tragic ending, and I feared the same could happen to us."[45] The legal world has been similarly shaken by the *Malahoff-Stiver* litigation,[46] concerning a surrogate baby which had severe birth defects. Although the baby was subsequently raised by the surrogate's family,[47] initially, his fate was in the hands of his commissioning father who refused the treatment and claimed the refund. The case, despite decided several decades ago, still appear to stand as a stark representation of media judgment: whilst this specific arrangement ended catastrophically, this does not mean that *all*, or even the *majority* of do. *Malahoff*-alikes should not be relied on for generalisations that surrogacy arrangements follow an identical unfortunate pattern.[48] It is hard to conclude how many arrangements do not result in the intended culmination unless they get into the media spotlight. The number of cases that did catch media attention and resulted in public outcry is relatively low compared to the 'soaring'[49] numbers of surrogacy arrangements. This seems to indicate that it is only the *minority* of the cases that do not go according to the plan. Accentuating on these minority cases through the media carries the danger of the distortion of reality and the misrepresentation of the data to the public.[50] While it is unquestionable that surrogacy, as any other medical practice does carry its risks, this does not seem to be a satisfactory justification of the denial for families to have genetically-related children.

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[43] Ibid 408-9.
[44] Ibid 405. Robertson also rightly notes that child-rearing is not the same as procreation but is central to it.
[45] Jerry Mahoney, 'My 5 Biggest Fears About Surrogacy (And How I Overcame Them)' (10 April 2014) *Everyday Feminism Magazine* available at <https://everydayfeminism.com/2014/04/fears-about-surrogacy/> accessed 14 April 2020.
[46] *Judy M. Stiver and Ray E. Stiver v. Alexander Malahoff* (6th Cir. 1992) 975 F.2d 261.
[47] Iver Peterson, 'Legal Snarl Developing around Case of a Baby Born to a Surrogate Mother' (7 Feb 1983) *The New York Times* available at <https://www.nytimes.com/1983/02/07/us/legal-snarl-developing-around-case-of-a- baby-born-to-surrogate-mother.html> accessed 11 April 2020.
[48] Lamb (n2) 407.
[49] 'As Demand for Surrogacy Soars, More Countries are Trying to Ban It' (13 May 2017) *The Economist* available at <https://www.economist.com/international/2017/05/13/as-demand-for-surrogacy-soars-more-countries-are- trying-to-ban-it> accessed on 11 April 2020.
[50] Lamb (n2).

From the perspective of the potential parents, not only might surrogacy be justified by their mere "desire to be a parent… [but also] the desire of continuation of the genetic line."[51] Genetic affinity axiomatically creates an additional value in a parent-child relationship and completes parents' and children's own identity. Genes are the building blocks for one's development, a contribution to one's life story. The commissioning parents aspire to see their individual talents and characteristics to be passed onto the future generation.[52] The realisation that one is unable to produce genetically-related offspring "usually leads to a form of bereavement, not associated with a psychical loss, but rather with a renunciation to procreate and the loss of fertility. Indeed, infertility has been widely shown in the literature as a devastating experience, particularly for women, causing distress and suffering."[53] Having gone through years of unsuccessful attempts to conceive, treatments and psychological exhaustion, the commissioning parents may be mentally unready for adoption as, ultimately, they may never be able to accept and welcome a child that is not blood-related to them.[54] Lappé observes: "[w]hen we speak of justification for medical practice, we are talking simply about a universal obligation to relieve suffering. And childlessness is a particularly acute form of such suffering."[55]

Surrogacy, in turn, addresses both the problem of childlessness and the possibility of retaining the genetic relationship with the children. A surrogate child would not be a carrier of genes of a mysterious couple, but their own continuation. He would be a collection of both parents' DNA, their physiological and physical identities.[56] The importance of transmission of genetic heritage has been highlighted in various studies. Thus, in the study conducted by Van Den Akker in the early 2000s concluded that although only 31% of female respondents claimed that the genetic link to the future baby is important, for more than half of the male ones it was crucial. Women, however, driven by the desire to start a family, nevertheless admitted that even a *partial* genetic link with their children would suffice for the best form of parenthood.[57] This way surrogacy embraces a traditional understanding of a family, which, rather powerfully symbolises the "powerful symbol of unity and intimacy in the history of Western kinship, in the possibility that two people can become as one in their love, and that the

[51] Robert Barnet, 'Surrogate Parenting: Social, Legal and Ethical Implications' (1987) 54 *The Linacre Quarterly* 28, 32.
[52] Astrid Indekeu & Kristien Hens, 'Part of my Story, The Meaning and Experiences of Genes and Genetics for Sperm Donor-Conceived Offspring' (2019) 38 *New Genetics and Society* 18, 26-27.
[53] Marta Casonato and Stéphanie Habersaat, 'Parenting without Being Genetically Connected' (2015) 3 NecPlus 289, 294.
[54] Ibid.
[55] Mark Lappé, 'Risk Taking for the Unborn' (1972) 2 *Hastings Center Report* 1, 1-2.
[56] E.g. Derek Parfit, *Reasons and Persons* (OUP 1984) 204-209.
[57] Olga Van Den Akker, 'The Importance of a Genetic Link in Mothers Commissioning a Surrogate Baby in the UK' (2000) 15 *Human Reproduction* 1849, 1853.

child represents an expression and reflection of that love."[58]

Furthermore, surrogacy allows procreation for same-sex and single parents. Despite being a "new [but developing] phenomenon,"[59] it equalises the status of heterosexual and homosexual couples by respecting "intentional creation of gay [and single-parent]-led families."[60] These parents have to overcome numerous legal and social barriers on their way to creation of a family, at times having to commit an illegal act in their pursuit of a genuine family. While some states allow different types of procreation, surrogacy tends to be preferred, as it uniquely provides for 'biogenetic relatedness.'[61] Despite the suggestions that some parents opted for surrogacy arrangements out of 'vanity', similarly to the heterosexual couples, the majority of homosexual couples felt that the genetic connection through their future children is also established through resemblance. Seeing the child as a reflection of one's self provides a sense of self-satisfaction whilst avoiding the social stigma of childlessness. Although the 'resemblance talk' might be a little less relevant in the modern world, there is still pressure for parents that their family members see them in their children.[62] In a study cited in Murphy, one of the interviewees observed: "You want to reproduce so that *your whole*, so that you, your line kind of goes on. We thought, well, you know, these genes need to keep going."[63] Another interviewee elaborated on the crucial distinction between surrogacy and adoption: "… for a lot of people there's a biological imperative to reproduce and I don't know if it's to do with ego or what, but to almost, to almost see themselves in their children… I think with an adoptive child, maybe, of course you'd love them, but maybe there's not that actual, it's an animal kind of thing, that animal connectedness with them… ."[64]

Surrogacy is the ray of hope for those whose partner has deceased or is terminally ill. It offers them a possibility of having a child that would be genetically-related to both the partners through posthumous conception. The surrogate mother is implanted with an embryo that has the genetic material of his parents after the death of the genetic contributor. At first glance, the fact that this form

[58] David Schneider, American Kinship, in Deborah Dempsey, 'Surrogacy, Gay Male Couples and the Significance of Biogenetic Paternity' (2013) 32 *New Genetics and Society* 37, 45.
[59] Jason Tuazon-McCheyne, 'Two Dads: Gay Male Parenting and its Politicisation— A Cooperative Inquiry Action Research Study' (2010) 31 *Australian and New Zealand Journal of Family Therapy* 311, 312.
[60] Ibid.
[61] Valory Mitchell and Robert-Jay Green, 'Different Storks for Different Folks. Gay and Lesbian Parents' Experiences with Alternative Insemination and Surrogacy' (2008) *Journal of GLBT Family Issues* 81, 81-104.
[62] Gay Becker, Anneliese Butler and Robert D. Nachtigall, 'Resemblance talk: A Challenge for Parents whose Children were Conceived with Donor Gametes in the US' (2005) 61 *Social Science & Medicine* 1300, 1303.
[63] Dean C Murphy, 'The Desire for Parenthood: Gay Men Choosing to Become Parents Through Surrogacy' (2013) 34 *Journal of Family Issues* 1114, 1116.
[64] Ibid.

of reproduction extends beyond one's life-time[65] makes it questionable. Not only does it seem push the boundaries of what might be acceptable in the sphere of reproduction but might also transfer the role of a 'surrogate' from a woman that carries a child to a child himself. Hunfled's study suggests that the surviving partner may see the child as a "substitute" for the lost one and exacerbate the negative implications arising from grief. This, in turn, might have a negative effect on the child's future upbringing.[66] Whilst there is a room for concerns, Hunfled admits that the results of the study are inconclusive. Since no medical reports to the contrary are available, the speculation that there *might* be an abstract psychological impact either does not prove sufficient or is at best exaggerated for this choice of reproduction to be denied.

Third-party reproduction responds to the last plea of the desperate who want their future generation to continue. Based on the concept of 'self-extension', this implies that the death of a person does not necessarily mean the death of his life story.[67] Indeed, one's life story continues by itself, through the relatives and those who were closed to the deceased. It is argued that although it is the surnames that is commonly thought to symbolically signify the connection with the future generations, the genetic material is equally, if not more, important.[68] Since lives are not indefinite, "begetting children is a sort of self-expansion, an attempt to extend one's existence, a guarantee for a kind of continuity of the self beyond its individual biological bounds."[69] The denial of this method of self-realisation leads to discrimination between those who can continue with ordinary lives and those who suffered a loss of the death of their loved ones. The choice of surrogacy would recognise that both equally deserve a chance to continue their legacy. As Antall notes, the sudden death of someone should not immediately lead to the loss of the opportunity to connect with the generations through reproduction.[70] After all, "the desire to have a child with the woman you love does not die with that person. The man left behind still wants a child produced out of the love he shared with his wife."[71] One of the examples comes from Israel, where a woman has become a 'mother' two years after dying from brain cancer. The husband made a promise 'to make her dream come true' and have a baby through surrogate motherhood using her eggs. Having overcome the legal hurdles, he successfully argued the right to be a father as 'former

[65] Maya Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective' (2014) 27 *Journal of Law and Health* 30, 35.
[66] J.A.M Hunfled, J. Passchier, L.L.E. Bolt & M. A. J. M. Buijsen, 'Protect the Child from Being Born: Arguments against IVF from Heads of the 13 Licensed Dutch Fertility Centres, Ethical and Legal Perspectives' (2004) 22 *Journal of Reproductive and Infant Psychology* 279, 284.
[67] Asa Kasher, 'Life in the Hearts' (2003) 8 *Journal of Loss and Trauma* 247, 247-248.
[68] Ibid 251.
[69] David Heyd, *Genetics* (Berkeley: University of California Press 1994) 215.
[70] Kristin A. Antall, 'Who is my Mother?: Why States Should Ban Posthumous Reproduction by Women' (1999) 9 *Health Matrix* 203, 217.
[71] Ibid.

member of a couple.'[72] Such contribution to the stream of life is said to equate to "the satisfaction experienced by a writer who knows that his novels will survive his death, or by a philanthropist who contemplates her name on a university building after she is deceased."[73] In a sense, this would allow to escape the confinement of mortality through 'vicarious immortality' and offer a consolation that something meaningful, that is, children, still left behind.[74] Simana cites a confession, made to Irit Rosenblum, an Israeli human rights activist, by a dying man: "Now I can die peacefully, knowing that life is not embodied only in the body. Life has energy and that energy has a mission. The energy is concealed in every person who delivers the energy of life. Please help me to pass it on."[75] Surrogacy, therefore, acts as a unique mechanism for posthumous reproduction.

While the freedom of a surrogate to enter into the arrangement is widely highlighted in the literature, the corresponding freedom of families to form the family of their choice is often overlooked. Yet, it is the interest of both parties that coincides to make the arrangement happen.[76] Surrogacy warrants legal protection not only for women to make healthy decisions regarding their bodies[77] but also enabling families themselves to choose a specific way to procreate. As Jackson argues, "When we disregard an individual's reproductive preferences, we undermine their ability to control one of the most intimate spheres of their life… reproductive freedom is sufficiently integral to a satisfying life that it would be recognised as a critical 'conviction about what helps to make a life good.' Insofar as it is now possible for individuals to decide if, whether or when to reproduce, depriving them of this control significantly interferes with their capacity to live their life according to their own beliefs and practices…."[78] The freedom to make reproductive choice facilitates the liberty of procreation,[79] the experience that starts from conception and extends to childrearing with each of the intermediate stages having their own meaning and soleness. What at first glance might seem as single-purpose activity – to follow one's natural instinct to procreate – in reality is much more than that. It is something that also has to accord with social norms and values. After all, reproduction brings new members into society.[80]

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[72] 'Israeli Woman Becomes Mother Two Years after Dying from Brain Cancer' (14 Jun 2011) The Haaretz at <https://www.haaretz.com/1.5021891> accessed on 15 April 2020.
[73] John A. Robertson, 'Posthumous Reproduction' (1994) 69 *Indiana Law Journal* 1027, 1042.
[74] Heyd (n68).
[75] Irit Rosenblum in Shelly Simana, 'Creating Life after Death: Should Posthumous Reproduction be Legally Permissible without the Deceased's prior Consent?' (2018) 5 *Journal of Law and the Biosciences* 329, 344.
[76] Larry Gostin, *Surrogate Motherhood: Politics and Privacy* (Indiana University Press 1990) 433.
[77] Seema Mohapatra, 'Achieving Reproductive Justice in the International Surrogacy Market' (2012) 21 *Annals of Health Law* 191, 191.
[78] Emily Jackson, *Regulating Reproduction* (Hart Publishing 2001) 7.
[79] Not the same as 'reproductive choice' or 'reproductive justice'. See Josephine Johnston and Rachel L. Zacharias, 'The Future of Reproductive Autonomy' (2017) 47 *The Hastings Centre Report* S8.
[80] Robertson (n22) 408.

2.2 Objections to surrogacy

Surrogacy 'seeks to shift the burden of gestation from one woman to another, usually for payment,'[81] freighting the arrangement with moral, philosophical and practical controversies. It seeks to satisfy the needs of multiple parties: the intended parents, the child and the surrogate herself, potentially giving rise to 'asymmetric vulnerability.'[82] The focus is usually placed upon the uneasy position of the surrogates and the surrogate children as their interests seem to be more likely to be violated. The vulnerability of surrogate mothers and children was recognised at the international level by art. 2(a) of the United Nations Convention on the Rights of the Child, which seems to see commercial surrogacy as commodification of children.[83] The Guidelines on the Implementation of the Optional Protocol explicitly state that "concerns exist with regard to surrogacy, which may also constitute sale of children."[84] The UNCRC calls the signatory states to take measures at all levels to "prevent… the sale of [the latter] for any purpose and form."[85] Such attitude to surrogacy was described as "confused, incoherent and poorly adapted to the specific realities of the practice."[86] Hence, it was suggested that the stance of those countries disfavouring commercial surrogacy is simply unable to keep the pace with social changes and does not prove satisfactory.[87] The current trend places emphasis on the increase in the number of pregnancies for commercial purposes as well peculiar cross- border surrogate arrangements so as to call for changes.[88]

2.2.1 Physical exploitation

Numerous types of human activities are said to have a price tag.[89] Personal injury compensation allowed by the law of torts, scientific research as well as life insurance – all put a monetary value on human lives.[90] Price tags tend to be the biggest driving forces behind lawsuits. Healthcare, education

[81] John A. Robertson, 'Other women's wombs: uterus transplants and gestational surrogacy' (2016) *Journal of Law and the Biosciences* 68, 71.
[82] Sheela Saravanan, 'An ethnomethodological approach to examine exploitation in the context of capacity, trust and experience of commercial surrogacy in India' (2013) 8 *Philosophy, Ethics, and Humanities in Medicine* 1, 1.
[83] Art.2(a) the Optional Protocol UNCRC.
[84] Explanatory Report to the Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2019) 60 para 52.
[85] Art 35 UNCRC.
[86] Anita Stuhmke, 'The Criminal Act of Commercial Surrogacy in Australia: A Call for Review' (2011) *Journal of Law and Medicine* 601, 601-613.
[87] Kirsty Horsey and Sally Sheldon, 'Still Hazy After All These Years: The Law Regulating Surrogacy' (2012) 20 *Medical Law Review* 67, 67.
[88] (n63) para 1.12.
[89] Carmel Shalev, *Birth Power: The Case for Surrogacy* (Yale University Press 1989) 159.
[90] Angie Godwin McEwen, 'So you're having another woman's baby: Economics and Exploitation in Gestational Surrogacy' (1999) 32 *Vanderbilt Journal of Transnational Law* 271, 272.

and even supermarket shopping also indirectly provide a calculation of one's life's worthiness.[91] Yet, when valuation enters the reproductive sphere, it is usually met with severe judgmentalism. With surrogacy increasingly becoming a 'market- driven event,'[92] it is argued that commercial surrogacy would physically degrade women in general.[93] *Prima facie* it is the very concept of a surrogate receiving the payment for carrying a child for someone else which seems to give rise to a variety of concerns by the opponents of surrogacy. The rationale underlying such antagonistic attitude appears to be that remuneration for carrying a baby may escalate into forced labour or physical exploitation. Whilst it is accepted that surrogacy, in principle, could be exploitative, nevertheless, it seems that whether it in reality exploits a surrogate depends on whether a specific arrangement is detrimental or harmful to her. This sub-chapter is going to argue that, while in some instances there might be an exploitative element to surrogacy, it is not necessarily exploitation.

Generally, exploitation happens where one party to the transaction *unfairly* takes advantage of the other's vulnerable position thereby leading to the latter's harm.[94] Being based on the Kantian imperative principle, this objection implies that people should not be treated as means to the ends and this is even more so where the 'end' is inherently instrumentalist. Wertheimer provides for the two dimensions which must be present for a transaction to be deemed harmful. First of all, there should be a dimension of value and secondly, a dimension of choice. For him, the arrangement could be exploitative if "the exchange of values" is defective,[95] that is the gain of one party being bigger than the gain of another. The defect appears at the point where the intended parents obtain more benefit from the arrangement than the surrogate herself: "… surrogacy is harmful… [it pays] very little money for a nine-month, twenty-four hour a day job."[96] If seen this way, an element of exploitation *might* be present as a surrogate makes various sacrifices throughout the pregnancy. For example, pregnancy carries some health risks, such as deep vein thrombosis and hypertension, which may be deadly.[97] Certain foods and alcohol are not allowed during the pregnancy. The question, however, is of the *extent of harm* caused by an arrangement. Some surrogates acknowledged the damaging effect of surrogacy as an experience. Sometimes it is not just the surrogates who have to make certain sacrifices but also

[91] Howard Steven Friedman, *Ultimate Price: The Value We Place on Life* (University of California Press 2020) 2-3.
[92] McEwen above (n89) 273.
[93] See generally Debra Satz, 'Markets in Women's Reproductive Labor' (1992) 21 *Philosophy & Public Affairs* 107, 107-131
[94] Vida Panitch, 'Global Surrogacy: Exploitation to Empowerment' (2013) 9 *Journal of Global Ethics* 329, 331.
[95] Alan Wertheimer, 'Two Questions About Surrogacy and Exploitation' (1992) 21 Philosophy & Public Affairs 213.
[96] Ibid 211, 217.
[97] See generally < https://www.nhs.uk/pregnancy/related-conditions/complications/ >.

their family members.[98] The gains appeared to be lesser compared to the ones of the intended parents: while they would receive a child at the end of the arrangement the surrogate mother would only receive a not very large financial remuneration for risking her health, or potentially life. For example, after the birth Mary Whitehead[99] argued that surrogacy was very traumatising: for her, the gain of financial compensation could not have been equated to the gain of having a child. However, Whitehead's claims seem to suggest that surrogacy is *necessarily* exploitative. Wertheimer observes that harm should be measured *before* the arrangement, not when it comes to an end: "… the question is not whether individual surrogates, such as Ms. Whitehead is harmed but whether (all things considered) the expected value of surrogacy is negative… whether it is *ex ante* harmful…"[100] If accepting this as a correct stance, it could be argued that the issue of value as an element of a harmful transaction would never be resolved. There are too many individualistic differences precluding from reaching a conclusion whether all surrogacies are detrimental.

The second dimension to consider in Wertheimer's harm account is the one of *choice* – whether a surrogate consented to the arrangement voluntarily or whether she did not fully appreciate the nature of the arrangement and/ or was coerced. For him, an arrangement is coercive when one forces another to do something and, if refused, the second party would be in a worse off position.[101] The most common view appears to be that sometimes financial compensation makes it very hard to resist, thereby pressurising a woman with little financial means into the surrogacy arrangement.[102] It is further contended that at times surrogates "may not fully understand the health and other ramifications of surrogacy."[103] Indeed, the blonde girls, widely smiling from the posters of surrogacy agencies and willing to carry a baby simply "to make a childless couples happy,"[104] appear to be an inaccurate representation of reality – women agree to become surrogate mothers not just to bring joy for the intended parents. As the Brazier Report confirms "…the majority of surrogates have relatively low educational attainments… A number are unemployed, unsupported by partners and responsible for

[98] Heather Jacobson, 'Commercial surrogacy in the Age of Intensive Mothering' (2021) 69 *Current Social Monograph* 193, 204.
[99] Discussed above in 1.2.
[100] Wertheimer (n79) 215. It should be further noted that the issue of value should be taken with care as some detriments of surrogacy would be very hard to measure.
[101] Wertheimer (n94) 225.
[102] See e.g. Ruth Macklin, 'Is there anything wrong with Surrogate Motherhood?' in Larry Gostin (ed.) *Surrogate Motherhood* 146.
[103] Kristine Schanbacher, 'India's Gestational Surrogacy Market: An Exploitation of Poor, Uneducated Women' (2014) 25 *Hasting's Womens' Law Journal* 201, 214.
[104] Julie Blindel, 'Commercial Surrogacy is a Rigged Market of Wombs for Rent' (20 Feb 2015) *The Guardian* available at <https://www.theguardian.com/commentisfree/2015/feb/20/commercial-surrogacy-wombs-rent-same-sex-pregnancy> accessed on 21 February 2015.

children of their own. It is also claimed that they live in prison-like conditions lacking hygiene. 'Professional' surrogacy may appear to be an attractive option for women in these circumstances."[105] The most apparent example used to be India, where commercial surrogacy was not only legal but also widespread until its ban in 2016. The data suggests that surrogates there were usually illiterate, living in indecent conditions with the expected income from the arrangement not exceeding $5000-6000.[106] They had neither legal representation nor any right under the contract and, in a case of unsuccessful pregnancy or defective foetus, they were left with no compensation whatsoever,[107] and they were also deemed liable for the losses. Therefore, an offer to earn the money so as to provide for the family makes it too good to refuse. For example, Nirmala, a surrogate from Chandigarh decided to enter into a surrogacy arrangement so as to be able to pay for her paralyzed husband's medical treatment,[108] something that has been described as 'an economic compulsion.'[109]

It is the surrogates' treatment by the intended parents or the agencies that may also raise an inevitable question of manipulation: the economic disparity between a wealthy commissioning couple and a surrogate mother from a rural Indian area seems to disturb the equality of bargaining power between the parties. Being heavily concerned with her financial situation a surrogate mother may not have the possibility to negotiate the terms of the agreement. Panitch claims that the fact making commercial surrogacy so coercive is that a commissioning couple would always seek the cheapest price, and Indian surrogates, albeit not forced physically (as clearly there is no threat of physical harm), are pressurised to consent to the terms least preferable for them. She realises that the failure to do so would lead the commissioning couple withdrawing their offer and making it to another surrogate; hence, her consent may not be authoritative enough to fully authorise the arrangement.[110] Panitch argues that it is not merely unfair remuneration that makes the surrogacy arrangements exploitative. It is also the treatment Indian surrogates receive which makes the practice degrading, unlike the US surrogate mothers who are generally well educated and enjoy full legal representation, as well as medical assistance and care.[111] Usually their contracts contain specific clauses providing for compensation for

[105] Margaret Brazier, Susan Golombok and Alastair Campbell 'Surrogacy: Review for Health Ministers and Current Arrangements for Payments and Regulation' (1998) para 4.19.
[106] Amrita Pande, 'Commercial Surrogacy in India' (2010) 35 *Signs* 969, 969 –992.
[107] Karen Busby and Delaney Vun, 'Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers' (2010) 26 *Canadian Journal of Family Law* 13, 13 – 93.
[108] Emily Stehr, 'International Surrogacy Contract Regulation: National Governments' and International Bodies' Misguided Quests to Prevent Exploitation' (2012) 35 *Hastings International and Competition Law Review* 253, 275. See also Mina Chang, 'Womb for Rent: India's Commercial Surrogacy' (2009) 31 *Harvard International Review* 11, 11.
[109] Schanbacher (n87) 214.
[110] Panitch (n93) 333.
[111] Frances W Twine, *Outsourcing the Womb: Race, Class and Gestational Surrogacy in a Global Market (Framing 21st Century Social Issues)* (Routledge 2015) 45.

travel, care of a child and some additional expenses.[112] Unlike Indian surrogate mothers, for the US ones the need to resolve some financial constrains is only a partial reason for an agreement to surrogacy: they are also motivated by a desire to pursue their own interests while helping others.[113] Gupta observes that surrogates' decision is "generally made in a context of limited possibilities for self-expression or development, rising unemployment, lack of financial resources… low education levels, poverty, marginalization in labour and job markets, and patriarchal social and family structures."[114] Yet, it remains unclear whether certain financial pressure is sufficient enough to discard the surrogate's consent as non- authoritative. One of the Indian housewives referred to her decision to become a surrogate mother as a '*majboori*,' 'compulsion' she had to go through in order to secure her children's future. She admitted that "this work is not ethical… it's just something we have to do to survive… we didn't have clothes to wear after the rain… and our house has fallen down."[115] The '*majboori*' would provide for 2-3 years of salary, which is admitted to be quite a "good earning."[116] Whilst it is clear that in India the surrogates' 'choices [might be] pre-determined by the socio-economic conditions,'[117] it seems that their position may be described as being far less fair than the one of their Western counterparts.

Thus, it is clear that surrogacy is far from being a coercion in itself: it does not make a surrogate's position worse off if she decides not to proceed with the arrangement. Neither does it substantially interfere with the voluntariness of the surrogate's choice. The *majboori* does not make her consent anomalous or extorted. Nor does it invalidate her consent thereby disabling from making a decision; it simply makes her perform what she agreed to do and what she has to do to receive the payment. Indeed, the sum may, to a certain extent, cloud the surrogate's judgment and force her to agree to a reduced payment 'because of the necessities of the situation.'[118] Wertheimer argues that the offer might simply lead to the distortion of the judgment whereby a surrogate just might not be able to think of the long-term consequences. If the transaction is seen as harmful simply because a surrogate would not enter into the arrangement has she not been offered the compensation, literally all jobs would be seen as

[112] http://www.growinggenerations.com/wordpress/wp-content/uploads/2013/02/Sample-BP-for-GG_Website_20130815.pdf.
[113] Twine (n110) 40-45.
[114] Jyotsna Agnihotri Gupta, 'Reproductive Biocrossings: Indian Egg Donors and Surrogates in the Globalized Fertility Market' (2012) 5 *International Journal of Feminist Approaches to Bioethics* 25, 46.
[115] Amrita Pande, 'Not an 'Angel', Not a 'Whore': Surrogates as Dirty Workers in India' (2009) 16 *Indian Journal of Gender Studies* 141, 160.
[116] Packiaraj Asirvatham, 'Can coercion be justified when it benefits the poor? The case of commercial surrogacy industry in India' (2017) 8 *Bangladesh Journal of Bioethics* 9, 11.
[117] Sreeja Jaiswal, 'Commercial Surrogacy in India: An Ethical Assessment of Existing Legal Scenario from the Perspective of Women's Autonomy and Reproductive Rights' (2012) 16 *Gender, Technology and Development* 1, 1-28.
[118] Asirvatham (n125) 10.

harmful and coercive for it would be hard to imagine under what circumstances one would agree to work for free.[119] Gupta further argues that the payment should be seen as means of empowerment, transforming the surrogate into a 'controller of her body.'[120]

Since exploitation may be defined as being analogous to '*unfair* advantage,' it is clear that it is the *adequacy* of the sum that is questionable, not the concept of payment generally. The problem, therefore, is rooted not in the concept of commercialization itself, but the fact that a surrogate might be underpaid for the pregnancy. In the UK, for example, as the Brazier Report reveals, surrogate mothers are paid 'in excess' of any reasonable level incurred during pregnancy, an estimate of £15,000,[121] which is approximately £4000 more than the wage of a provider of cleaning services.[122] If the sum provided for pregnancy is seen as being higher than reasonably expected, then some surrogate mothers if are not being (over)paid, they are still capable of making some net profit. The interviews conducted in the US with surrogate mothers confirm that they are far from being exploited. Generally, their earnings may go up to $40,000 (approx. £26,000) and the reasons for involvement into surrogacy arrangements are not related to basic minimum needs, but the household expenditures such as a brand-new car or paying tuition fees for their children.[123] Similarly, in Russia a surrogate receives approximately £15,000-20,000, which sometimes is enough to buy/ secure a mortgage for a flat.[124] Nevertheless, the discrepancy in payment does not always equate the inequality of purchase power. The cost of living in the US is higher than in India,[125] which means that despite the fact that an Indian surrogate mother is paid eight times less than the US one, the purchasing power of the payment is more or less the same. Therefore, for some surrogates, surrogacy might be deemed less exploitative if their compensation was higher.

Therefore, the deontological objection, based on surrogacy being an ethically controversial practice, does not prove entirely satisfactory. First of all, any remotely beneficial transaction might

[119] Wertheimer (n93) 224.
[120] Gupta in Asirvatham (n115) 10.
[121] (n83) para 5.4.
[122] Average Cleaner Pay in the UK' (2015) available at <http://www.payscale.com/research/UK/Job=Cleaner/Hourly_Rate> accessed on 16 March 2015
[123] Stephen Chapman, 'Surrogacy Successes Make New Laws All the More Ill-Advised' (31 Jul 1988) *Chicago Tribune* available at <https://www.chicagotribune.com/news/ct-xpm-1988-07-31-8801190657-story.html> accessed on 15 March 2015.
[124] Dina Soifer, 'The Cheapest Flats in Russia: where is buying flats the best' (17 May 2021) *New Metres* < https://novmetr.ru/articles/samye-deshevye-kvartiry-v-rossii-gde-vygodnee-vsego-pokupat-zhile/ >.
[125] http://www.numbeo.com/cost-of-living/compare_countries_result.jsp?country1=India&country2=United+States.

have a negative connotation even if the nature of the transaction itself is not ethically controversial.[126] Secondly, although it can be argued that possible exploitation stemming from the distortion of bargaining power would be eliminated if the bargain does not happen at all, this perspective fails to take into account the fact that as long as there are couples unable to conceive a child for one reason or another, despite the prohibition commercial surrogacy arrangements could still be widely practiced.[127]

2.2.2. Moral exploitation

The orthodoxy deeming exploitation as grounds for legal differentiation between commercial and altruistic surrogacies usually tends to ignore the fact that exploitation may also be psychological. Unlike altruistic surrogacy, the commercial one is often criticised for causing severe emotional distress not only during pregnancy but also after birth. Anderson explains that "most surrogate mothers experience grief upon giving up their children – in 10% of cases seriously enough to require therapy."[128] Indeed, the practice as a whole may be psychologically exploitative, since both commercial and altruistic surrogacies may be capable of inflicting psychological traumas. Sometimes, it may be the surrogate's family which exerts a certain amount of pressure. This argument is heavily based on the surrogate mother's view of self within her family circle as well as in light of the separation from a baby for payment. Yang notes, familial kinship could be equally, if not even more, exploitative than the pressure coming from surrogacy,[129] thereby making women unable to think rationally and feel remorseful for refusing to bear a child for a close relative. Ironically, the level of familial exploitation seems to increase *on par* with the strength of the integration within the family. Even in the absence of physical force, "the nature of family opinion [that it is egocentric to deprive another less fortunate family member of one's reproductive abilities] may be so engulfing it exacts reproductive donation from female source."[130]

There is a plethora of academic research focusing on the psychologically damaging impact of commercial surrogacy. Indeed, whilst for some surrogate mothers the process of carrying the child and

[126] Alan Wertheimer, 'Exploitation and Commercial Surrogacy Symposium on Coercion: An Interdisciplinary Examination of Coercion, Exploitation and the Law: IV Trans-substantive Themes' (1996-1997) 74 *Denver University Law Review* 1215, 216-17.
[127] Statistically, the United Kingdom, where commercial surrogacy is not permitted is the leading EU Member State engaging in commercial surrogacy. See Denis Campbell, 'More and More Childless Britons Head Overseas to Find Surrogate Mother' (14 Mar 2015) *The Guardian* at <http://www.theguardian.com/lifeandstyle/2015/mar/14/childless-britons-increasingly-surrogate-babies> accessed on 16 March 2015.
[128] Elizabeth Anderson, 'Is Women's Labour a Commodity? (1990) 19 *Philosophy and Public Affairs* 71, 92.
[129] Jie Yang, 'Informal Surrogacy in China: Embodiment and Biopower' (2014) 21 *Body & Society* 90, 100.
[130] Janice G Raymond, 'Reproductive Gifts and Gift-Giving: The Altruistic Woman' (1990) *the Hastings Centre Report* 7, 10.

relinquishment may be emotionally devastating, this does not mean that *all* surrogates suffer a psychological trauma following the arrangement. Thus, for others, surrogacy means nothing more than a job, fulfilling their contractual obligation whereby they receive a payment for carrying a child for another couple. Indeed, for some surrogacy in itself is a highly emotional journey. The levels of anxiety, prevalent even in traditional pregnancies,[131] may be as high,[132] if not higher during surrogacy pregnancy. The study conducted by Tehran and others revealed that surrogate mothers tend to worry about a plethora of issues, including the child's development in womb and the perception of their surrogate pregnancies by their own relatives.[133] As one of the surrogates admitted: "I was always worried that this child would be retarded. My sister said that "don't worry because your child is healthy" but, actually that was not my own child. That was [the child] of someone else. I thought if the baby was abnormal, maybe his/her commissioning couple didn't want him/her. Thereafter what could I do with a retarded baby."[134] Another surrogate was concerned with the judgment of her own family: "none of my family members and relatives did know that I had rented my uterus except my mother and sister. I was very worried. I did not know if my mother-in-law found out, how she would react. I had to undergo this action because my husband was in a bad financial situation but I did not know what should I say to others?"[135] Yet, it is the fact that the surrogate has to relinquish the baby upon giving birth which is usually said to be psychologically traumatizing. The bond between the surrogate and the child, formed during the pregnancy, is disrupted when the child is being handed over to the genetic parents. The relinquishment affects surrogate mothers so negatively, even forcing some to seek counselling.[136] Some women involved in commercial surrogacy were reported to feel "pain, betrayal and separation" as well as complete neglect of the fact that they formed emotional bonds with the babies on the part of the commissioning couple.[137] Similarly, those agreeing voluntarily described the surrogacy aftermath as "[feeling] violated, their existence lacking any sense of dignity leading to the suffering from such 'humiliation, [leaving invisible scars in the womb]."[138]

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[131] Generally C. Rubertsson, J. Hellström, M. Cross, 'Anxiety in early pregnancy: prevalence and contributing factors' (2014) 17 *Archives of Women's Mental Health* 221, 221-228.
[132] A. Reading, 'The influence of maternal anxiety on the course and outcome of pregnancy: a review' (1983) 2 Health Psychology 187, 187-202.
[133] Hoda Ahmari Tehran, Shohreh Tashi, Nahid Mehran, Narges Eskandari, and Tahmineh Dadkhah Tehrani, 'Emotional experiences in surrogate mothers: A qualitative study' (2014) 12 *Iran Journal of Reproductive Medicine* 471, 471-480.
[134] Ibid 475.
[135] ibid 475. However, the study conducted by Janice Cicarelli observes that half of the surrogate mothers surveyed became closer to their family members. See Janice Cicarelli, 'The surrogate mother: A post- birth follow-up study' (1997) Los Angeles: California School of Professional Psychology (1997. 9727638) at https://www.proquest.com/openview/14a136a56f7c8d5e4250bab202ed2d36/1?pq-origsite=gscholar&cbl=18750&diss=y> .
[136] Pip Trowse, 'Surrogacy: Is it harder to relinquish genes?' (2011) 18 *Journal of Law and Medicine* 614, 614-633.
[137] Carol L Delaney, 'Cutting the Ties that Bind: The Sacrifice of Abraham and Patriarchal Kinship' in Sarah Franklin and Sarah McKinnon, *Relative Values: Reconfiguring Kinship Studies* (Durham University Press 2001) 458.
[138] Yang (n128) 104.

The evidence on the matter, however, is not entirely conclusive. The research revealed two controversial trends: on the one hand, it indicated that in terms of disconnection with a baby, for some surrogate mothers the financial factor played no role at all – it is the process of relinquishment which was psychologically damaging. A comparative study conducted in China revealed that women experience a wide array of emotions related to surrogacy, irrespective of whether or not payment was the underlying purpose of their arrangements.[139] Furthermore, it was suggested that for some surrogates the involvement of a commercial element in the process of relinquishment, instead of being psychologically degrading, in reality, made it easier. In fact, surrogate mothers are said to have different expectations when they know in advance that the babies they are carrying are not theirs. Some of them tried to persuade themselves during the pregnancy "that [the] baby would never belong to me. I only provided an appropriate environment for the baby in my womb to be born and delivered to his/her parents. That was the easiest type of a child nursing."[140] This is especially so if the surrogate mother forms some sort of friendship with the commissioning couple. Other interviews also confirmed that the initial feeling surrogate mothers form is detachment from the child: while still being interested in a baby's future, this interest was somewhat distant. One of the interviewees, going through the second surrogate pregnancy, noted that although she saw the baby as being hers, this was only partially: he was never perceived as a part of the family. Since the surrogate was being paid for the job, she considered to be involved only in the contractual side of the agreement: "…I don't think you can be a surrogate for nothing. Also it makes it more business-like so that you look at the baby and think it's a job, I'm being paid for the time out of my life, mmm and, and in doing so I'm, it makes it not an emotional thing, it's more business like…"[141] It is clear that the monetary part completely eliminates any bonding, if there was any, and a slight grief she experienced after giving birth goes away fairly quickly.[142] Thus, the payment detaches her from the offspring and the establishment of friendship with the couple reassures that "the baby is in good hands [thereby] diverting her emotions from the child.'[143]

This is not to say that negative experiences suffered by some surrogates should be ignored. Rather, this means that increased attention should also be paid to welfare and counselling of surrogate mothers as well as their careful selection. Surrogacy involves "complex interpersonal processes and

[139] Yang (n128).
[140] Tehran and others (n132) 475.
[141] Hazel Baslington, 'The Social Organization of Surrogacy: Relinquishing a Baby and The Role of Payment in the Psychological Detachment Process' (2002) 7 *The Journal of Health Psychology* 57, 63.
[142] Generally, ibid.
[143] Ibid 67.

interactions,"[144] which means that professional help should be widely available.[145] Such counselling services or 'surrogate support' helping surrogates to supress maternal instinct and overcome the surrendering of the baby to the commissioning couple already exist in the US.[146] Whilst more research might be needed in order to analyse the full extent of their benefits,[147] various psychological problems might be eliminated with the timely provision of professional services.[148]

2.2.3 Children as a commodity and the dangers of black market

One of the most popular objections to surrogacy is based on the premise that surrogacy arrangements are harmful not only for the surrogate mothers but also for children. Surrogacy appears to violate children's rights by making them an object for sale, thereby creating the atmosphere of abuse or neglect. The term 'baby-selling' is attributable to Radin, who saw surrogacy as "impingement on parenthood" and "equation of a whole self to a dollar value."[149] It is suggested that reducing the child to an extremely tangible product of surrogate motherhood[150] expands the moral limits of trade, promoting the "everything-for-sale world."[151] It was argued that "contract pregnancy commodifies children in ways that undermine the autonomy and love parents owe to their children."[152] The objection becomes even more concerning taking into account that whilst for the intended parents and a surrogate the arrangement is consensual, the child is incapable of consensually becoming the 'subject to exchange.'[153] If a baby is seen as an object, parental rights seem to be automatically transformed into property rights. If seen this way, parents have complete ownership over their children – i.e. the right to deal with them as they please. As Anderson argues, "surrogacy requires us to understand parental rights no longer as trusts but as things more like property rights – that is, rights of use and disposal over the things owned."[154] Thus, it has been argued that not everything that "could be, should be available on the market."[155]

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[144] Janice Cicarelli and Linda Bekman, 'Navigating rough waters: an overview of psychological aspects of surrogacy' (2005) *Journal of SocialIssues* Plenum Publishing Corporation 11 at http://claradoc.gpa.free.fr/doc/33.pdf.
[145] Megan Smith, 'Maternal-Fetal Attachment of the Surrogate Mothers' (1998) 6 British Journal of Midwifery 188, 191.
[146] Robert Edelmann, 'Surrogacy: the psychological issues' (2004) 22 *Journal of Reproductive and Infant Pscyhology* 123, 129.
[147] Sarah Boseley, 'Kiss and Sell' (1997) the Guardian in Megan Smith (n144) 191.
[148] Edelmann (n130) 129, 130.
[149] Margaret Jane Radin, 'What, if anything, is wrong with baby-selling?' (1994) 26 *Pacific Law Journal* 135, 145.
[150] Generally, Kajsa Ekis Ekman, *Being and Being Bought: Prostitution, Surrogacy & the Split Self* (Spinfex 2013).
[151] Arlie Hochschild, 'Emotional Life on the Market Frontier' (2011) 37 Annual Review of Sociology 21, 22.
[152] Anton Van Niekerk and Liezl van Zyl, 'Commercial Surrogacy and the Commodification of Children: An Ethical Perspective' (1995) 14 *Medicine and Law* 163, 168.
[153] Jason K. M. Hanna, 'Revisiting Child-Based Approach to Commercial Surrogacy' (2010) 24 *Bioethics* 341, 341.
[154] Elizabeth Anderson, 'Is Women's Labour a Commodity?' (1990) 19 *Philosophy and Public Affairs* 71, 76.
[155] Elizabeth Anderson, Value in Ethics and Economics (Harvard University Press 1995) 229.

Indeed, the situations where the child was abandoned are not unheard of. If a child is *seen* as an object, then logically, he could be treated as an object. Allowing "to shop for children" thereby "maximising the value of their children… brings commercial attitudes into a sphere properly governed by love."[156] Instead of receiving what he is supposed to receive from the family – that is, the relationship of love and care, it is argued that the element of commercialisation may have a "degrading effect"[157] potentially giving rise to the relationship of abuse or neglect. As Khazova notes, in extreme situations, surrogacy may indeed lead to sale of children.[158] The transactional nature of the arrangement seeks to commodify the child,[159] in other words, to "fail to value them in an appropriate way by treating beings worthy of respect as if they were worthy merely of use."[160] The latter is exactly what occurred in the notorious *Baby Manji* case,[161] where the baby girl was left as a child of no-one as if being an object of an unfortunate sale where the customers simply changed their minds. The commissioning couple, Yuki and Ikufumi Yamada, were initially adamant about having a baby through a surrogacy arrangement with an Indian surrogate mother. Upon the couple's relationship breakdown, however, the Japanese mother as well as the surrogate refused the baby girl rendering her both parentless and stateless. It is suggested that it was a commercial element, underlying the agreement, which distorted the link between the parents and the child thereby transforming relationship of care into the one of alienation and abandonment.[162] This seems to have been a key factor in her parent' decision to refuse her as if she was merely an item for a sale.

Nevertheless, it is questionable whether a child may be seen as an item for which ownership can be claimed. This implies that the right for a baby should either be sold to both parents or this right is not a property right at all, which means it cannot be sold. Ownership never constitutes a part of a surrogacy agreement, which means that the genetic parents do not legally obtain property rights.[163] Van Nierkerk draws an analogy with "an act of shopping" and notes that shopping for a new car and surrogacy agreement are distinct in nature – payment for a child does not provide one with a right to

[156] Debra Satz, 'Markets in Women's Reproductive Labor' in Debra Satz, *Why Some Things Should not be for Sale* (Oxford University Press 2010) 123.
[157] Neil Duxbury, 'Do Markets Degrade?' (1996) 59 *Modern Law Review* 331, 331.
[158] Olga Khazova and Dawit Benyam, 'Reflections on Family Law Issues in the Jurisprudence of the CRC Committee: The Convention on the Rights of the Child @ 30 UN Committee on the Rights of the Child' (2019) *International Survey of Family Law* 305, 322.
[159] Elizabeth Scott, 'Surrogacy and the Politics of Commodification' (2009) 72 *Law and Contemporary Problems* 109, 112
[160] Van Niekerk and Van Zyl (n151) 163.
[161] *Baby Manji Yamada v. Union of India and Another* (2008) 13 SCC 518.
[162] This is not to say that children cannot be abandoned in natural conception cases. For further discussion of *Baby Manji* case see Yehezkel Margalit, 'From Baby M to Baby M(anji): Regulating International Surrogacy Agreements' (2016) 24 *Journal of Law and Policy* 71, 71-92.
[163] Richard Arneson, 'Commodification and Commercial Surrogacy' (1992) 21 Philosophy and Public Affairs 132, 132-164

treat it in the same way as an object would be treated.[164] The key difference may be seen in the attitudes and feelings developed towards the objects and children. The attitude towards an object is usually neutral – one might 'like' a particular thing, e.g. a new car or a pair of shoes, however, it cannot be actually 'loved.' Indeed, the intended parents may own their reproductive material; it may also be argued that the embryos this reproductive material subsequently transforms into might also be owned. However, what the genetic parents obtain as a result of surrogacy is parental rights and an obligation to care for the child.[165] Ultimately, even if it is accepted that the right for a child exists, the right that is paid for is to *become a child's parent*,[166] not to exploit him or resale for a profit. The fact that the child was born as a result of the commercial surrogacy agreement does not mean that its treatment would be different to the treatment of the child born in a conventional way.[167] The genetic parents' journey to parenthood is most likely to be long and troublesome.[168] Having invested in the arrangement financially and, most importantly, emotionally, it is highly unlikely that they would want to subject their child to abuse or neglect. While the non-foreseeability and the extent of risks for children should not be easily discarded, the majority of cases involving commercial surrogacy still result in a child who is nurtured and cared for. Commercial surrogacy is not unethical if being brought into this world is what makes children happy.[169] The children born out of surrogacy arrangement also do not always agree with the commodification rationale. Whilst some accepted that it might be the case that they were subject to a transaction to some extent, the interviewees do not speak in unison. An interview with an eighteen-year old boy born as a result of commercial surrogacy agrees with the commodification rationale by noting that the whole enterprise made him feel "lost and frustrated." He perceived it as if he was "bought and sold" and considered the desires of the surrogate mother were merely narcissistic and selfish.[170] On the contrary a fourteen-year-old girl claimed that it is the fact that she was born which mattered to her and the circumstances as to how were immaterial.[171]

Furthermore, it would be wrong to deny the parties an opportunity to enter into surrogacy simply because there is a possibility that it might not go according to the plan. Indeed, it is not unusual to ban

[164] Van Niekerk and Van Zyl (n151) 167.
[165] Hanna (n152) 342.
[166] Jennifer Domelio and Kelly Sorensen, 'Enhancing Autonomy in Paid Surrogacy' (2008) 22 Bioethics 269, 271.
[167] Ibid.
[168] Mary Welstead, 'International Surrogacy: Arduous Journey to Parenthood' (2014) 9 *Journal of Competition Law* 293, 298.
[169] Sarah Jones, 'The Ethics of Intercountry Adoption: Why it Matters to Healthcare Providers and Bioethicists' (2010) 24 Bioethics 358, 361.
[170] Usha Rengachary Smerdon, 'Crossing Bodies Crossing Borders: International Surrogacy Between the United States and India' (2008) 39 *Cumberland Law Review* 15, 60.
[171] Ibid.

a dangerous or hazardous activity if the *majority* of the cases 'go wrong.' The precautionary principle recognises the risks and, in cases of doubt, the necessity to take certain steps for these risks to be avoided. Whilst risk-management is mostly found in environmental law,[172] in some states it may be also found in surrogacy context. For example, the strict Norwegian law on surrogacy[173] is said to be based on "better safe than sorry" approach.[174] Sunstein recognises two types of precautionary principle – the weak and the extreme one.[175] According to the weak one, the regulation is needed even if there is no evidence that a specific activity will lead to harm.[176] Sunstein refers to the rules requiring not to walk in dangerous places and at night even if there is no certainty that the risks will materialise.[177] Thus, the ban of surrogacy as a precaution could be justified even if the link between the broken surrogacy arrangement and the harm is not established. The stronger sense, by contrast, requires "regulation whenever [the minimal threshold of scientific plausibility] for risk to health, safety, or the environment… [is satisfied] even if the supporting evidence remains speculative and even if the economic costs of regulation are high."[178] Following this interpretation of the precautionary principle, regulation is required, as small number of arrangements do not go according to plan.

Although it cannot be denied that even a very small number of broken arrangements are attention worthy, nonetheless it does not seem plausible to impose a total ban on surrogacy practice. First of all, precautionary consideration does not seem to be applied to other ethically sensitive practices, such as abortions. The WHO estimated that around 45% abortions are deemed to be unsafe with around 13% resulting in maternal death.[179] Whilst some states ban abortions on a religious basis, the fact that the procedure also carries certain health-related risks and, sometimes, deaths[180] does not seem to be a major consideration. In fact, it is admitted that in countries where abortion is banned, maternal deaths are 62% higher than in states where it is accessible, which means that the total ban does not necessarily eliminate the practice. Rather, it pushes it underground. Thus, it is highly unlikely that prohibition of surrogacy will address ethical controversies related to it. Instead, the practice might become even more

[172] Generally, Robert A. Fjeld, Norman A. Eisenberg, Keith L., *Quantitative Environmental Risk Analysis for Human Health* (John Wiley & Sons 2007)
[173] Norway's Biotechnology Act (5.12.2003/100).
[174] Marit Melhuus, 'Cross-Border Procreative Practices. Examples from Norway in Merete Lie and Nina Lykke (eds.) *Assisted Reproduction across Borders, Feminist Perspectives on Normalizations, Disruptions and Transmissions* (Routledge 2017) chapter 8.
[175] Cass Sunstein, *Laws of Fear* (CUP 2012) 13-34.
[176] Ibid 18.
[177] Ibid 23.
[178] Ibid 23, 24.
[179] 'Abortion' (25 Nov 2021) WHO at < https://www.who.int/news-room/fact-sheets/detail/abortion.
[180] See generally Khalid Khan, Daniel Wojdyla, Lale Say, Metin Gulmezoglu and Paul Van Look, 'WHO analysis of causes of maternal death: a systematic review' (2006) 367 *The Lancet: Science Direct* 1066, 1066-1074.

dangerous and either increase the number of transnational arrangements, stranding the parties in legal limbo (discussed in 2.2.4 below) or push surrogacy underground thereby creating the black market. Therefore, the most appropriate approach would be to introduce a close regulation of surrogacy instead of a blanket ban.

Undeniably, commodification in the reproductive sphere has captured much attention. The fact that commercial surrogacy involves money exchange might introduce a commercial element into the arrangement. Indeed, the concerns that commercialisation could change the nature of the relationship between the intended parents and the child are not completely lacking basis. The *Baby Manji* case shows that the instances where a child could be left with no parents at all could and do occur. However, it does not seem that it is the commercial nature of surrogacy that is to blame here. Rather, this appears to be an exceptional situation where the parents could not cope with their separation. In fact, a child born out of an altruistic surrogacy or a traditional pregnancy also have a chance of being rejected and given up for a state care. Luckily, the majority of surrogate children are born into a loving and caring environment, where the parents nurture and provide an ideal atmosphere for their upbringing. As Chell succinctly puts it: "…the child's best interests after birth are served if the child is loved, cared for and nurtured. This process has nothing to do with the manner of conception and gestation. A child may be raised with love and care by "natural" parents, adoptive parents, grandparents, foster parents, aunts or uncles. At the same time, a child may be neglected and be unloved by all of the same types of irresponsible and unloving parents."[181]

2.2.4 Reproductive tourism: restricted access to surrogacy and cross-country situations

Cross-border surrogacy happens when a child is conceived and born abroad and is subsequently returned to the jurisdiction of the intended parents' residence.[182] The number of cross-border surrogacies has soared in the recent years,[183] making surrogacy a 'booming business.'[184] The mosaic legal treatment of surrogacy, resulting from historically developed various moral or religious views within the states led to a complicated issue of cross-border surrogacy. In their desire to have genetic offspring, the intended parents travel thousands of miles to a more permissive state for their child to be gestated. After India banned surrogacy for foreigners, the couples tend to choose the US, Russia and Ukraine as a

[181] Byron Chell, 'But Murderers can Have all the children they want: Surrogacy and Public Policy' (1988) 9 Theoretical Medicine 3, 12.
[182] Welstead (n167) 301.
[183] Hague Conference on Private International Law (2015) 'The Parentage/ Surrogacy Project: an Updating Note' Preliminary Document № 3A 7 at <https://assets.hcch.net/docs/82d31f31-294f-47fe-9166-4d9315031737.pdf>.
[184] Seema Mohapatra, 'Stateless Babies and Adoption Scams. A Bioethical Analysis of International Commercial Surrogacy' (2012) 30 *Berkeley Journal of International Law* 412, 413.

reproductive mecca[185] due to their lax approaches. Yet, the process is described as being "not a frivolous amusing vacation from which they return with a souvenir:"[186] apart from being "painful, frustrating and time- consuming"[187] for the genetic parents, it also carries certain serious risks for the babies. While searching for low-cost arrangements mainly due to unavailability of these in their home country, commissioning couples sometimes trap their newborn children between the borders of a prohibitionist jurisdiction and the one that rigorously promotes the surrogacy market. At times, the intended parents are also misled by surrogacy agencies, whereby the agencies either voluntary or accidentally facilitate an arrangement which will be deemed illegal in their country of residence or cause various administrative problems for the intended parents.

A child stranded between two conflicting jurisdictions is exactly what happened in the abovementioned *Baby Manji* case. Following Manji's mother's refusal to take custody of the baby girl, her grandmother, Emiko Yamada offered to step in and take joint custody with her father, if he agrees. However, the Japanese authorities in India refused to issue a Japanese birth certificate and the no-objection certificate for travel back to Japan, claiming that in accordance with Japanese rules, the girl born on Indian soil will be deemed an Indian national.[188] The Indian authorities, by contrast, stated that the child's nationality must be the same as her mother's, which proved highly problematic as neither the genetic nor the surrogate mother wanted the child. This rendered Manji not only parentless, but also stateless – having no passport she could not even leave India. After a lengthy dispute, the Supreme Court of India ruled that the grandmother should be granted custody of the child. The Court recognised surrogacy as a way of reproduction for those unable to have biological offspring and directed the travel certificate to be issued.[189] Following the decision of the Supreme Court, the Indian authorities granted Manji the travel certificate. This was followed by the decision of the Japanese authorities to issue a year-long humanitarian visa,[190] which allowed the baby girl to be taken to Osaka.

A similar situation occurred in *Balaz,*[191] a knotty litigation involving a couple from Germany, which also commissioned a baby in India, ironically, with the assistance of the same doctor who

[185] ibid 413. Since the article was written before the ban on cross-border surrogacy came into force, Mohapatra also referred to India as being a permissive state.
[186] Welstead (n167) 298.
[187] Laurence Brunet, Janeen Carruthers, Konstantina Davaki, Derek King, Clairo Marzo and Julie McCandless, 'A Comparative Study on the Regime of Surrogacy in EU Member States' (2013) available at https://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf 25.
[188] (2008)(3) LS (SC). See also Y. F. Jayakumar, 'Socio-Legal Aspects of Surrogacy in India' (2011) 1 *Indian Journal of Law and Justice* 86, 86.
[189] (2008)(3) LS (SC) and Jayakumar (ibid) 87.
[190] Ibid.
[191] *Balaz v. Anand Municipality,* LPA 2151/2009, Gujarat HC.

facilitated the Yamadas' arrangement. The child was conceived with Jan Balaz's sperm and donor egg. Upon the child's birth, the Registrar had put Jan as the legal father and the surrogate as the legal mother on the birth certificate.[192] This was followed by granting two Indian passports to the twins - born to a German father but an Indian mother, they were deemed Indian by nationality.[193] However, since in Germany, similarly to the majority of the EU countries, all types of surrogacy are banned, birth certificates were insufficient for the purposes of filiation and for the issuance of German passports. The only option left for the German parents was adoption: firstly by taking custody of their children through the provisional guardianship agreement in India and afterwards adopting the twins back in Germany within a certain timeframe.[194] The Apex Court ruled that the Central Resources Adoption Agency had to re-consider the requirements without creating a precedent.[195] The Agency granted the certificates of no objection, allowing them to be adopted in Germany. Following the issue of German visas, the distressed parents were allowed to travel to Germany.[196]

Surrogate children are also affected when the intended parents become victims of misleading advice received from surrogacy agencies pursuing the goal of promoting the surrogate services. An issue of misrepresentation as to the legal outcome arose in the UK in 2011, when the clash with the Ukrainian legal system happened.[197] An English family contracted with the Ukrainian couple for commissioning a baby without being aware that according to the UK law the baby would be Ukrainian whereas the Ukrainian law would deem him British. Although it is not clear whether the Ukrainian surrogacy agency intentionally misled the potential parents, the outcome was that "the applicants, who had done their conscientious best to act lawfully and to be prepared for all contingencies, had been misled by some unduly simplistic advice."[198] MJ Hendley, while expressing concern about the current legal situation granted an *ex poste* authorization of the agreement. Albeit acknowledging that the underlying purpose for doing so is not the encouragement of commercial surrogacy, but the welfare of the child, he observed that: "the statute does give power to the High Court retrospectively to authorise these payments… because of the impossible position which the child born as a result of the arrangement finds themselves in when they are back in this country."[199] The current regulation of

[192] Ibid para 4.
[193] Yasmine Ergas, 'Babies without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy' (2013) 27 *Emory International Law Review* 117, 129.
[194] Ibid 130.
[195] Ibid 130.
[196] Ibid 130.
[197] *Re IJ (A Child)* [2011] EWHC 921.
[198] Ibid para 3.
[199] 'High Court Judge Approves Commercial Surrogacy' (19 May 2011) BBC News available at http://www.bbc.co.uk/news/uk-13452330 accessed on 2 March 2015.

surrogacy was referred to as a 'mess'[200] which couples get into unnecessarily, and worst of all, it is the children that carry the burden of the legal incoherence.

The above cases expose the extensive problems created by conflicting regulations of surrogacy between the states. The legal uncertainty has resulted in calls for and implementation of reforms in many permissive states, including India itself, which bans surrogacy for foreigners since 2015. Whilst the legislators clearly intended to prevent the exploitation of women and legal snags, some voiced concerns that a total ban would not, in reality, help surrogacy disappear.[201] Instead, it will 'go underground,' whereby women would still engage in surrogacy arrangements, yet would do so outside governmental control. This is what has already been reported to happen in China, where surrogacy is illegal yet still widespread.[202] It is claimed that despite the restrictions, around 10,000 surrogate babies are born yearly. The black market has led to a plethora of problems, where all parties may potentially become the 'helpless victims' but will be unable to obtain any legal protection.[203] One of the genetic mothers, known as Zuo, shared her unfortunate experience of participating in an illegal surrogacy arrangement. Upon receipt of $5000, her surrogate mother had taken the baby and vanished, leaving Zuo with nothing.[204] The legal position of surrogates participating in more expensive surrogacy schemes is also grim, if existent at all. They are 'contained' in a private apartment, controlled by the security guard. They are also isolated from their family or friends, so that they do not attempt to keep the children.[205] China is not the only country where underground surrogacy market flourishes. Illegal surrogacy had become so popular in ASEAN countries, it is even advertised on social platforms.[206] It is reported that the surrogates are being found in rural areas, e.g. in Vietnam, so that they could carry children for wealthy Chinese customers.

Despite the unfortunate implications the parties have suffered while engaging in illegal surrogacy arrangements, it is clear that it is not surrogacy itself to blame for it. It is the poor regulation or a complete lack thereof that blurs the line between a legally and morally questionable activity and a

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[200] Ibid.
[201] Generally Drishti Rathi, 'Critical Analysis of the Surrogacy Regulation Bill, 2016' (2020) 5 *International Journal of Innovative Science and Research Technology* 751, 751-756.
[202] Ian Johnson and Cao Li, 'China Experiences a Booming Underground Market in Surrogate Motherhood' (2014) *The New York Times* at <https://www.nytimes.com/2014/08/03/world/asia/china-experiences-a-booming- black-market-in-child-surrogacy.html> accessed 25 Jan 2015.
[203] Yukari Semba, Chiungfang Chang, Hyunsoo Hong, Ayako Kamisato, Minori Kokado and Kaori Muto, 'Surrogacy: Donor Conception Regulation in Japan' (2010) 24 *Bioethics* 348, 354.
[204] Johnson and Li (n201).
[205] Ibid.
[206] Athira Nortajuddin, 'ASEAN's Black Market Babies' (2 Mar 2020) *The ASEAN Post* at <https://theaseanpost.com/article/aseans-black-market-babies> accessed 10 Mar 2020.

reproductive method that allowed thousands to have genetic children. At the moment, only 71 country offer some sort of framework governing surrogacy,[207] which makes it more difficult to find a much needed unified approach. As Bajaj observes, "Surrogacy offers promising economic and social benefits, and effective regulation is feasible and necessary."[208] After all, surrogacy is in great demand "and where there is a need, there is a market."[209]

2.2.5 Practical difficulties in surrogacy (pre) arrangement

Some scholars describe surrogacy as "a perfect journey,"[210] referring to the arrangements ending according to the parties' plan: the parents receive the child, and the surrogate mother obtains remuneration for her hard work. Due to the sensitive nature of the arrangement and in order to minimise the risks of any future conflict, the selection of the parties by surrogacy agencies is a careful process, seeking to ensure compatibility between the surrogate mother and the intended parents. The latter engage in an 'in-depth' consultation, where their background, social, cultural and familial stability are being examined by the clinic workers.[211] Since the majority of the intended parents that bravely chose surrogacy are already psychologically traumatised by the years of infertility, in order to build the relationship of mutual trust the agencies intend to find the closest match possible, ensuring that there would be no miscommunication and the expectations of both parties are as clear as possible. Jacobson compares the process of selection to online dating, where, thanks to the modern social media platforms, the users can check the profile, hobbies and brief character outline before committing to a meeting in real life.[212] Nevertheless, sometimes even an inadvertent gesture might negatively affect the future relationship between the surrogate and the intended parents. As Patel and others note, even the intended parents' excitement may scare the surrogate mother as it could be interpreted as 'anxiety, aversion or aloofness.'[213] The intended parents can also be suspicious towards the surrogate and inadvertently cause her emotional frustration.[214] Despite the precautions taken by the parties involved, the surrogacy journey is not immune from the tensions that may arise even during the

[207] Jack Glaser, 'Womb for Rent: Regulating the international surrogacy market' (6 Nov 2016) *Brown Political Review* at <https://brownpoliticalreview.org/2016/11/womb-for-rent-regulating-international-surrogacy- market/> accessed 30 Nov 2017.
[208] Ibid
[209] Wan Bin in ibid.
[210] Heather Jacobson, 'Managing Relations: Surrogates and the Intended Parents' in Heather Jacobson, Naomi R. Gerstel, Karen V. Hansen, Rosanna Hertz and Margaret K. Nelson, *Labor of Love: Gestational Surrogacy and the Work of Making Babies* (Rutdgers University Press 2016) chapter 4.
[211] For a detailed discussion see Ansha Patel, Pratap Kumar and P. Sharma, 'The Miracle Mothers and Marvelous Babies": Psychosocial Aspects of Surrogacy – A Narrative Review' (2020) 1 The Journal of Human Reproduction and Science 89, 89-99.
[212] Jacobson (n209) 82.
[213] Patel, Kumar and Sharma (n210).
[214] Ibid.

process. At times something called "bad matches,"[215] general emotional frustration caused by misunderstood expectations as well as misinterpretations stemming from cultural barriers can still occur. Although some may be resolved amicably, others could lead to a complete agreement breakdown - the intended parents' worst fear. This sub-chapter will highlight the potential practical difficulties that may be encountered by the parties before and during the surrogate's pregnancy and conclude that if surrogacy is perceived as a business arrangement some of these challenges may be avoided.

At first glance, a successful surrogacy arrangement appears to be based on well-maintained interpersonal relationship and the establishment of mutual trust between the parties. Some suggest that trust leads to the fulfilment of a 'psychological contract,' where the parties feel morally obligated to ensure the performance.[216] It seems the phrase 'it takes two to tango' is very well applied in the sphere of surrogacy agreements. Indeed, in some arrangements, the intended parents and the surrogate might simply 'click:' a feeling that has been described by them as 'falling in love' or having 'butterflies.'[217] Their personalities, mutual interests as well as the similar life experiences would 'bring them closer' and ultimately lead to the conclusion that 'it is meant to be.' As Berend explains, during the communication the surrogate and the intended parents learn a lot about each other.[218] Some surrogates and the intended parents go the extra mile in their efforts to connect personally. They bring something they have created themselves if it transpires that they share the same hobby. For example, Erin Peters, an intended mother, brought a scrapbook to the meeting as an appreciation of the surrogate mother's hobby of making scrapbooks.[219] Another surrogate explains that her choice of the intended parents was determined by the chat about a TV show they both watched: "she said something about Grey's anatomy… and I go… these are my people!"[220]

However, whilst sometimes small things may help strangers to establish a personal relationship, it is well known that no surrogacy arrangement is be the same. The first 'meeting' is equally worrying for the surrogates and the intended parents. Both parties have an ideal 'façade' in mind and are aware of the possibility of being rejected at this stage if the wrong impression is made. It has been suggested that a wide range of factors may affect the parties' decision-making - sometimes the social background

[215] Jacobson (n209) chapter 4.
[216] Milissa FY Cheung, Chi-Sum Wong and Gong Yuan Yuan, 'Why Mutual Trust Leads to Highest Performance: the Mediating Role of Psychological Contract Fulfilment' (2017) 55 *Asia Pacific Journal of Human Resources* 430,430.
[217] An example of a Dawn Rudge, a surrogate mother from the US, provided by Jacobson (n209) 86.
[218] Zsuzsa Berend, 'The Romance of Surrogacy' (2012) 27 Sociological Forum 913, 920.
[219] Jacobson (n209) 86.
[220] Ibid.

or affiliations as well as body complexion may play a role in the decision-making as to whether the arrangement should proceed. As Leah, one of the surrogate mothers interviewed in Jacobson's study, admitted, she had been rejected by a prospective couple in the past and this has affected her confidence in the subsequent matching meetings.[221] Leah had experienced homelessness, lived in a car while completing her degree and was involved in a relationship with a convict. She was very concerned that the intended parents would perceive her as nothing more than "a bum off the street" [222] instead of a diligent and responsible surrogate, capable of performing her duties. Other surrogates expressed very similar concerns.[223] It is clear that at this stage the surrogates might become the victims of what Goffmann calls "the [desired] presentation of self."[224] He explains that it is inherent in human nature to 'accentuate' certain activities that would give a positive impression and supress the 'discrediting' ones in the relevant circumstances.[225] 'Construed to provide others with 'impressions' that are consonant with the desired goals of the actor'[226] the surrogates tend to act the way they *think* the intended parents would want them to be rather than what they *actually* are in order to stand out in the competition. Jacobson observes that in the context of matching the intended parents to a surrogate the impression-making is exacerbated by the extensive 'due diligence' that is usually carried out even before the first meeting – from candidate selection to phone conversation and electronic communication.[227] The surrogates are often forced to conceal their concerns and wishes in order to be selected. Some of them admitted to downplaying their financial instability in order not to 'scare' the intended parents off by asking for the payment to be increased, thereby looking 'demanding.'[228] Rosalyn Wheelan felt somewhat uneasy about the fee she had agreed to. She recalls feeling intimidated by the compensation negotiations and thought that showing that she was driven by the money rather than altruism would send the intended parents a wrong message.[229]

Yet, it is not just the surrogates that tend to be 'cherry-picked' by the intended parents, the matching process works the other way round too. Some surrogates also give the arrangement red light based on the intended parents' choice of a life style.[230] For them, the type of the family the child was going to be a

[221] Ibid 82.
[222] An interview with Leah Spalding in Jacobson ibid 83.
[223] Ibid 84.
[224] Erving Goffmann in Adam Barnhart at <http://web.pdx.edu/~tothm/theory/Presentation%20of%20Self.htm> accessed 5 Feb 2018.
[225] Erving Goffmann, *The Presentation of Self in Everyday Life* (Doubleday 1959) 114.
[226] Adam Barnhart (n223).
[227] Jacobson (n209) 84.
[228] Ibid.
[229] Ibid.
[230] ibid 88.

part of was the primary concern: "the baby [must be] raised with morals and in a good family."[231] Thus, one of the surrogates refused to carry a child for a family living in a caravan home with a cat constantly bringing in hunted rodents and bats. The surrogate noted that she was not really judgmental about the parents' lifestyle but could not imagine a child living in such conditions. Having imagined a child 'crawling around [the] dirty floor [with] bats coming into the house,' she decided not to proceed with that particular family.[232] There are also instances where the social differences hindered the parties' ability to match: the intended parents and the surrogate mothers simply belong to different social classes.[233] Angela Cross, a three-time surrogate, noted that her intended parents' circle was completely different compared to her own. Her intended parents were not famous themselves but were friends with famous people and lived in Beverly Hills. Another surrogate mother observed that not being as educated as the intended parents could have impeded their bonding. The intended parents '[kept] using all these big words' in the conversations whereas neither the surrogate mother nor her husband went to college.[234] The majority of the surrogates admitted that these differences lead to an initial hesitation and anxiety during the pregnancy.

By being intimate by its very nature, surrogacy undeniably may still be defined as what Majumdar calls a 'risky relationship.'[235] Despite having started on a positive note, some surrogacy relationships become tensed at a later stage. Whilst the parties clearly possess a great degree of enthusiasm and hope at the very beginning of the surrogacy journey, afterwards some rough bumps along the way could negatively affect the existence of trust between the parties, the allegedly holding element of the arrangement that already came into existence. In this context, an in itself risky relationship would also be exacerbated by medicalisation and the need for the surrogate's self-surveillance and the contemplations of either the surrogate mother cheating on the intended parents or the latter leaving her with no compensation.[236] The 'emotional roller-coaster' caused by pregnancy and fueled by hormonal changes as well as the fact that there is a large pecuniary element to the arrangement may lead to a surrogate feeling overwhelmed by the importance of her role.[237] Unlike the traditional pregnancy, where the future mother may distract herself with the house chores, the

[231] An interview with the surrogate Molly Hughes in ibid 88.
[232] ibid 88.
[233] ibid 87.
[234] ibid 87.
[235] Anindita Majumdar, 'Nurturing an Alien Pregnancy: Surrogate Mothers, Intended Parents and Disembodied Relationships' (2014) 21 Indian Journal of Gender Studies 199, 201.
[236] See generally Katie Featherstone, Paul Atkinson, Aditya Bharadwaj and Angus Clarke, *Risky Relations: Family, Kinship and the New Genetics* (London Berg 2006); see also Deborah Lupton, 'Risk and the Ontology of Pregnant Embodiment' in Deborah Lupton (ed.) *Risk and sociocultural theory: New directions and Perspectives* (Cambridge University Press 1999). See also Majumdar above (n234) 207.
[237] Jacobson (n209) 92.

distinguishing feature of surrogacy is the 'nine month vigil,'[238] where the surrogate might feel that she 'does not belong to herself.' It is argued that the intended parents may also sense the rising tensions. The fear of a failed arrangement may also take a toll on them, giving rise to potential conflicts. Jacobson's study reveals that the surrogates as well as the intended parents always have the thought of potential risks at the back of their minds, thereby firstly creating and later contributing to the uneasy atmosphere. According to the study, the intended parents also tend to be concerned that a surrogate may 'misbehave,' thereby putting the child's health at risk,[239] that she would change her mind and refuse to hand the child over after birth,[240] or that the pregnancy would not result in live birth whereby they would not only lose the child, but also substantial material and emotional investment. They are also concerned with the surrogate's health, for example a potential need for a Caesarian section or other medical complications.[241] Some surrogates do not respond well to the extensive involvement of the intended parents into their daily lives, adding to the intended parents' frustration. Although some of the surrogates wanted 'to enjoy their pregnancies with the intended parents' and do 'some shopping for maternity clothing, picture-taking… participate in the baby showers," in other words, to be appreciated for changing lives for the intended parents,'[242] others felt bothered by the latter and saw their engagement as an intrusion. As one of the surrogates observed, she did not have a feeling that the relationship was natural. She preferred to completely distance herself from the intended parents and have very little or no communication with them before the due date. Instead of feeling being cared of, she felt as if the intended parents felt obliged to impose a 'fake friendship.'[243] For her, constant health monitoring implies that she is irresponsible and cannot be trusted.

The constant anxiety as to the outcomes may be an indication of lack of trust potentially leading to the 'collapse of the arrangement.' In this context, "the monitoring of the pregnancy becomes a time of wait-and-watch that hides within it simmering undercurrents of conflict."[244] Yet, despite much emphasis placed on matching and bonding, interpersonal trust does not seem to be the mandatory prerequisite for a surrogacy arrangement to continue. There are numerous examples where the intended parents entered into an arrangement with the surrogate in another country, e.g. India or the United States. In the majority of cross-border arrangements the parties do not manage to create any sort of interpersonal relationship. In fact, they do not ever meet and the communication is maintained through a third party intermediary

[238] Majumdar (n234) 205.
[239] Jacobson (n209) 94.
[240] ibid 93.
[241] Ibid.
[242] ibid 91.
[243] ibid 92.
[244] Majumdar (n234) 201.

– an agency worker. The fact that the parties did not develop trust may only deprive them of the fulfilling elements of 'friendship' experience but should not affect the perception of trustworthiness. Therefore, if surrogacy is seen as being based on cooperation, rather than trust, an emotional element might be partially eliminated. In this respect, a contract is a useful tool in defining the contours and adding the business nature to the arrangement.

Overall, it is clear that surrogacy as a practice is not devoid of controversies. However, to some extent, the issues arising in imperfect arrangements may be solved by close regulation. Some scholars, like Millbank for example, argue that in order to tackle exploitation a flat rate could be introduced – a minimum fee for pregnancy providing for an average net profit so that to avoid unequal bargains that would allow to adhere to fairness.[245] Since degrading living standards are rooted in the failure of the state's economy to provide appropriate level of support to its population thereby motivating women to act as surrogates for the pay much lower than their Western counterparts. This is clear from the fact that $5000 received for a 9-month-pregnancy is the 10-year wage for an average Indian woman from a rural area. The inability to provide with other opportunities as well as low income from other sources force women to have recourse to commercial surrogacy.[246] As Gupta acknowledges: "the problem lies… with the lack of a powerful welfare state that fails to ensure the basic needs of its citizens and protect them from exploitation ... Empowerment of vulnerable people to meet their basic needs and strengthen the capabilities and rights of vulnerable women ... [is a thing for which] the state is accountable and must take action."[247] Hence, minimum welfare would require the state-funded legal advice, which would ensure that a commissioning couple is not subject to misrepresentation and surrogate mother to either unfair terms or pressure. This is apparent from the American example where surrogate mothers have other chances of getting equal remuneration whereas this is less likely for the Indian ones. This re-emphasizes the discrepancy in treatment between the so-called first-world countries and third-world countries as well as unfairness in social welfare system in India, rather than pressure from the commissioning couple. The governmentally increased wages for women, in turn, would respect their freedom to contract.

Secondly, since family formation involving surrogacy requires adherence by both parties to the contract there is also a call for counselling and monitoring. First of all, this would determine who is

[245] Jenni Millbank, 'Paying for Birth: the case for (cautious) Commercial Surrogacy' (2 Sep 2013) the Guardian at https://www.theguardian.com/commentisfree/2013/sep/02/australia-commercial-surrogacy.
[246] 'Journey to Parenthood' at http://www.oprah.com/world/Wombs-for-Rent.
[247] Jyotsna Gupta, 'Reproductive Biocrossings: Indian Egg Donors and Surrogates in the Globalised Fertility Market, International Journal of Feminist Approach to Bioethics (2012) 5 *International Journal of Feminist Approaches to Bioethics*147.

eligible for the agreement.[248] It should be noted that the counsellor himself should be experienced and capable of providing the surrogate mother with the necessary details[249] and options as well as assessing her suitability for this role. The operation of 'determination criteria' would be essentially *ex ante*, seeking to clarify the nature of the procedure as well as the feelings the surrogate might experience at the point of its completion before she enters into the agreement. Since surrogate motherhood still may raise concerns within society it seems this may have impact on a surrogate mother's mental health. Thus, it was suggested that a woman should not be allowed to become a surrogate for more than two times. Shanley proposes the agreement to be unavailable for those, who had never given birth before,[250] as potential surrogate mothers should be aware of what to expect immediately after the child is born.

Furthermore, the counselling services should place emphasis on care ethics helping the couple firstly to overcome the problem in relation to their infertility and to build the relationship with the yet unborn baby.[251] By establishing the link at the time of the conception the potential parents would think of the responsibility they are undertaking and help all of them become the narratives of the family history they are about to start writing.[252] In relation to the surrogate mother, counselling might assist to reach the decision before she embarks on this serious procedure. More specifically, it would be beneficial to assess whether the surrogate has considered the outcome in short-term and long-term. Obtaining some background information might assist the counsellors to familiarise themselves with the personality of the future surrogate mother. For instance, the preliminary questions might include the motivation underlying surrogacy, her family's attitude, the reasons for commitment to a particular couple, whether she wishes to continue the practice etc.[253] At the final stage of pregnancy and after the birth counselling would also help to 'ease some anxieties, facilitate decision making and ensure that issues are resolved at an early stage before difficulties had a chance to arise'.[254] Thirdly, there is a need for regulation that would determine the legal parentage of a baby. For these purposes, the starting point

[248] Andrea Stumpf, 'Redefining Motherhood: A Legal Matrix for New Reproductive Technologies' 1986) 96 Yale Law Journal 187, 195.
[249] Samuel Sanabria, When Adoption is not an Option: Counselling Implications Related to Surrogacy (2013) 25 Journal of Gay & Lesbian Social Services 269, 277.
[250] Mary Shanley, '"Surrogate Mothering" and Women's Freedom: A Critique of Contracts for Human Reproduction' (1993) 18 Signs 618, 621.
[251] Eric Blythe, Abigail Farrand, 'Reproductive Tourism – A Price Worth Paying For Reproductive Autonomy?' (2005) 25 Critical Social Policy 91, 108.
[252] Jennifer Parks, 'Care Ethics and the Global Practice of Commercial Surrogacy' (2010) 24 Bioethics 333, 335.
[253] Sanabria above (n248) 282.
[254] Edelmann in Olga Van Den Akker, 'Psychosocial Aspect of Surrogate Motherhood' (2007) 13 Human Reproduction Update 53, 57.

might be the so-called 'compulsory international coordination'.[255] Although not innovative[256] this approach would give effect to a contractual agreement relying on the intent-based paradigm. Anderson states that essentially it implies legislative enforcement and judicial protection of the intentions to raise a child. For example, in *Johnson v Calvert,*[257] the judge had to consider competing maternity interests genetic and gestational. The complexity was caused by the fact that Californian law recognised two routes to the recognition of motherhood – via genetic consanguinity as well as through carrying and giving birth to the child.

Having decided that without the genetic parents' intention to have a child, the child would not have been born, and since initially the surrogate mother had not intended to conceive, she could not have the intention to raise him, hence she was not the legal mother.

The intent-based approach might solve, at least partially, the jurisdictional issue of who, in law, should be the parents of a baby commissioned as a result of surrogacy arrangement. It could also provide at least a foundation for cross-border uniformity. If not providing the best possible results, this would be a clear improvement. With parenthood being determined at the time of conception, further uncertainties and legal challenges could be avoided. Although the situations the courts face bear striking differences, intent-based approach would allow the legislatures to determine legal parents in cases of assisted reproduction and surrogacy arrangements thereby ensuring that children have both legal parents. Thus, assuming that all the jurisdiction cross border recognise the rapidly developing reality of the reproductive world founded upon the concepts of contract and intent, the catastrophe of *Balaz* twins could have been avoided. Germany would simply consider the birth certificate as a basis for filiation, which in turn would suffice for the issuance of passports. If applied carefully, the intent-based approach is forward-looking and unlike rigid statutory-made law recognises the fact that society and its goals change which in turn would end all the parental chaos.[258] Consistency in the legal approach to surrogacy would be beneficial for those who wishes to create a family via such a non-traditional method.[259]

[255] Above (n113) 138.
[256] *Johnson v Calvert* (1993) 851 P.2d 776.
[257] Linda Anderson, 'Adding Players to the Game, Parentage Determinations When Assisted Reproductive Technology is used to create Families' (2009) 62 *Arkansas Law Review* 29, 33-34.
[258] Van Den Akker above (n237) 55.
[259] For further discussion see Melissa Ruth, 'Enforcing Surrogacy Agreements in the Courts' (2018) 63 *Villanova Law Review Online: Tolle Lege* 1, 19.

3. THE EVOLUTION OF SURROGACY ARRANGEMENTS IN THE RUSSIAN FEDERATION

3.1 Introduction

Assisted reproduction has become a 'new normal' in the sphere of procreation in Russia. The medical technologies have advanced to the extent when people can easily "trick the nature" and overcome the difficulties caused by infertility.[1] The development have been welcomed by the authorities for their perfect timing: the demographic situation has been identified as an area for concern since the end of the 20th century. The initial demographic gaps created by WWII and the post-Soviet fall economic crises have been further accelerated by the ongoing COVID-19 pandemic, and the mass migration abroad.[2] The lack of financial sustainability and appropriate accommodation as well as the increasing popularity of the so-called 'childfree' movement were also named as contributing factors.[3] More couples choose to be voluntarily childless: 46% of Russians aged 18-45 expressed their intentions to remain childfree and this number is expected to grow even further.[4] Therefore, currently the low birth rates are being outweighed by the high death rates.[5] As of 2017 this means that in 1000 people for every 11.4% of births, there is a 12.6% of deaths.[6] While not looking critical in short term, the future long-term state of demographics is not encouraging either. If the trend continues, by 2035 the natural growth is predicted to shrink into a negative ratio of at least - 6.3%,[7] meaning that the population numbers would be in an even steeper decline. By 2025 it is expected to drop to 124,9 million people. This constitutes a sharp contrast to the 146,880 million recorded in 2018.[8] Another anti-record was said to have been made in 2020. It is expected that the population has been further reduced by 158,000 people with the fall attributable to COVID-19 deaths and hesitancy to have children due to post-pandemic financial

[1] Лаптева Любовь Владимировна, 'Суррогатное Материнство В Российской Федерации' (2017) Образование и Наука в Современном Мире 374, 374. Lapteva Ljubov' Vladimirovna, 'Surrogatnoe Materinstvo V Rossijskoj Federacii' (2017) *Obrazovanie i Nauka v Sovremennom Mire* 374, 374. Liubov Lapteva, 'Surrogate Motherhood in the Russian Federation' (2017) *Education and Science in the Current Realities* 374, 374.

[2] Nataliia Granina, 'People do not Choose to have Children at all. The Population in Russia is being reduced each year. How will the Country overcome this crisis?' (25 Sep 2020) *Lenta.ru* at https://lenta.ru/articles/2020/09/25/demographics/ accessed 5 Oct 2020.

[3] 'The Childfree Generation: Why more young couples refuse to give birth?' (3 Apr 2019) Yandex.zen at https://zen.yandex.ru/media/wonderwoman/pokolenie-chaildfri-pochemu-vse-bolshe-molodyh-par- otkazyvaetsia-rojat-5ca4c41a29c43800b44c1198 accessed 5 Apr 2019.

[4] 'Almost half of Russians Happened to Be Childfree' (1 Oct 2020) *Rosbalt* at <https://www.rosbalt.ru/russia/2020/10/01/1866004.html > accessed 10 Oct 2020

[5] А. Шабунова и О. Калачикова, *Рождаемость И Воспроизводство Населения Территории* (ИСЭРТ РАН 2011) A. Shabunova i O. Kalachikova, *Rozhdaemost' I Vosproizvodstvo Naselenija Territorii* (ISJeRT RAN 2011) A. Shabunova and O. Kalachikova, *Birth and the Reproduction of Territorial Population*, (ISERT RAN 2011) table 1.2.

[6] This is a low prognosis. According to the average Russian Federal Statistical Service: Births, Deaths and Natural Growth in Population available at http://www.gks.ru/wps/wcm/connect/rosstat_main/rosstat/ru/statistics/population/demography/#.

[7] Ibid. This is a low prognosis. According to the average and high prognoses, the natural growth would be - 1,8% and 2,3% which is still relatively low.

[8] Rosstat Population (2018) Rosstat Population 2018 http://web.archive.org/web/20180317175529/http://www.gks.ru/free_doc/new_site/population/demo/Popul2018.xls .

turmoil.[9] This prompted the state to develop a 'holistic' approach to the problem by introducing various policies for, among other things, birth stimulation with the assistance of the ART,[10] thereby challenging the traditional family formation and the concept of motherhood. Thus, this chapter seeks to trace the development of the approach to family, motherhood and reproduction in Russia in the past centuries in order to understand the background to the establishment of the institution of surrogate motherhood. It will look at the historical evolution of the legislation on assisted reproduction and will also explain why the Church and the reactionaries failed to obstruct liberal development of surrogacy law. A broader approach to motherhood and childhood will help to contextualise the Russian approach to surrogacy in order to gain deeper understanding of the circumstances in which it came into existence and evolved. This chapter will also explore a number of failed attempts by conservative members of the State Duma in recent years to bring about regressive changes in surrogacy legislation. Identifying the reasons behind the lack of success of the conservative proposals for reform will cast light on the State's commitment to moving surrogacy law in a liberal direction.

The necessity to boost the demographics has been recognised by the President of the Russian Federation. Back in 2007 Vladimir Putin stressed the necessity for a 'corrective intervention in such a pessimistic situation.' He ordered a strict deadline before which the demographic decline had to be addressed. Thus, before 2025[11] 'the aim of the demographic politics of the Russian Federation is to improve life expectancy, reduce the death rates and increase the birth rates…in various federations the circumstances require urgent reaction.'[12] The goal is broadly aligned with the state's general policies on family and maternity support. The state has introduced more extensive young child support as well as a state subsidy for mortgage repayment for the families, to name just a few.[13] The mere hesitancy to have children or the lack of financial stability do not constitute the main causes of demographic decline. It is the concerning health status of the Russian citizens which was said to be the crucial obstacle to demographic growth. The problem is rooted in 'a complete degradation of reproductive health leading to infertility,' – explains Oleg Polikhin, the main expert on reproductive health at the

[9] Granina above (n2).
[10] Ирина Матвиенко, "Федеральные инструменты демографической политики" (2021) 66 *Региональная Экономика И Управление: Электронный Научный Журнал* 1, 1-18. Irina Matvienko, "Federal'nye instrumenty demograficheskoj politiki" (2021) 66 *Regional'naja jekonomika i upravlenie: jelektronnyj nauchnyj zhurnal* 1, 1-18. Irina Matvienko, 'Federal Demographic Policy Instruments' (2021) *66 Regional Economy and Management: Electronic Journal* 1, 1-18.
[11] 'The Concept of the demographical politics of the Russian Federation' until 2025 at <http://base.garant.ru/191961/ > accessed 5 Nov 2017.
[12] Ibid at http://base.garant.ru/191961/53f89421bbdaf741eb2d1ecc4ddb4c33/#block_1000.
[13] Anna Galcheva, Olga Ageeva, Ivan Tkachev, Yulia Starostina and Egor Gubernatorov, 'Putin Suggested a Solution to a Demographic Trap. How much will the Battle with Poverty and Low Birth Rate cost?' (15 Jan 2020) *RBC.ru* at <https://www.rbc.ru/economics/15/01/2020/5e1f21a39a7947dbeef5f5a3> accessed 22 Jan 2020.

Russian Health Ministry.[14] The data suggests that currently approximately 15-20% of married couples are unable to have children. Some suggest that this is already 5% above the critical index signaling that infertility constitutes a nationwide problem.[15] As Svitnev notes, some 6 million women and 4 million men are affected by infertility.[16] The already grim situation is expected to exacerbate in the near future with more millennials likely to suffer from fertility problems.[17] Whilst it has been widely proclaimed that infertility is no longer a 'death sentence,'[18] there are still cases where the treatment has not proved to be fruitful.[19] Infertility is blamed not only for the inability to procreate but also for disturbing the environment in the family – it leads to chronic stress, conflicts between the partners and reduces the quality of life overall.[20] Assisted reproduction would provide a unique opportunity to become parents for the couples suffering from infertility.

The Russian Federation is said to be 'one of a few lucky countries'[21] with the most progressive and liberal attitude towards assisted reproduction. Surrogacy also became popular nationwide bringing Russia in the top lead of countries where the arrangement is legally permitted.[22] Currently, the practice is widespread even in the most remote Russian regions, such as Siberia, which houses numerous clinics with the most affordable prices. The price range also used to make Russia an attractive surrogacy destination for foreign commissioning couples. Although the cost for surrogacy increased in 2017, it

[14] Yelena Yakovleva, 'The Main Reproduction Expert from Minzdrav named the main reason behind Demographic Problems' (12 Jun 2021) *Rossiyskaia Gazeta* at https://rg.ru/2021/06/12/glavnyj-reproduktolog-minzdrava-nazval-prichinu-demograficheskih-problem.html accessed 13 Jun 2021.

[15] Ю.А. Григорьев, О.И. Баран, «Семейная политика и материнский капитал как меры воздействия на рождаемость в России» (2017) 20 *Вестник Российской Академии Естественных Наук* 175. Ju.A. Grigor'ev, O.I. Baran, «Semejnaja politika i materinskij kapital kak mery vozdejstvija na rozhdaemost' v Rossii» (2017) 20 Vestnik Rossijskoj Akademii Estestvennyh Nauk. See in general Y. Grigoryev, O. Baran, 'Family Politics and Maternity Capital as Means to Promote the Birth Growth in Russia' (2017) 20 *Messenger of Russian Academy of Natural Science* 175, 176-177. It should be noted that the statistics is silent on unmarried couples, therefore, it could be presumed that the actual number is higher.

[16] Konstantin Svitnev, 'Gestational Surrogacy in the Russian Federation' in E. Scott-Sills (ed.) *The Handbook of Gestational Surrogacy*, (Cambridge University Press 2016) 232.

[17] 'Infertility in Russia and the World' *Reprobank* at https://reprobank.ru/novosti/stati/besplodie-v-rossii accessed 2 Aug 2017.

[18] Infertility: a Death sentence or a Hope for a Miracle?' *Abicadem* at <https://acibadem.com.ru/news/infertility- a-sentence-or-hope-of-a-miracle/ accessed 2 Sep 2017.

[19] Elena Oya, 'Infertile Russians are Becoming more common' (4 Jul 2019) News.ru at <https://news.ru/health/besplodnyh-rossiyan-stanovitsya-bolshe/> accessed 10 Aug 2019.

[20] 'Infertility in Russia' Reprobank at < https://reprobank.ru/novosti/stati/besplodie-v-rossii > accessed 5 Mar 2018

[21] Surrogacy in Russia and Abroad available at https://surrogacy.ru/en/surrogacy/surrogacy_russia_abroad/ .

[22] 'Russia is amongst the world leaders on Surrogate Motherhood' (8 Aug 2018) *Eurasia.net* at <https://russian.eurasianet.org/%D1%80%D0%BE%D1%81%D1%81%D0%B8%D1%8F-%E2%80%93-%D1%81%D1%80%D0%B5%D0%B4%D0%B8-%D0%BC%D0%B8%D1%80%D0%BE%D0%B2%D1%8B%D1%85-%D0%BB%D0%B8%D0%B4%D0%B5%D1%80%D0%BE%D0%B2-%D0%BF%D0%BE-%D1%81%D1%83%D1%80%D1%80%D0%BE%D0%B3%D0%B0%D1%82%D0%BD%D0%BE%D0%BC%D1%83-%D0%BC%D0%B0%D1%82%D0%B5%D1%80%D0%B8%D0%BD%D1%81%D1%82%D0%B2%D1%8> accessed 4 Mar 2019.

still remains relatively lower than in other permissive countries, such as the United States.[23] Thus, in 2015 more than 3,500 babies were born out of surrogacy arrangements, with around 9% involving foreign commissioning parents.[24] The increasing number of successfully completed surrogacy arrangements indicates increasing interest of the population in this reproductive method. Having recognised that surrogacy may offer a unique way of drastically changing the reproductive situation not just for the intended parents but also provide a long-term solution to demographic decline,[25] Russia became one of the few countries that legally allows surrogacy on altruistic and commercial bases. The state is engaged in various campaigns, seemingly further encouraging surrogacy. Despite the uncertainty surrounding the future legal eligibility of single fathers for access to surrogacy, it was proposed that the single fathers who are already engaged in surrogacy from December 2020 could apply for the so-called 'paternity' capital which would allow them to claim state support.[26]

The state offers a fairly comprehensive legal framework provided by the Family Code 1995 and the supplementary legislation. Yet, the despite having the 'most progressive [and detailed] laws on surrogacy,'[27] Russia's legal approach is extensively patchy, with a variety of grey areas, often leaving the parties in an uneasy position. The multi-partied nature of the arrangement gives rise to a variety of controversial issues that the legislation does not address. Art. 51(4) of the Family Code 1995 deems the surrogate mother to be the legal mother, essentially leaving the intended parents 'empty handed' if she wishes. The arrangement itself is governed by a contract, which also seems to lack enforceability – neither the Family Code nor the supplementing Federal Statutes clarify its nature or whether it possesses any normative force. The legislation fails to provide for the situations where the arrangement does not go as planned resulting either in death of either parties or loss of pregnancy. Judicial intervention, albeit partially addressing the issues, still fell short of remedying them. The element of subjectivity in the judges' perception of surrogacy leads to difficult situations where in seemingly identical cases the decisions made are completely the opposite.[28] This purpose of this chapter is to explain the current legal rules on surrogacy, including the criteria that the commissioning parents and

[23] For instance, the Altravita Surrogacy Agency price for single-baby surrogacy is 2,470,000 (£34,300). Cf. twin pregnancy which is 3,770,000 RUR (£52,000). It should be noted that this agency covers Moscow area which is rather expensive. https://altravita-ivf.ru/surrogatnoe-materinstvo.htmlhttps://altravita-ivf.ru/surrogatnoe- materinstvo.html .

[24] Prohibition of surrogate motherhood will exacerbate the demographic problem in Russia (16 Jan 2018) *MKRU* available at http://www.mk.ru/social/2018/01/16/zapret-surrogatnogo-materinstva-v-rossii-uglubit- demograficheskuyu-yamu.html.

[25] Konstantin Svitnev in E. Novoselova, 'A Mother for 9 months –Surrogate motherhood can solve the demographic problem' (2006) *A Federal Issue* 4243(0*) Russian Gazette* available at https://rg.ru/2006/12/08/surrogatnaya-mat.html .

[26] 'A proposal was introduced to the state Duma that would allow to pay capital for single-fathers engaged in surrogacy' (1 Dec 2021) *Tass* https://tass.ru/obschestvo/13076509?utm_source=yxnews&utm_medium=desktop&nw=1638531347000 .

[27] Konstantin Svitnev, 'Assisted Reproductive Technologies and the Right to Maternity' (2010) 3 *Medical Law* 6.

[28] Сулико Алборов*, Правовое Регулирование Суррогатного Материнства: Монография* (Юстицинформ 2020). Suliko Alborov, Pravovoe Regulirovanie Surrogatnogo Materinstva: Monografija (Justicinform 2020). Suliko Alborov, *Legal Regulation of Surrogate Motherhood: a Monograph* (Yustitsinform Moscow 2020) 17.

the surrogate mother have to satisfy, the rationale underlying the establishment of parenthood and the approach taken to the child registration. The chapter also looks at the background to the legislation and the legal treatment of complication in surrogacy arrangements.

3.2. The sources of Russian law on assisted reproduction: legislative hierarchy and the role of the judiciary

Assisted reproduction is subject to family law framework, deriving from a variety of sources. Apart from being a part of continental law tradition, Russian family legislation is also a product of unique historical events and political transformations that overwhelmed the country for centuries. It is, however, during the 20th century when the family law system sustained a drastic change from the so-called pre-revolution constitutional law, reflecting the transition from the absolute (constitutional) monarchy[29] to parliamentary republic.[30] The changes resulted in a vast array of laws governing familial relationships. As if to mirror the plurality of social and legal changes, the sources of law in Russian legal system also became highly diverse: varying not only by the scope of their application but also their normative force. The plurality of legislative sources may be explained by the fact that, historically, society was not regulated by a single mechanism, but various branches of government. After the collapse of the USSR and the loss of the former states, Russia was split into regions or 'republics,' each of which established its own legislative body governing the region, with the main power centralised in Moscow. It has been argued that "the diversification of the sources reflects the combination of rulemaking powers of various federal, regional and local authorities…"[31] this resulted in the hierarchy of legal norms which fully reflects the hierarchy of the bodies that enact and enforce them. The sources of Russian family law may be divided into normative acts, normative agreements and judicial practice.

Russian family law may be most usefully described as a 'pyramid.'[32] On its top sits the Constitution of the Russian Federation, enacted in its latest edition in 1993. Usually seen as a civil law source,[33] the

[29] From 1905-until February 1917. See М. В. Баглай, *Конституционное право Российской Федерации* (Москва Норма 2007). M. V. Baglaj, *Konstitucionnoe pravo Rossijskoj Federacii* (Moskva Norma 2007). M. Baglay, *Constitutional Law of the Russian Federation* (Moscow Norma 2007) 49.
[30] From February 1917 –until October 1917.
[31] Олег Кутафин, *«Источники Конституционного Права Российской Федерации»* (Москва Проспект 2013). Oleg Kutafin, «*Istochniki Konstitucionnogo Prava Rossijskoj Federacii*» (Moskva Prospekt 2013). Oleg Kutafin*, Sources of Constitutional Law of the Russian Federation*, (Moscow, Prospekt 2013) 18.
[32] Yuri Luryi, 'The Communist Soviet Family Law' (1979-1980) 20 *Manitoba Law Journal* 117, 120.
[33] Виктория Быстрова, «К вопросу о системе и предмете права» (2020) 10 *Молодой Ученый Международный Научный Журнал* 22, 23. Viktorija Bystrova, «K voprosu o sisteme i predmete prava» (2020) *10 Molodoj Uchenyj*

Constitution sets out the basic principles applicable to family relations. Art. 72(1) (k) of the Constitution provides that family law is subject to mutual governance by the Russian Federation and its 'subjects' – the republics. The Constitution further proclaims that Russia is a social state and that it guarantees the protection of private relationships.[34] Arts. 7 and 38 provide that family is protected by the state alongside motherhood, fatherhood and childhood. Art. 15 of the Constitution provides that it is the highest source of law: "the Constitution of the Russian Federation shall have supreme legal force and shall be applicable throughout the entire territory of the Russian Federation."[35] The Constitution is equally applicable to all citizens, including those residing abroad.[36] Its normative force has been confirmed by the Resolution of the Supreme Court № 8, which states that all constitutional norms take priority over all other normative legislative acts.[37] The courts of lower instance are also required to check the compatibility of the inferior norms with the Constitution.[38] The Constitution consists of the Preamble and two chapters. The Preamble is mainly an aspirational part of the Constitution, with the introduction defining the state's democratic values. In its substance, the Constitution ascertains the basics of political, social, legal and economic system in Russia and seeks to provide for the stability and strength of the relationships within society, as well systemising various governmental institutions.[39] Having resulted from the nationwide referendum following the constitutional crisis in 1993, the Constitution places emphasis on human rights and fundamental freedoms. It seeks to promote the aspirations, basic rights and liberties of the people in accordance with the international standards and treaties on human rights and fundamental freedoms. The Constitution also acts as the guardian of the rights by confirming that they will not be derogated from or interfered with: "the law of the Constitution… is the constituent pillar of the legal system… it is the totality of the legal norms as protected by the state…"[40] The special status of the Constitution is also reflected in the fact that, in order to "control the constitutionality of the normative legislative acts," the Constitutional

Mezhdunarodnyj Nauchnyj Zhurnal 22, 23. Viktoriia Bystrova, 'On a Question of a System and Subject of Law' (2020) 10 *Young Scientist: International Scientific Journal* 22, 23.

[34] Pavel Krashennikov, 'We will protect the Family, we will protect the children' (31 May 2020) *Rossiyskaia Gazeta* at <https://rg.ru/2020/05/31/kakie-garantii-i-zashchitu-daiut-roditeliam-i-rebenku-popravki-v-osnovnoj-zakon.html> accessed 7 Jun 2020.

[35] Translated by Peter B. Maggs, Olga Schwartz, William Burnham (eds.) *Law and Legal System of the Russian Federation* (6th ed.) 11.

[36] Б. Эбзеев, *Человек, народ, государство в конституционном строе Российской Федерации* (Москва 2013) глава 2 пара 3. B Jebzeev, *Chelovek, narod, gosudarstvo v konstitucionnom stroe Rossijskoj Federacii* (Moskva 2013) glava 2 para 3. B. Ebzeev, *A Person, a Nation, A State in the Constitutional Structure of the Russian Federation* (Moscow 2013) chapter 2 para.3.

[37] The Resolution of the Plenum of the Supreme Court № 8 from 31 Oct 1995 at <https://www.vsrf.ru/documents/own/8342/ >.

[38] Ibid.

[39] Ebzeev (n36).

[40] (n31) 44-45.

Court has been established.[41] The Court has powers to strike out the norms that contradict the Constitution.[42]

The Family and Civil Codes of 1995, constituting the crux of family law, are placed below the Constitution. The Codes govern a vast spectrum of relations: the Family Code seeks to regulate familial relationships, such as the formation of marriage, divorce and assisted reproduction, while the latter Code governs personal non-proprietary or inheritance relations.[43] The Codes[44] constitute a compilation of Federal Statutes - normative legislative Acts grouped to govern a specific *type* of social relations. The Codes' general aim is to further protect the values enshrined in the Constitution and make the aspirations more specific. Due to occasional gaps in provisions, the Codes are usually subject to less rigid interpretation by the courts.[45] Similarly to the European courts, the judges would interpret the provision 'in light of the general principles,' usually outlined at the beginning of each provision.[46] Standalone Federal Statutes, in general, are the most common type of legislative acts.[47] These are enacted by the State Duma and approved by the Soviet of the Federation by a majority vote.[48] Federal Statutes seek to supplement the gaps left by the Codes, by usually outlining the powers of various bodies. Federal Statutes govern the most important social relations and may be enacted by the State Duma only.[49] Kutafin notes that the superiority and almost complete universality of a Federal Statute means that "it realises the citizens' freedoms and inviolability of their rights and liberties."[50] For example, the Federal Statute № 143-FL sets out the process of birth registration which should be followed across the country. Whilst Federal Statutes have to comply with the Constitution, it is them, rather than the Constitution itself, that are crucial in the operation of the Russian legal system. Federal Statutes are applicable across the whole territory of the Russian Federation and are

[41] Mauro Mazza, 'The Russian Constitutional Court and the Judicial Use of Comparative Law: A Problematic Relationship' in Giuseppe Franco Ferrari (ed.) *Judicial Cosmopolitanism: The Use of Foreign Law in Contemporary Constitutional Systems* (Brill 2019) 532.
[42] Т. Алиев, «Роль Конституционного суда Российской Федерации в сочетании баланса частных и публичных интересов в России» (2010) 4 *Совеременное Право* 63, 64. T. Aliev, «Rol' Konstitucionnogo suda Rossijskoj Federacii v sochetanii balansa chastnyh i publichnyh interesov v Rossii» (2010) 4 *Soveremennoe Pravo* 63, 64. T. Aliev, 'The Role of the Constitutional Court of the Russian Federation in Combination with Private and Public Interests in Russia' (2010) 4 *Contemporary Law 63,* 64.
[43] Л. Герасимова, «*Семейное Право: Короткая Серия Лекций*» (Москва Юраит 2011) 13. L. Gerasimova, «*Semejnoe Pravo: Korotkaja Serija Lekcij*» (Moskva Jurait 2011) 13. L. Gerasimova, *Family law: a Short Series of Lectures* (Moscow Jurait 2011) 13.
[44] Other examples would include: Administrative, Labour, Tax, Civil, Construction, Land, Family and Criminal Codes.
[45] Maggs, Schwartz, and Burnham (n35) 15.
[46] Ibid 15.
[47] Ibid 13.
[48] 'Federal Law' the Soviet of the Federation at <http://council.gov.ru/services/reference/9550/> accessed 5 Jan 2017.
[49] Part 1 article 105 of the Constitution. The State Duma is the lower House of the Federal Assembly see http://www.politika.su/e/fs/gd.html.
[50] (n31) 49.

"*obligatory* for execution."[51] Part 5 article 76 of the Constitution provides that no normative Acts can contravene Federal Statutes enacted in accordance with the Constitution itself. In case of contradiction between a Federal Statute and another norm, the Federal Statute always prevails.[52] Art.115 further provides that governmental decrees are based upon Federal Statutes and are voided in case of a conflict.[53] Thus, even the decrees of the President of the Russian Federation (discussed below) should not contravene a Federal Statute.[54] Their strong normative force is reflected not only in the scope of their applicability but also in their relationship vis-à-vis other types of normative acts.

Despite the strong normative force of the Codes and the standalone Federal Statutes, their scope of application is not completely unlimited. Certain reservations are determined by the territorial division of the Russian Federation. As the Federation consists of 22 republics, or 'subjects,' each adhering to its own religious confessions and local traditions, the Family Code leaves the local governments to decide upon certain matters. For example, the Family Code allows the 'subjects' to determine the rules in regards to choice of a child's name, surname or a patronymic.[55] Whilst as a general rule, a child born on the territory of the Russian Federation must have a name, surname and a patronymic,[56] the 'subjects' may still choose to enforce their own rules, e.g. exclude the obligation to assign a patronymic upon the child's birth.[57] Thus, the Republic of Buryatia introduced its own rules, which allow to proceed with the child registration in accordance with the republic's own traditions and customs as long as both parents provide consent.[58] Some other areas delegated to the republics include, but are not limited to, determining the marriage age eligibility[59] and the rules for choosing the surname after marriage.[60] Allowing the republics to decide on certain matters does not necessarily imply the reduction of Federal Statutes' authority. Instead, the government was trying to reduce the 'forceful russification,' a popular and widely practiced strategy during the Soviet times.[61] Whilst seeking to achieve the unification of the Russian population, the effect of russification seems to be completely the

[51] (n50).
[52] Part 2 article 4 of the Constitution of the Russian Federation 1993.
[53] The Constitution of the Russian Federation 1993.
[54] Part 3 article 90 of the Constitution of the Russian Federation 1993.
[55] Art 58 paras 2 and 3 of the Family Code 1995.
[56] Art 19 para 1 of the Civil Code 1995.
[57] See generally Любовь Масимович, «Законы Субъектов Российской Федерации Как Источник Семейного Законодательства» (2016) 2 *Вестник Тверского Государственного Университета. Серия: Право* 83, 84. Ljubov' Masimovich, «Zakony Sub"ektov Rossijskoj Federacii Kak Istochnik Semejnogo Zakonodatel'stva» (2016) 2 *Vestnik Tverskogo Gosudarstvennogo Universiteta. Serija: Pravo* 83, 84. Liubov Maksimovich, 'The Laws of the Subjects of the Russian Federation as a Source of Russian Law' (2016) 2 *the Herald of TVGU the Series 'Law'* 83, 84.
[58] The Law of the Republic of Buryatia № 207-II from 22 Jun 1999.
[59] Art 13 para 2 of the Family Code 1995.
[60] Art 32 para 1 of the Family Code 1995.
[61] Maksimovich (n57) 85.

opposite – other nations strongly resisted what they saw as the 'Russian colonialism.'[62]

The Executive Orders of the President of the Russian Federation are ranked below the Federal Statutes. These are classified as sub-statutory Acts. The Orders are issued by the President of the State and govern the areas that are within the scope of his competence. The Orders are supplementary in nature, seeking to fill in a legal lacuna until the grey area becomes 'covered' by a Federal Statute.[63] The Orders are enforceable within the whole territory of the state. The Orders may have either normative or non-normative force and must not contradict the norms laid by the Constitution.[64] Those having normative force become effective seven days after being signed off. For example, the Order "On the Main Directions of State Policies Governing Family" from 1996 sets out the aims of the state policies in the family law sphere – "to provide the appropriate standards for the realisation of the family's functions and improvement its quality of life."[65] Since this Order addresses a specific social issue - welfare state - and complies with broader aspirations provided by the Constitution, it has normative force. Similarly, the Order "On National Aims, Strategic Tasks on Development of the Russian Federation until 2024" № 204 from 2018 makes the improvement of the demographic situation in Russia one of the state's strategic priorities.[66] The Order provides that decreasing population constitutes one of the state's main concerns. Historically, the Orders have been criticised for being controversial. On the one hand, as they were issued by the executive branch, they were said to blur the difference between the legislative and the executive, thereby disturbing the principle of the separation of powers. On the other hand, it was also argued that the efficiency and speed with which the Orders were issued outweighed the downsides:[67] the urgent need for stabilisation of the state takes precedence over theoretical legitimacy.[68] Despite their apparent advantages, making a recourse to a Presidential Order is not a frequent practice: from 1991 until 2015 only 129 supplementary Orders have been issued.[69]

Due to intersectionality between family law and other spheres, the Orders of various Ministries

[62] Svetlana Lurie, 'Russian Empire as an Ethnocultural Phenomenon' (1994) *Social Sciences and Contemporary Times* 56-64.
[63]Алимбек Хиндзев, «О Восполняющих Указах Президента РФ» (2016) 2 Международный Журнал Конституционного и Государственного Права 87. Alimbek Kindzev, «O Vospolnjajushhih Ukazah Prezidenta RF» (2016) 2 *Mezhdunarodnyj Zhurnal Konstitucionnogo i Gosudarstvennogo Prava* 87. Alimbek Khindzev, 'About the Complimentary Ruling of the Russian President' (2016) 2 *International Journal of Constitutional Law* 87.
[64] Art. 90 of the Constitution of the Russian Federation 1993.
[65] № 712 from 14 May 1996.
[66] From 7 May 2018.
[67] See generally З. Телубаев, «Скрытый Авторитет Президента» (2012) 27 Вестник Челябинского Государственного Университета 36. Z. Telubaev, «Skrytyj Avtoritet Prezidenta» (2012) 27 *Vestnik Cheljabinskogo Gosudarstvennogo Universiteta* 36. Z. Telubaev, 'The Hidden Authority of the President' (2012) 27 *The Herald of Cheliabinsk State University* 36.
[68] Ibid 36.
[69]Khindzev (n63) 88.

often supplement the law. These are placed below the Constitution, Federal Statuses and the Orders of the President. Art. 3 of the Civil Code allows the government ministries to govern both public and private relationships, mostly on an *ad hoc* basis.[70] Whilst at first glance the role of the Ministries' Orders might seem insignificant, they play one of the leading roles in governing social policies.[71] For example, the Orders of the Ministry of Health provide the regulation of the crossroads between family law and medicine. They constitute a specialised norm building upon the Constitution and Federal Statutes in the relevant sphere, usually the regulation of hospitals. The Orders, however, do not have a uniform application, which means that they do not apply to *all* medical institutions without an exception.[72] Usually, the Order would state to which institution it is "addressed." For example, the Order of the Ministry of Justice "On the Application of Assisted Reproduction Technology" is specifically addressed to clinics specialising in assisted reproduction.

Having "embraced the idea of direct incorporation of international law in order to accelerate the establishment of the rule of law in the country,"[73] the Russian Federation became signatory to various international Treaties and multiple international agreements.[74] One of the most important international agreements in the family sphere is the UN Convention on the Rights of the Child 1989. The Russian position within international law is an unusual one – officially, the Russian Federation is the legal successor to the USSR, which meant it could not immediately become a member of international organisations such as the United Nations. Unlike former Soviet Republics, the Russian Federation has never declared its independence. However, the role of international law in the Russian legal system has been steadily increasing. One of the main constitutional provisions solidly codifies the principle of precedence of international law over conflicting national legislation. According to art. 15 para 4, in case of a conflict between family norms and an international agreement, the latter takes precedence. This is further confirmed in the Federal Statute "On the International Treaties in the Russian Federation" № 101-FL[75] "international norms and principles of international law and international agreements are

[70] Peter B. Maggs, Olga Schwartz, William Burnham (n35) 17.
[71] Ю. Арзамасов, «Какие Органы формируют правовую политику российского государства?» в А. Малько и А. Мазуренко, *Правовая Политика в Современной России* (Саратов 2009). Ju. Arzamasov, «Kakie Organy formirujut pravovuju politiku rossijskogo gosudarstva?» v A. Mal'ko i A. Mazurenko, *Pravovaja Politika v Sovremennoj Rossii* (Saratov 2009). Yu. Arzamasov, 'What Organs Form Legal Policies of the Russian State?' in A. Mal'ko, N. Isakova and A. Mazurenko, *Legislative Politics in Contemporary Russia* (Saratov 2009) 8.
[72] Диана Мустафина-Бредихина, «Иерархия нормативных правовых актов Российской Федерации: зачем врачу об этом знать?» (2018) *Неонатология: Новости. Мнения. Обучение* 158. Diana Mustafina-Bredihina, «Ierarhija normativnyh pravovyh aktov Rossijskoj Federacii: zachem vrachu ob jetom znat'?» (2018) *Neonatologija: Novosti. Mnenija. Obuchenie* 158. Diana Mustafina-Bredikhina, 'The Hierarchy of Legislative-Normative Acts of the Russian Federation: why does a doctor have to know about it?' (2018) *Neonatology. News. Opinions. Education* 158.
[73] Maggs, Schwartz, Burnham (n35) 32.
[74] International Agreements in Russian Legal System at http://constitution.garant.ru/science- work/modern/3540062/.
[75] From 21 Jul 1995.

constituent of the Russian legal system. If the law provided by the international agreement differs from the one provided by the national law, the international law will be applied." This incorporates international law in the Russian legal system and provides that in case of a conflict international law is applicable until the national law is brought up to the standard of the international one.[76] This is also applicable to civil law cases. Para 1 article 7 of the Civil Code confirms that international law applies to civil relationships as provided in sections 1 and 2 of the Code, unless the international agreement explicitly states that a situation requires the regulation on the national level. Federal Statute № 101-FL from 15 Jul 1995 "On international agreements of the Russian Federation" confirms that an agreement should be complied with from the date of entry into force and deemed unenforceable only in accordance with the conditions outlined in the agreement itself.[77] Furthermore, part 1 of the Civil Procedural Code makes it an obligation for the judiciary to accept that universally recognised principles and international law constitutes a part of the Russian legal system. When interpreting the national law provisions which are in conflict with international law the judges should give priority to international law. This may be seen as an important step towards the further development of Russian partnership with the world; it is reinforcement of its social, political and cultural connection with other states. National law assists Russian foreign policy to succeed, as well as protect the state international rights and interests. Indeed, the promotion of the collaboration with international law means that Russia may learn from legal responses from other jurisdictions. Boyarshinov notes: "it is a way to improve the operation of Russian legal system… the collected experience will help to stabilise contractual relations with the Russian Federation and international relations in general."[78]

Judicial decisions have a special place within the hierarchy of the legal sources. Arguably, the decisions may be called 'quasi-legislation.' The traditional school of thought claims that since the courts' role is only to apply the law, rather than create it, judicial decisions do not constitute a source of law at all.[79] Therefore, this school of thought accepts the legal force only if the norm was enacted by Parliament: "Russia remains to be the state which is still unfamiliar with the concept of [judicial] precedent."[80] From this perspective, accepting the decisions or the Orders of the Plenum as binding

[76] Ibid.
[77] Ibid.
[78] Ibid.
[79] Maggs, Schwartz, Burnham (n35) 18.
[80] Роман Мохов, «Правовая Доктрина как источник права» (2018) *Политика, Экономика и Инновации* 20-22. Roman Mohov, «Pravovaja Doktrina kak istochnik prava» (2018) *Politika, Jekonomika i Innovacii* 20-22Roman Mokhov, 'Judicial Doctrine as a Source of Law' (2018) *Politics, Economics and Innovation* 20-22.

would imply an "abuse of court's powers."[81] Nevertheless, case-law remains highly influential – some suggest that it even plays a role identical to a source of law.[82] The Orders of the Plenums have one apparent advantage: unlike Parliament-enacted law, which is notorious for its rigidity, judge-made law is more flexible, more adaptable to social changes.[83] It can also be argued that the courts are more than mere 'application machines.'[84] Their decision-making is a 'creative process,' which cannot be ignored.[85] This role is most prominent for the Constitutional Court – not only do its decisions have to be taken into account by the lower courts but also the legislator.[86] The inferior courts are not, in practice, allowed to 'deviate' from the decisions made by the senior courts. Issuing an Order of the Plenum constitutes an effective way of "guiding" the courts of lower instances through the situations where a Federal Statute or another normative act is unclear.

It is clear that the plurality of legal sources in the Russian legal system is a reflection of the ongoing political and historical changes the state has undergone. These are influenced by various factors, such as the peculiar territorial layout as well as its location. Despite being affected by the increasing role of the international instruments, Russian legal system largely remains the product of the singular features of the democratic and market reforms; the difficult economic and political state of society wracked by economic problems and unsuccessful reforms built upon the ruins of the post-Soviet legislation.

3.3. The view of the Church and its historical influence on the understanding of family and motherhood

Russia has always been one of the most multi-nationalist states,[87] where each nation is free to practice

[81] С. Бошно, «Судебная Практика: Способы Выражения» (Государство и Право 2003) 21. S. Boshno, *«Sudebnaja Praktika: Sposoby Vyrazhenija»* (Gosudarstvo i Pravo 2003) S. Boshno, *Judicial Practice: Ways of Expression* (State and Law 2003) 21.
[82] Mokhov (n80) 20-22.
[83] И. Покровский, *Главные Проблемы Гражданского Права* (M 2001). I. Pokrovskij, *Glavnye Problemy Grazhdanskogo Prava* (M 2001). I. Pokrovskii, *The Main Problems of Civil Law* (M 2001) 138.
[84] Ibid.
[85] Ibid.
[86] В. Быстров, «Судебный прецедент как формальный источник права» (2020) 1 *Вестник Самарской Гуманитарной Академии* 153, 155-56. V. Bystrov, «Sudebnyj precedent kak formal'nyj istochnik prava» (2020) 1 *Vestnik Samarskoj Gumanitarnoj Akademii* 153, 155-56. V. Bystrov, 'Judicial Precedent as a Formal Source of Law' (2020) 1 *the Herald of Samara Academy of Humanities* 153, 155-156.
[87] O. Aleshina, 'Influence of orthodox customs on family legal relations in the sphere of conclusion of marriage' WiseLawyer at https://wiselawyer.ru/poleznoe/35341-vliyanie-pravoslavnykh-obychaev-semejnye- pravootnosheniya-sfere-zaklyucheniya accessed 7 Mar 2017.

religion in accordance with its own choice or tradition. Freedom of religion is cemented in the Constitution, which provides that all faiths are equal and there is no legal obligation to practise one.[88] Unlike many other states with multi-religious population, Russia has never been involved in a religious conflict with the religious majorities and minorities co- existing peacefully.[89] As a matter of history, however, the Russian Orthodox Church grew dominant with 74% of Russians considering themselves to be orthodox.[90] Its distinctive status has also been noted in the Federal Statute № 125-FL, whose Preamble provides for the Orthodoxy's 'special role in the Russian history.'[91] Religious practice and legal developments have historically been interrelated.[92] In fact, it was even argued that religion was one of the main roles in shaping ancient Russian law.[93] Since the early 11th century,[94] the Russian Orthodox Church has governed various legal branches, most prominently, family law.[95] The Church has been responsible for the strong promotion of the traditional notion of 'family', where women were almost oppressed and subjected to the will of their husbands. The extent of the Church's influence on the state's policies, however, has been fluctuating over time: from peaking in late 16th century, it started to fade away in late 17th century and completely diminished with the establishment of the Communist ideology in the 20th century. The collapse of the Soviet Union allowed a partial 'rehabilitation' of religion.[96] Despite the state's secularisation, the Church's influence is continuing to increase.[97] Thus,

[88] Arts 14 para 1 and 2 of the Constitution of the Russian Federation from 12 Dec 1993.
[89] Aleshina (n87).
[90] The data is valid as of 2012. Unfortunately, no more recent official statistics is available. <https://rosinfostat.ru/religii-v-rossii/#i > accessed 5 Jan 2018.
[91] From 26 Sep 1997.
[92] С. Поленина, «История России. Право и Религия. Социальные Аспекты» (2018) 2 *Правовая Политика и Правовая Жизнь* 14, 14. S. Polenina, «Istorija Rossii. Pravo i Religija. Social'nye Aspekty» (2018) 2 *Pravovaja Politika i Pravovaja Zhizn'* 14, 14. S. Polenina, 'History of Russia: Law and Religion. Social Aspects' (2018) 2 *Legal Politics and Legal Life* 14, 14.
[93] Д. Пашенцев, «Роль Религии В Формировании Российской Правовой Традиции» (2010) 6 Правоведение 168, 168-173. D. Pashencev, «Rol' Religii V Formirovanii Rossijskoj Pravovoj Tradicii» (2010) 6 *Pravovedenie* 168, 168-173D. Pashentsev, 'The Role of Religion in Shaping of the Russian Legal Tradition' (2010) 6 *Jurisprudence* 168, 168-173.
[94] See generally Александра Дорская, *Влияние Церковно-Правовых Норм На Развитие Отраслей Российского Права* (Санкт-Петербург 2007). Aleksandra Dorskaja, *Vlijanie Cerkovno-Pravovyh Norm Na Razvitie Otraslej Rossijskogo Prava* (Sankt-Peterburg 2007). Aleksandra Dorskaia, *The Influence of the Church's Norms on the Development of the Legal Branches of Russian Law* (Sankt-Peterburg 2007) 9.
[95] Е. Сухарева, «Проблемы правового регулирования происхождения ребёнка в условиях применения репродуктивных технологий: реалии времени и христианские ценности» (2018) 43 *Философия. Социология. Право* 155, 155-156. E. Suhareva, «Problemy pravovogo regulirovanija proishozhdenija rebjonka v uslovijah primenenija reproduktivnyh tehnologij: realii vremeni i hristianskie cennosti» (2018) 43 *Filosofija. Sociologija. Pravo* 155, 155-156. E. Sukhareva, 'Problems of Legal Regulation of the Origin of Child of Assisted Reproductive Technologies: The Realities of Time and Christian Values' (2018) 43 *Series in Philosophy. Sociology. Law, Scientific Statements* 155, 155-156.
[96] Полина Горкунова, «Церковно-государственные отношения в пост-советскую эпоху» (2009) 11 *Молодой Ученый* 221, 221-223. Polina Gorkunova, «Cerkovno-gosudarstvennye otnoshenija v post-sovetskuju jepohu» (2009) 11 *Molodoj Uchenyj* 221, 221-223. Polina Gorkunova, 'Church and State Relationship in Post-Soviet Epoch' (2009) 11 *Young Scientist* 221, 221-223.
[97] Ольга Вольтер, «Отношения Русской Православной Церкви и государства в XX -начале XXI века: идеологическое измерение проблемы» (2009) 3 *Среднерусский Вестник Общественных Наук* 100, 105. Ol'ga Vol'ter, «Otnoshenija Russkoj Pravoslavnoj Cerkvi i gosudarstva v XX -nachale XXI veka: ideologicheskoe izmerenie problemy» (2009) 3 *Srednerusskij Vestnik Obshhestvennyh Nauk* 100, 105. Olga Volter, 'The Relationship between the Russian

this chapter seeks to analyse whether increasing secularism has played a role in the Church's fluctuating influence on the concept of motherhood and procreation as well as the role of the child in the family. This chapter will firstly look at the influence of the Church in the 16th century. The introduction of Domostroi ('*Domestic Order'*), a book containing the household norms, marked the most oppressive period for women. The chapter will then analyse the impact of the gradual shift to secularism at the end of the 19th century until the Great October Revolution in 1917. Lastly, the chapter will look at the developments post-1990, after the downfall of the Soviet regime. These periods coincide with the major political turmoil either extending or diminishing the impact of the Church's dogma on public opinion. The chapter will conclude that the Church has always been adherent to traditional concepts of family and motherhood thereby rejecting untraditional family formations and means of reproduction including surrogate motherhood.

From the times of Ancient Rus' the Russian Orthodox Church has grown highly influential not only in the determination of the legal norms but also enforcing them through the so-called *judicem dei*.[98] The Church powerfully transformed family law from a very primitive form, mainly deriving from some local customs,[99] into a separate branch of law, governing familial relationships. It incorporated Byzantine and Roman laws and its own canons thereby creating a fusion of imperial and ecclesiastical law.[100] This marks the establishment of the traditional concept of family and marriage. In stark contrast to the previous regime, which allowed incestuous marriages and polygamy,[101] the Church 'strengthened marriage and gave it the significance of a sacrament.'[102] The position of women within the marriage, however, could hardly be envied – the Church has set certain limits on freedom to obtain a divorce, by prohibiting, for example, voluntary separation.[103] In the eyes of the Church a woman was 'an unclean [sinful] creature'[104] with childbirth being the only way of redemption. The Church asserted that 'the sanctity of motherhood' may only be achieved through the pain and suffering caused by

Orthodox Church and the State at the beginning of XX – XXI Centuries: Ideological Dimension of the Problem (2009) 3 *Mid-Russian Herald of Social Sciences* 100, 105.

[98] Б. Успенский, «Право и религия в Московской Руси» (2008) *Факты и Знаки: Исследования по Семиотике* 122, 122. B. Uspenskij, «Pravo i religija v Moskovskoj Rusi» (2008) *Fakty i Znaki: Issledovanija po Semiotike* 122, 122. B. Uspenskii, 'Law and Religion in Moscovian Rus' (2008) *Facts and Signs: the Examination of history's semiotics* 122, 122.

[99] Harold J. Berman, 'Soviet Family Law in the Light of Russian History and Marxist Theory' (1946) 56 *The Yale Law Journal* 26, 26.

[100] Ibid.

[101] Ibid 27.

[102] Ibid.

[103] Ibid.

[104] Н.Л. Пушкарева, *Женщины Древней Руси* (Издательский Дом Мысль 1989) глава 2. N.L. Pushkareva, *Zhenshhiny Drevnej Rusi* (Izdatel'skij Dom Mysl' 1989) glava 2. N. Pushkareva, *Women of Ancient Rus'* (Publishing House "Mysl' 1989) chapter II.

physical pain during natural childbirth.[105] Vasyagina and Kalimullin observed that the Church sought to incorporate a social ideal of motherhood with Virgin Mary being a role model: "the value of childbearing embodied in the image of Our Lady, determined the emergence of the idea-image of women as mothers. It is a cultural symbol that defines the concept of the sanctity of mothers, their value to the world."[106] It is believed that a concept of motherhood became so important, an ancient custom even allowed pregnant women to commit theft, a crime that in other circumstances would have been punishable by rods:[107] "future mummies were allowed to enter [any] garden and pick anything [her heart] desired, be it an apple, cherry or a cucumber and a parsnip."[108] The years of Mongol invasion, where gender oppression was the norm,[109] have further contributed to Church's ideals of family and the gender roles. According to Berman, this was the period where the position of women became even more vulnerable. In light of the Mongol approach, it became acceptable for women '[to be] locked away' from social life. This approach became more entrenched after release of the first ever family manual,[110] the *Domostroi*, the compilation of tyrannical commandments on 'household organisation.'[111] Written by archpriest Sylvestr, the book provided an explicit instruction on the 'wife whipping method'[112] detailing the circumstances for and the ways of 'correct [wife] beating.'[113] In accordance with the *Domostroi* the Church encouraged the husband's dominance, with the only role assigned to a woman continued to be the mother.[114] Her main duties were to serve the husband and raise and care for children.[115] The Church has also remained the sole interpreter and enforcer of the *Domostroi*, requiring people to obey God and maintain a traditional form of a family.[116]Albeit falling short of being a binding form of legislation, the *Domostroi* has significantly influenced the social perception and treatment of women, which remained mostly derogatory until the 19th century.

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[105] Irina Akhundova, 'Without the Happiness of Motherhood there is no Sacrament of Motherhood' (20 Oct 2015) Pravoslavie at <https://pravoslavie.ru/86929.html> accessed 10 Jan 2017.
[106] Nataliya N. Vasyagina and Aidar M. Kalimullin, 'Retrospective Analysis of Social and Cultural Meanings of Motherhood in Russia' (2015) 7 Review of European Studies 61, 62.
[107] 'How Theft was Punisheable at old times' (11 Apr 2011) 1tv.ru at < https://www.1tv.ru/shows/dobroe- utro/mezhdu-tem/kak-nakazyvali-za-vorovstvo-v-starinu > accessed 5 Jun 2018.
[108] Zhanna Sribnaia, 'Motherhood in ancient Russia' (27 Oct 2006) *Motherhood* at <https://materinstvo.ru/art/969> accessed 5 Jun 2018.
[109] Berman (n99). Some, however, question the accuracy of this theory. See e.g. Donald Ostrowski, Muscovy and the Mongols: Cross-Cultural Influences on the Steppe Frontier (Cambridge University Press 1998) Book Review 205.
[110]Rosemary Jane Finlinson, 'Gender, Body and Parenthood in Muscovite Russia' (April 2020) at https://www.repository.cam.ac.uk/bitstream/handle/1810/311277/Redacted-Finlinson-2020-PhD.pdf?sequence=1 14.
[111] Berman (n99) 31.
[112] Elaine Elnett, *Historic Origin and Social Development of Family Life in Russia* (Columbia University Press 1926) 34, 35
[113] Ibid.
[114] Art 130 of the Domostroi.
[115] Margarita Kovyneva, 'Domostroi: the Norms of Family Life in Rus' Kultura.rf at <https://www.culture.ru/materials/254777/domostroi-normy-semeinoi-zhizni-na-rusi> accessed 17 Jan 2018.
[116] Dorskaia (n94).

In late 18th century the Church's influence started to gradually reduce, with the majority of its lands being 'secularised' in favour of the state.[117] Whilst the Church was dependent on the state, this period may be described mostly as a time of forced cooperation between religion and the state. On the one hand, the Monarch's vast power and his personality was still believed to be 'given by God:'[118] "the personality of the Emperor is *sacred* and inviolable."[119] On the other hand, however, the Church also retained its importance - it still played a major role in the regulation of familial relationships. The *Domostroi*'s customs were modified and developed, laying the foundation for subsequent Imperial Russian Code of Laws, the first full collection of law that came into force in 1835.[120] The Code has been a product of the state – a specific body has been created for its revision – the committee consisting of representatives from the Ministry of Justice.[121]

Family law of the Russian Empire was deemed to be the 'fusion' – it remained under the government of both the Church and the state, striking a careful balance between religious compliance and the state's authoritarian absolutism. Although still being highly dependent on the Monarch's will and unable to conduct its affairs without his or her approval, the Church was influential in the Monarch's decision-making too.[122] Family law, in turn, has been based on a variety of religious canon laws, such as the so-called divine law, the laws of the Gospel writers etc., which was subsequently built upon by the secular legislation.[123] For example, the state enforced the engagement eligibility criteria that were prescribed by the Holy Synod, the highest body governing the Church.[124] The legislation did not seem to undermine the religious norms, but on the contrary, reinforce them to ensure that they are

[117] The Decree of Catherine II to the Senate, "On the Division of Spiritual Possessions…" from the 8 Mar 1764.
[118] This was reflected in various laws, e.g. the Constitution of 1906, clause 4 - the main law of the Russian Empire available at 'Domarchive' at http://www.domarchive.ru/history/part-1-empire/59.
[119] Clause 5 of the Constitution 1906.
[120] A Compilation of Laws of the Russian Empire is declared as an active source of legislation' *Presidential Library* at <https://www.prlib.ru/history/619022> accessed 4 Jun 2018.
[121] 'Codification of Legislation under Nicholas I' at <https://histerl.ru/lectures/19_vek/kodifikacia_zakonov.htm#i-6 > accessed 4 Jun 2018.
[122] А. Семашко, «Синодальный XIX век в истории отношений государства и РПЦ» (2007) 2 *Знание. Понимание. Умение* 150, 150. A. Semashko, «Sinodal'nyj XIX vek v istorii otnoshenij gosudarstva i RPC» (2007) 2 *Znanie. Ponimanie. Umenie* 150, 150. A. Semashko, 'Sinoidal XIX Century in the History of the Relationship between the ROC and the State' (2007) 2 *Knowledge, Understanding and Skills* 150, 150.
[123] Анна Семашко, «Брачно-Семейные Отношения В России В Xix Веке: Правовые Основы Реализации Церковью Делегированных Ей Полномочий» (2015) 15 Молодой Ученый 467, 467. Anna Semashko, «Brachno-Semejnye Otnoshenija V Rossii V Xix Veke: Pravovye Osnovy Realizacii Cerkov'ju Delegirovannyh Ej Polnomochij» (2015) 15 *Molodoj Uchenyj* 467, 467. Anna Semashko, 'Marital and Family Relationships in Russia in XIX century: the legal basis and the realisation of the delegated powers by the Church' (2015) 15 *Young Scientist* 467, 467.
[124] Ibid.

complied with occasionally through criminal punishment.[125] The first Family Code from 1914 echoes the Constitutional provisions by stating that religious marriages are equated to civil marriages and create the same rights.[126] The position of women within the Church-established patriarchy remained rather peculiar, if not outdated. Although the state has tried to retreat from the tyrannical nature of *Domostroi,* it still retained some of its core commandments. For example, women's rights were limited as they were still subordinate to men within the family hierarchy.[127] According to arts. 107-108 of the Imperial Code of Civil Laws, "a wife must obey her husband… be respectful of her husband… a wife must subdue to the will of her husband."[128] Whilst not explicitly codified in the Code, procreation has been crucial to the marriage and motherhood was widely seen as the woman's only true purpose.[129] It implied that a "mother giving birth, shining in the faith and love is the very heart of life processes, the foundation of life."[130] The child, therefore, should become the mother's 'centre of [her] world.'[131] This position was reflected in the fact that there was no existing legislation governing women's rights specifically, they simply were not at the centre of the state's attention.[132] Yet, women were deemed to be protected through as 'mothers.' In order to promote motherhood, the state sought to implement various policies aiming at protecting motherhood and childhood. The state enacted the first laws recognising motherhood as the social and legal status of a woman.[133] Protection of pregnant women was placed under the realm of criminal law. Murders committed by pregnant women were excused as an act of 'madness,' thereby leading to a reduced sentence.[134] The Monarchs have established various charities

[125] В.В.Клочков, *Закон И Религия: От государственной религии в России к свободе совести в СССР* (Политическая Литература 1982) 54. V.V.Klochkov, *Zakon I Religija: Ot gosudarstvennoj religii v Rossii k svobode sovesti v SSSR* (Politicheskaja Literatura 1982) 54. V. Klochkov, *The Law and Religion, From State Religion to the Freedom of Conscience in USSR,* (Political Literature 1982) 54.

[126] A Compilation of Laws Volume 10 Part 1 from 1914.

[127] С. Ворошилова, *Правовое положение женщин в России в XIX- начале XX вв.*(Саратов 2011) 45-48. S. Voroshilova, « Pravovoe polozhenie zhenshhin v Rossii v XIX- nachale XX vv.(Saratov 2011) 45-48. S. Voroshilova, '*Legal Position of Women in Russia in XIX- early XX centuries'* (Saratov 2011) 45-48.

[128] A Code of Laws of the Russian Empire Vol.10 Part 1.

[129] Валентина Фадюшина, «Влияние Русской Православной Церкви на воспитание детей в семье» (2009) Областная Научная Конференция Молодых Исследователей «Шаг В Будущее» 1, 7. Valentina Fadjushina, «Vlijanie Russkoj Pravoslavnoj Cerkvi na vospitanie detej v sem'e» (2009*) Oblastnaja Nauchnaja Konferencija Molodyh Issledovatelej «Shag V Budushhee*» 1, 7. Valentina Faduyshina, 'The Influence of Russian Orthodox Church on a Child Upbringing in a Family' (2009) Local Scientific Conference of Young Scientists "A Step into the Future' Tuymen' 1, 7.

[130] E. Shamarina, 'Cultural meaning of motherhood in Western European and Russian philosophical thought' (2008) Master's Thesis in Nataliya N. Vasyagina and Aidar M. Kalimullin, 'Retrospective Analysis of Social and Cultural Meanings of Motherhood in Russia' 7 *Review of European Studies* 62.

[131] Ibid.

[132] Виктория Мун, «Охрана Материнства И Детства В Научной, Общественной И Политической Мысли России В Середине XIX - Начале XX Вв» (2019) 2 *Вестник Саратовской Государственной Юридической Академии* 67, 68-69. Viktorija Mun, «Ohrana Materinstva I Detstva V Nauchnoj, Obshhestvennoj I Politicheskoj Mysli Rossii V Seredine XIX - Nachale XX Vv» (2019) *2 Vestnik Saratovskoj Gosudarstvennoj Juridicheskoj Akademii* 67, 68-69. Viktoriia Mun, 'Protection of Motherhood and Childhood in the Scientific, Social and Political Thought of Russia in the Mid XIX- early XX Centuries' (2019) *the Herald of Saratov State Law Academy* 67, 68-69.

[133] Ibid.

[134] Виктория Мун, «Законодательное регулирование охраны прав беременных женщин и женщин-матерей в России в середине XIX – начале XX века» (2020) *Вестник Саратовской государственной юридической академии* 37, 40-41.

and societies that aimed at improving social conditions for mothers and children,[135] including the provision of assistance to mothers serving a prison sentence.[136] Thus, the adherence to traditional ideals of family and motherhood seem to have been very strong by the late 19th – early 20th century.

The imperialist legacy, however, was brutally destroyed by the Great October Revolution in 1917. Having started with the occupation of the government in Petrograd Russia has embarked on something that was subsequently labelled as an "unprecedented experiment – a systematic, state-supported attempt to destroy religion."[137] This period symbolised not only a mere retreat from the Church's dogmas, but its relentless and complete destruction. The state based its policy on the well-known Marxist dictum that 'religion is the opiate for the masses'[138] and put all the effort to implement it in practice. Thus, a few years later, Lenin ordered in his Decree that "the confiscation the valuables, [belonging] to the Churches and monasteries has to be conducted [very quickly] and relentlessly. The more representatives of spirituality are shot the better."[139] The Bolsheviks quickly excluded religious studies from schools and universities, parents were not permitted to raise their children in a religious background.[140] The peasantry used to religious customs and unable to adapt to the changes complained against the closures of churches but was repressed.[141] As Solzhenitsyn wrote: "Militant atheism - … is not the periphery, it is not incidental … to the communist politics, but it [was its] main 'rotator'.[142]

The patriarchal understanding of a family and motherhood engrained by the Church during the imperialist times became a subject to extreme criticism and denial. Secular legislation was used to fill

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Viktorija Mun, «Zakonodatel'noe regulirovanie ohrany prav beremennyh zhenshhin i zhenshhin-materej v Rossii v seredine XIX – nachale XX veka» (2020) 1 *Vestnik Saratovskoj gosudarstvennoj juridicheskoj akademii* 37, 40-41. Viktoriia Mun, 'Legal Regulation of Protection of Rights of Pregnant Women' (2020) *1 the Herald of Saratov State Law Academy* 37, 40-41

[135] Adele Lindenmeyr, 'Maternalism and Child Welfare in Late Imperial Russia' (1993) 5 *Journal of Women's History* 114, 114-125.

[136] Art. 213 the Statute of Custody 1890 Vol.14.

[137] Giles Fraser, Why the USSR did not destroy religion (31 Oct 2017) Russia Today available at https://inosmi.ru/politic/20171031/240650870.html.

[138] Karl Marx in R. Ellwood, G. Alles, The Encyclopaedia of World Religions (New York 1998) 160.

[139] Н. Емельянов, « Оценка статистики гонений на Русскую Православную Церковь с 1917 по 1952 гг» (1999) *Богословский сборник* 258, 258-259. N. Emel'janov, « Ocenka statistiki gonenij na Russkuju Pravoslavnuju Cerkov' s 1917 po 1952 gg» (1999) *Bogoslovskij sbornik* 258, 258-259. N. Emelianov, 'The Evaluation of the Statistics of the Repressions imposed on the Russian Orthodox Church from 1917 to 1922' (1999) *Theologian Herald* 258, 258-259.

[140] А. Л. Худобородов, М. А. Яшина, «Репрессивная политика советского государства в отношении Русской православной церкви (1920—1930-е гг.)» (2011) 17 *Вестник ЮУрГ* 61, 61. A. L. Hudoborodov, M. A. Jashina, «Repressivnaja politika sovetskogo gosudarstva v otnoshenii Russkoj pravoslavnoj cerkvi (1920—1930-e gg.)» (2011) 17 *Vestnik JuUrG* 61, 61. A. Khudoborodov and M. Yashina, 'Repressive Politics of a Secular State in Relation to the Russian Orthodox Church' (1920-1930) (2011) 17 *The Herald of South-Ural State University: Socio-Humanitarian Sciences* 61, 61.

[141] Ibid 61.

[142] Aleksandr Solzhenitsyn, Templton Lecture (10 May 1983) Guildhall, London at http://www.literator.ucoz.ru/publ/7-1-0-85.

the gaps and partially replace canon law".[143] The state took over other spheres that used to be subjected to the Church's customs. Thus, various religious principles, such as the sanctity of marriage sank into oblivion. The Church became completely alienated from the processes of conclusion of marriages and their dissolution.[144] The state has rapidly issued two Decrees – "On Civil Partnership" and on "Dissolution of Civil Partnership"[145] making the formation of marriage and divorce its own matter. Motherhood has also undergone what has been labelled as 'sovietisation,'[146] a process of complete transformation from 'motherhood as a burden' to 'motherhood as happiness.'[147] The Bolsheviks declared the 'death' of family as an institution and liberalisation of women from 'domestic slavery.'[148] Contrary to the Church's ideals, the Soviet ideal of mother was the so-called working mother: "the primary role of a woman [being] a hard-working person, an employee outside her household."[149] A woman was a political and social actor,[150] a propagandist of the communist ideology.[151] This is not to say that motherhood, as defined by religious norms, has completely been rejected. The Soviets deemed motherhood as the 'secondary role' of a woman – outside work, she could still be a mother and a housekeeper. A Soviet mother was portrayed as an object for immense pride and a living proof of a progressive society.[152] However, the promotion of motherhood had nothing to do with religious ideals

[143] Н. Нижник, *Правовое Регулирование Брачно-Семейных Отношений В Контексте Эволюции Государственно-Правовой Системы России, Ix - Xx вв.* (Санкт-Петербург 2003) 35. N. Nizhnik, *Pravovoe Regulirovanie Brachno-Semejnyh Otnoshenij V Kontekste Jevoljucii Gosudarstvenno-Pravovoj Sistemy Rossii, Ih - Hh vv.* (Sankt-Peterburg 2003) 35. N. Nizhnik, *Legal Regulation of Familial Relations in the context of evolution of the state-legal system of Russia, (IX-XX cent.)* (Saint-Petersburg 2003) 35.

[144] Historical Aspects of the formation and updates of Russian Family Law, the Process of Formation of Russian Family Law, http://studbooks.net/1111652/pravo/istoricheskie_aspekty_formirovaniya_obnovleniya_rossiyskogo_semeynogo_prava.

[145] These Decrees were passed within two-day time-frame. See Xenia Cherkasova, 'On the History of Codification of Family Law in Russia' (2020) Student Science: an Insight into the Future 147, 148.

[146] Юлия Градскова, «Культуризация, гигиена и гендер: «советизация» материнства в советской России в 1920-1930х» в Павел Романов и Елена Ярская-Смирнова, *Советская Социальная Политика 1920-1930х. Идеология и Повседневность* (Вариант 2007) 243. Julija Gradskova, «Kul'turizacija, gigiena i gender: «sovetizacija» materinstva v sovetskoj Rossii v 1920-1930h» v Pavel Romanov i Elena Jarskaja-Smirnova, *Sovetskaja Social'naja Politika* 1920-1930h. Ideologija i Povsednevnost' (Variant 2007) 243. Yulia Gradskova, 'Cultureness, Hygiene and Gender: the 'sovietisation' of motherhood in Soviet Russia in 1920-1930s' in Pavel Romanov and Yelena Yarskaia-Smirnova, *Soviet Social Politcs of the 1920-1930. Ideology and Daily Life* (Variant 2007) 243.

[147] Ibid.

[148] Natalia Cherniaeva, 'Production of Mothers in Soviet Russia' (14 Oct 2004) Polit.ru at <https://polit.ru/article/2004/10/14/chern/ > accessed 25 Feb 2017.

[149] Ibid.

[150] Марина Латышева, «Образ Советской Женщины В Журнале "Работница" (1923-1937 Гг.) 1 *Этнодиалоги* 95, 97. Marina Latysheva, «Obraz Sovetskoj Zhenshhiny V Zhurnale "Rabotnica" (1923-1937 Gg.) 1 *Jetnodialogi* 95, 97. Marina Latysheva, 'The Image of a Soviet Woman in the Journal 'Rabotnitsa' (1923-1937) 1 *Ethnodialogues* 95, 97.

[151] 'The Mother, An employee, Housekeeper. How the vision of femininity has changed over in Soviet journals?' (14 Mar 2018) *Proftula* at <http://proftula.ru/articles/301/39547/ > accessed 21 Mar 2018.

[152] 'Kolhoznitsa: Gender Story of Soviet Peasantry' (8 Mar 2016) at https://latifundist.com/blog/read/1365- kolhoznitsa-gendernaya-istoriya-sovetskogo-krestyanstva accessed 22 Jan 2018.

themselves – the state saw mothers as nothing more than useful tools in building communism.[153] Although similarly to the Church the state also strongly supported women's role as child-bearers, it did so insofar it made women's' position more equalised to men.[154] Thus, through various statutes and initiatives, the state ensured that all responsibilities for child-rearing and their provision would also be borne by the Soviets.[155] For example, the VTSYK enacted the Act on Civil Statuses № 79 from 1924, which provides that if a woman is involved in child-rearing in addition to primary occupation, she becomes entitled to half of the estate, acquired during her marriage.[156]

During and after the Second World War, the remaining adherents of the Church distinguished themselves by serving at the frontline.[157] Not only have the archbishops promoted anti-fascist policies but also acted as scouts, spying on the Germans. The Church's patriotic attitude has been recognised by the Soviet state, which put an end to anti-religious propaganda and pardoned some of the bishops.[158] By virtue of Stalin's Decrees, some privileges of the Church were re-introduced, such as partial re-openings and deeming the Church as having a limited legal personality.[159] However, this does not mean that the Soviets allowed secularism to be overtaken by religion. The Church was still very limited in its rights and continued to play absolutely no role in the law-making process. The state was concerned with rapidly declining demographics and was actively trying to re-build the economy and promote childbirth instead of rushing to significantly reform the Church's position. For the state, the post-War period was significant for glorifying motherhood by means of awards and orders. Thus, in 1944 the state issued an Order of the Supreme Soviet of the Soviet Union "On increasing state Aid to Pregnant Women, Mothers with Many Children and Single Mothers, Strengthening the protection of mothers and children, on establishing the highest degree of distinction - the title "Mother Heroine" and

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[153] «Советские женщины активные строители коммунизма» (1959) 58 *Социалистическая Якутия* 3. «Sovetskie zhenshhiny aktivnye stroiteli kommunizma» (1959) 58 *Socialisticheskaja Jakutija* 3. 'Soviet Women are Active Builders of Communism' (1959) 58 *Socialist Yakutia* 3.

[154] See G. Litvinova, 'Protection of Motherhood and Childhood in the USSR (2018) at https://library.by/portalus/modules/love/readme.php?subaction=showfull&id=1518354208&archive=&start_from=&ucat=& .

[155] О. Хасбулатова и А. Смирнова, «Эволюция государственной политики в отношении семьи в России в XX - начале XXI века» (2008) *Женщина в российском обществе* 1, 5. O. Hasbulatova i A. Smirnova, «Jevoljucija gosudarstvennoj politiki v otnoshenii sem'i v Rossii v XX - nachale XXI veka» (2008) *Zhenshhina v rossijskom obshhestve* 1, 5. O. Khasbulatova and A. Smirnova, 'The Evolution of State Policies in Relation to Family in Russia in XX- beginning of XXI Century' (2008) *A Woman in Russian Society* 1, 5.

[156] Arts. 792, 794-795.

[157] See generally О. Зеленова, « Русская Православная Церковь в годы Великой Отечественной войны» (2015) *Контуры глобальных трансформаций: политика, экономика, право* 52, 52-63. O. Zelenova, « Russkaja Pravoslavnaja Cerkov' v gody Velikoj Otechestvennoj vojny» (2015) *Kontury global'nyh transformacij: politika, jekonomika, pravo* 52, 52-63. O.Zelenova, 'Russian Orthodox Church during the Great Patriotic War' (2015) *The Contours of Global Transformations: Politics, Economics and Law* 52, 52-63.

[158] Ibid 60.

[159] Ibid 60-61.

the establishment of the Order "Maternal Glory" and the Medal of Maternity."[160] This Order encouraged birth by providing the monthly payments which increased in accordance with the number of children in the family.[161] For example, a mother of three children was to be awarded a one-off payment of 200 roubles whereas a mother of ninth and tenth child would obtain not only a one-off payment of 1750 roubles but also additional monthly support of 125 roubles.[162]

A brief period of religious tolerance abruptly terminated with the beginning of the 'Khrushev thaw'[163] in 1958-1959. Apart from mass closure of churches and other religious establishments, Khrushev sought to completely eliminate the remains of religion from Soviet life. Unlike his predecessors, Khrushev did not seek to 'use' the Church in building communism, but make it completely disappear from the face of the Earth. This period marks not simply the establishment of a secular state, but an attempt to create a whole new fully atheist one. Khrushev promised to "show the last archbishop on television."[164] The leader introduced a variety of totalitarian laws, prohibiting religious books from being displayed in libraries, the 'sacred places' were turned into waste tips. The Criminal Code was amended accordingly by introducing harsher sentences for violation of the provisions on "separation of the Church from the state"[165] and "on creation of religious groups."[166] Often these provisions were interpreted broadly and inconsistently, making them more repressive than originally envisaged.[167] The churches and other religious places were sometimes closed without any warning or legal basis whatsoever.[168] Once again, the Church became completely alienated from the sphere of private life. The state saw religion as a threat to communist family life often prompting conflicts between religious parents and atheist children.[169] The state sought restrict parental rights for teaching

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[160] From 8 July 1944.

[161] Б. А. Архангельский, Г. Н. Сперанский, Мать и Дитя в СССР (Медгиз 1955) глава 1. B. A. Arhangel'skij, G. N. Speranskij, *Mat' i Ditja v SSSR* (Medgiz 1955) glava 1. B. Arkhangelskii and G. Speranskii, *Care of Mother and Child in the USSR* (Medgiz 1955) chapter 1.

[162] Ibid.

[163] This is usually referred to Krushchev's rule, criticism of Stalinism and a period of rehabilitation. See 'Territory Terror' http://territoryterror.org.ua/en/history/1953-1964/.

[164] Aleksei Leonov, 'Khrushev's toll on religion' (17 Oct 2008) *Stoletie* at < https://www.stoletie.ru/territoriya_istorii/hruschevskiy_udar_po_pravoslaviju_2008-10-17.htm > accessed 13 Jan 2018.

[165] Art. 142 of the Criminal Code 1960.

[166] Art. 227 of the Criminal Code 1960.

[167] Татьяна Никольская, *Русский протестантизм и государственная власть в 1905 - 1991 годах* Издательский дом Европейского Университета в Санкт-Петербурге 2009) 198. Tat'jana Nikol'skaja, *Russkij protestantizm i gosudarstvennaja vlast' v 1905 - 1991* godah (Izdatel'skij dom Evropejskogo Universiteta v Sankt-Peterburge 2009) 198. Tatiana Nikolskaia, *Russian Potestantism and State Power 1905-1991* (Publishing House of a European University in Saint Petersburg 2009) 198.

[168] В. Дымарский, Хрущев и церковь. Антирелигиозная кампания (АСТ 2011) 1-340. V. Dymarskij, Hrushhev i cerkov'. Antireligioznaja kampanija (AST 2011) 1-340. Vitalii Dymarskii, 'Khrushev and the Church. Anti-Religious Campaign' in The Times of Khrushev: (AST 2011) 1-340.

[169] 'The Country that Disappeared. Children and State Atheism. Real Stories' at

religion and forbad children's attendance of churches.[170] Children of religious parents were forcefully removed from their homes and placed in a state-run institution. Voronina describes the situations when children tried to escape home but were returned.[171] This repressive trend continued almost until the collapse of the USSR in 1991.

The 1990s were a controversial period for the Russian Orthodox Church. Having identified the political turmoil as an opportunity to re-establish its position, the Church has started to actively cooperate with the state.[172] In attempts to democratise the new country, its first President, Boris Yeltsin, fully supported the Church's activity, thereby ending the period of strong atheism and beginning to collaborate with religious organisations.[173] In order to mark the new relationship between the Church and the state a new piece of legislation has been enacted. It sought to transform the relationship between the state and the Church: clause 5 of the Law on Freedom of Conscience and Religious Organisations[174] legally prohibited anti- religious propaganda by stating that "the government does not sponsor the actions of religious establishments and anti-religious movements and propaganda". Furthermore, after 72 years since its enactment, the draconian Decree "On Separation of Religion and the State" was also declared ineffective. The Law "On Freedom of Religion"[175] provided that churches were not the property of the state anymore and allowed to choose religious studies as an optional module at schools. The state control over religious establishments also stopped. In totality, Russian society went through a full cycle of secularisation: from complete religiosity to religious indifference/ atheism, to religious syncretism, to complete secularisation/ partial resurrection of religiosity.[176] In the post-Soviet era the position of the Church was greatly improved.

After the Soviet collapse, Russia remained a secular state, albeit partially restoring the Church's position in social life. The downfall of communism led to increased permissiveness, whereby the

https://www.invictory.org/articles/history/8677-strana-kotoroj-ne-stalo-deti-i-gosateizm-realnye-istorii accessed 27 Jan 2018.

[170] Nikolskaia (n169) 198.

[171] L. Voronina, 'History.Documents MHG (1976-1982) (12 Jan 1977) at https://web.archive.org/web/20120201031102/http://www.mhg.ru/history/14AE490 accessed 27 Jan 2017

[172] Aleksii Fedotov, Russian Orthodox Church in 1943-2000: inter-Church Life, Relationship with the State and Society at <https://azbyka.ru/otechnik/Istorija_Tserkvi/russkaja-pravoslavnaja-tserkov-v-1943-2000-gg-vnutritserkovnaja-zhizn-vzaimootnoshenija-s-gosudarstvom-i-obshestvom/4_1>.

[173] Ibid.

[174] "On Freedom of Conscience and Religious Organisations" № 41. Superseded by the Federal Law on the Freedom of Conscience and Religious Associations from 26.09.1997 N-125 FL.

[175] The Law of RSFSR № 267-1 (as amended from 27.01.1995) "On Freedom of Religion" from 25 Oct 1990.

[176] Ю. Синелина, «О циклах изменения религиозности образованной части населения» (2003) *Социология Религии* 89, 89. Ju. Sinelina, «O ciklah izmenenija religioznosti obrazovannoj chasti naselenija» (2003) *Sociologija Religii* 89, 89.Y. Sinelina, 'On Changing Cycles of Religiosity of Educated Part of Russian Society' (XVIII cent-1917) (2003) *Sociology of Religion* 89, 89.

society, tired of ever-lasting religious restrictions, hoped that the Church could constitute a tool for its unification.[177] Undeniably, the Church's participation in political matters has become more extensive compared to the Soviet times.[178] Nevertheless, it still has no major say on policy matters. The Church only expresses its opinion on socially controversial matters: "the Church is a part of the society so speaking out on various social matters is its very duty."[179] The Church participates in numerous discussions on private family life and procreation. Its advocacy for traditional, almost *Domostroi*-like family remains as strong as ever. As discussed below in greater detail, in 2017 the Church was one of the main proponents of surrogacy ban. Still seeing natural birth as a continuation of marriage,[180] the Church is highly critical of assisted reproduction that involves donor sperm, eggs or surrogacy.[181] For example, the Church is highly reluctant to christen children born out of surrogacy unless the parents admit that, by entering into a surrogacy arrangement, they have engaged in a morally questionable or even sinful activity. Some representatives of the Church even go as far so as to say that the intended parents should confess prior to christening of the surrogate child.[182] The Holy Synod of the Russian Orthodox Church[183] provides that the Church needs to be certain that the parents will raise the child in a purely Christian environment: "[this is only possible after] they make a penance for neglecting the Christian tradition.[184] The Church claims to be sympathetic to childless couples, yet, the only methods of procreation it accepts are adoption and artificial insemination with the husband's sperm.[185] For the Church, artificial insemination does not violate sanctity of marriage as it bears no substantial differences with natural conception. Surrogate motherhood, by contrast, is equated to 'irresponsible motherhood:'[186] "gestational carriage of a fertilized egg by a woman who has to give the baby away…

[177] Fedotov (n172).
[178] Generally A. Dorskaia (n94).
[179] 'Scientists against the Involvement of the Russian Orthodox Church in the State's Life' (23 Jul 2007) Finmarket at < http://www.finmarket.ru/main/article/632506 > accessed 20 Sep 2017.
[180] Russian Orthodox Church, On Christening of Children Born with the Assistance of Surrogate Motherhood, Official Website of Moscow Patriarchy (2013) the Journal of Holy Synod at http://www.patriarchia.ru/db/text/3481024.html.
[181] Н. Агеева, «Биоэтическое измерение вспомогательных репродуктивных технологий» (2014) 2 Инновации в науке 68, 68 N. Ageeva, «Biojeticheskoe izmerenie vspomogatel'nyh reproduktivnyh tehnologij» (2014) 2 *Innovacii v nauke* 68, 68. N. Ageeva, Bioethical Dimension of Assisted Reproductive Technologies (2014) 2 *Innovations in Science, A Compilation of Articles from XXX International Scientific-Practical Conference* 68, 68.
[182] И. Минюшева, «К Вопросу О Функционально-Смысловых Типах Речи В Публикациях Российской Прессы» (2014) *Духовная Ситуация Времени. Россия XXI Век* 34, 36. I. Minjusheva, «K Voprosu O Funkcional'no-Smyslovyh Tipah Rechi V Publikacijah Rossijskoj Pressy» (2014) *Duhovnaja Situacija Vremeni. Rossija XXI Vek* 34, 36. I. Miniusheva, 'On the Question of Functional types of Speech in Publication of Russian Press (2014) Philosophy, Culture, Education 34, 36.
[183] Will also be referred to as "ROC".
[184] (n180).
[185] Ibid.
[186] Why is the Church against Surrogate Motherhood? Orthodoxy and the World (2013) at http://www.pravmir.ru/pochemu-cerkov-protiv-surrogatnogo-materinstva/.

after birth, is unnatural and morally unacceptable even if performed on a non-commercial basis".[187] Furthermore, by allowing the interference of a third party in an intimate relationship, sperm and egg donation are said to disturb marital relations.[188]

The Church's assertions are implausible for two reasons. First of all, such disapproval of assisted reproduction contradicts the Church as a pro-family establishment. Indeed, the Church submits that its priority is the entrenchment of the traditional understanding of a family by stating that family is the Godly creation and God commanded humans to reproduce: "childbirth has not only demographical but also a sacred aim, which is clear from the viewpoint of faith… [you have to] look forward to a new baby, like an angel…"[189] Thus, the very mission of parents is to have a baby; this makes a child almost central to the family's existence[190] Therefore, by forbidding surrogacy and other means of assisted reproduction the Church denies infertile couples the joy of parenthood as well as an opportunity to fulfil their mission in life. This, in turn, deprives the family of the cementing element, the element which would make the family complete.[191] This approach may be contrasted with other religions, for example Judaism. The latter is less principled when it comes to christening of children. Judaism rejects discrimination between children born via natural birth and surrogate ones. The Chief Rabbi of Moscow agrees that in the eyes of God surrogacy children are no different than children born naturally: "a couple unable to have children through traditional methods has, in accordance with the commandments or Talmud, all the due rights to rely on all kinds of reproductive technologies – including a surrogate mother. There is no sin on behalf of either the parents or the child"[192] However, he also clarified, that the very fact of opting for surrogate motherhood simply because a woman does not feel going through a risky or a difficult pregnancy suggests that she is not looking for the creation of a family.[193]

Secondly, the fact that surrogate motherhood disturbs marital relations and may lead to irresponsibility in maternal and/ or paternal duties also do not prove satisfactory. It seems that

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[187] Ibid.
[188] Ibid.
[189] The Bishop Smolensky and Vyazemsky Panteleimon, 'What can the Church do to Save the Family', (2012) available at http://www.pravoslavie.ru/54775.html.
[190] Ю. Сапожников, «Православная церковь и нравственные ценности в современном мире» (2017) Молодой учёный 210, 213. Ju. Sapozhnikov, «Pravoslavnaja cerkov' i nravstvennye cennosti v sovremennom mire» (2017) *Molodoj uchjonyj* 210, 213. Y. Sapozhnikov, 'The Orthodox Church and moral values in Contemporary World' (2017) 51 *Young Scientist an International Scientific Journal* 210, 213.
[191] I am not considering the situations where the parents have opted for the "childfree" option and perceive their family to be complete without children.
[192] Surrogate Motherhood: A View of Religious Jewish Community (2014) at http://www.probirka.org/surrogatnieprogrammy/6505-surrogatnoe-materinstvo-vzglyad-evreyskoy-religioznoy- misli.html.
[193] Ibid.

traditionally a child plays a crucial role within the marital relations, which means that the role of the surrogate is to make familial relationship even stronger. Therefore, *a priori* she cannot disturb these very relations. In fact, the disturbance may happen in families where a baby has been born by their biological mother. Yearly, thousands of babies are abandoned by their biological mothers feeling absolutely no connection with their offspring.[194] The data suggests that 84% of children brought up in orphanages were refused by alive parents.[195] A child born out of surrogacy arrangement might receive the same, if no better, treatment than a child born in a conventional way. Some parents embark on a long and difficult journey of medical examinations, treatments, IVF attempts before they opt for surrogate motherhood, which means that they would value such a child more.

Whilst it may be argued that the Church's political influence is somewhat lost, it still plays *some* role in social life. The secular nature of the Russian Federation is reflected in the Constitution, which explicitly states that "Russia is a secular state."[196] However, this does not mean that Russia is a completely anti-religious or atheist state.[197] Unlike the Soviet times, where the Church was almost destroyed, in the 21st century, the Russian state does not strictly inhibit the formation of religious organisations and movements.[198] There is also some evidence of potential entrenchment of the Church in certain spheres, for example, education. Certain calls were made for introducing theology in secondary school curriculum.[199] Family values and morality are said to be the attributes that need to be taught by the Church. Archbishops may also be seen on TV as often as 'secular' politicians.[200] On the other hand, Russia is also described as a state with what may be called as a "harsh separationist model of state-religion relationship."[201] Verkhovskii observes that what the state actually does is to provide the bare legislative minimum for protection of confessions.[202] The variation of the protection would depend on the extent of the role the state wants the Church to play. At the moment, the possibilities of

[194] Orphanage statistics (2017) available at http://vawilon.ru/statistika-detskih-domov/.
[195] Ibid.
[196] Art. 14(1) of the Constitution of the Russian Federation 1993.
[197] Владимир Лексин, «Россия как светское государство: религиозные объединения в секулярном обществе» (2009) *Мир России. Социология. Этнология* 1, 4. Vladimir Leksin, «Rossija kak svetskoe gosudarstvo: religioznye ob"edinenija v sekuljarnom obshhestve» (2009) *Mir Rossii. Sociologija. Jetnologija* 1, 4. Vladimir Leksin, 'Russia as a Secular State. Religious Organisations in a Secular Movement' (2009) *World of Russia. Sociology. Etnology* 1, 4.
[198] Ольга Жукова, «Взгляд из xxi века: образование и русская православная церковь» (2012) *Magister Dixit* 5. Ol'ga Zhukova, «Vzgljad iz xxi veka: obrazovanie i russkaja pravoslavnaja cerkov'» (2012) *Magister Dixit* 5. Olga Zhukova, 'The View from the XXI Century: Education and the Russian Orthodox Church' (2012) *Magister Dixit* 1, 5.
[199] Above (n181).
[200] Dmitii Sidorov, 'To God the God's: the Influence of ROC is increasing but many are not happy with it' (7 Aug 2017) *Lenta.ru* at < https://lenta.ru/articles/2017/08/03/rpc_power/ > accessed 20 Sep 2017.
[201] A. Verkhovskii, 'The Limits of Secular State in Russia: Legal Norms and the Issues of their Interpretation' Gazeta Protestant at < http://www.gazetaprotestant.ru/2008/02/granicy-sekulyarnosti-gosudarstva-v-rossii- pravovye-normy-i-spory-ob-ih-interpretacii/ > accessed 22 Sep 2017.
[202] Ibid.

further incorporation of religion into social life are strongly rejected by the society itself and the scientists. A social survey revealed that almost 60% of Russians think that the Church should be completely separated from social or political life.[203] As Lunkin explains, "[Russian] citizens do not wish to see orthodoxy in politics… They see communism and religion as two equal evils."[204] In a similar way, scientists see the Church as a threat to science and progress: "[attention must be drawn] to the [importance] of protection of the state's secularism as the crawly clerkism [tries to] spread."[205]

3.4. Background to the current legal framework on surrogacy

The Russian law on assisted reproduction is mostly consolidated in the Family Code 1995.[206] It came into force on the 1st of March 1996 and was initially met with enthusiasm.[207] The Code constitutes a single document, consisting of 8 parts and 170 sections. It is a logical, more liberal continuation of the previous Code on Marriage and the Family of 1969, which was already slightly "less extreme" than its Soviet predecessors by carefully balancing the society's demands and preserving some limitations in family sphere.[208] Being a product of an extensive legislative reform, the Code mainly sought to align Russian family law with the post-1991 political and other legal developments, such as the 1993 Constitution and the newly enacted Civil Code.[209] The ratification of international treaties was also said to be one of the driving forces behind the Code. Indeed, some provisions of the UN Convention of the Rights of the Child 1990 were mirrored in the provisions of the Family Code. For example, part IV "On rights and obligations of parents and children" stems directly from the Preamble to the Convention. In order to further reflect the Convention obligations, the Family Code introduced a separate chapter dedicated to children's rights only.[210] The new Code also had to take into account the accelerated speed in development of assisted reproduction.[211] The Code was the first statute to legitimise registration of surrogacy births. As Antokol'skaia explains, the Code needed to fill the legal lacuna created by the advancement in medical technology: "artificial insemination, surrogate motherhood and genetic expertise called for modification of the rules on the attribution of parenthood."[212] This chapter seeks to

[203] Sidorov (n200).
[204] Ibid.
[205] Ibid.
[206] Russia does not usually publish the background to legislative enactments. Therefore, this sub-chapter is going to be largely based on the research conducted by Olga Antokol'skaia and Olga Khazova. See generally, Olga Antakol'skaia, 'The 1995 Family Code: A New Approach to the Regulation of Family Relations' (1996) 22 *Review of Eastern and Central European Law* 635, 635. See also Olga Khazova, 'Russia: the New Family Code' (1996) *The International Survey of Family Law* 371, 371.
[207] Olga Khazova, 'Five Years of the Russian Family Code' (2002) *The International Survey of Family Law* 347, 348.
[208] Antokol'skaia (n206) 637.
[209] Khazova (n207) 371.
[210] Antokol'skaia (n206) 636-637.
[211] Ibid.
[212] Ibid.

explain the rationales behind the current family legislative framework. It contends that the rationales have been determined by an urgent need to systematise the aftermath of imperialist and Soviet family law norms as well as to fill the gaps created by the uneasy relationship between civil and family law.[213]

The Family Code is the result of a long-awaited family law reform.[214] It symbolises the new approach 'putting an end' to the contradictions created by the 'pendulum'- like developments in family law mainly after the 1917 Great October Revolution.[215] The "Post-Revolution" development of norms governing familial relationships, especially the position of women and children, has never pursued a clear trajectory, constantly "swinging back and forth."[216] On the one hand, in the early 20th century, Russian family law was already very progressive and liberal, maybe even more liberal than the family law rules enforced in the West.[217] Driven by the Marxist ideology, the state sought to remove the majority of limits on familial relationships. The strong retreat from old-fashioned ecclesiastic laws, dictated by the Marxist ideology, provided the Bolsheviks with an excellent opportunity for introducing a completely new approach. Thus, they introduced a variety of ultra-liberal laws, which might seem astonishing: from 1918 onwards, homosexual relationships, adultery, polygamy – all were decriminalised.[218] Special attention was paid to the concept of equality within a relationship. Russia became one of the first states to grant full equality to women, allowing to conclude and dissolve civil partnerships without additional legislative hurdles.[219] Thus, the Decree on "Civil Partnership, Children and Keeping the Books of the Acts of Civil Statuses"[220] was introduced in 1917 as a part of the policy seeking to simplify the divorce procedures and tackle the 'domestic slavery' - women's long-standing social oppression within the familial patriarchy. It took the newly formed government only two months to completely liberalise divorce by mutual consent. This was followed by an introduction of what has been labelled a "postcard divorce," allowing couples to obtain divorce without any judicial involvement whatsoever.[221] As Alexandra Kollontai wrote back in 1919: "the family is ceasing to be the necessity for both its members and the state."[222] Children

[213] Ibid 639-641.
[214] Ibid 637.
[215] Ibid.
[216] Ibid 636.
[217] Khazova above (n207) 348.
[218] Lenin's Decree "On Removal of Punishment for Homosexuality" from 1918. This was followed by the Criminal Codes 1920 and 1926.
[219] Василий Чвыкалов, «Гендерная политика советского государства в социальной сфере в целях защиты прав женщин» (2011) *Юристъ – Правоведъ* 1. Vasilij Chvykalov, «Gendernaja politika sovetskogo gosudarstva v social'noj sfere v celjah zashhity prav zhenshhin» (2011) *Jurist – Pravoved* 1. V. Chvykalov, 'Gender Politics of the Soviet State in the Gender Sphere for the Purpose of Protection of Women' (2011) *Lawyer – jurist* 1.
[220] Art. 152 SU RSFSR 1917 № 10.
[221] The Code on Marriage, Family and Care 1926.
[222] Harold J. Berman, Justice in the U.S.S.R (Cambridge Massachusets 1963) 330.

born within and outside wedlock were also equalised in their rights.[223] The Bolshevik Russia was also the first country to legalise abortions in 1920.[224] The Decree of the People's Commissariat of Healthcare and Justice "On Artificial Termination of Pregnancy"[225] allowed women to undergo abortions on demand. These developments fit into the state's broader policy of non-intervention into private life. As Lenin himself subsequently wrote: "There is no democratic party in the entire world that has done as much as we did during only the first year of our power… we have left virtually nothing of the vile laws… the remains of these multiple laws still existent in civilised countries to the embarrassment of the bourgeois and capitalist states… We have the right to be proud of what we have done in this sphere."[226] It is clear that the state undertook the so-called *laissez-faire* approach by mostly treating family relationship as a "private domain."[227]

However, such rapidly spreading liberalism was not very long-lived – some twenty years later Joseph Stalin made a drastic U-turn on the previously progressive policies. The sharp reversion from liberal laws to traditional, almost imperialist values led to the adoption of an approach based on almost extreme intervention into one's private life. In its legislative reforms, the state pursued two objectives: transpersonalism and paternalism.[228] The state deemed family to be in the interest of the communist society, and this interest prevailed over the freedom of an individual citizen to determine his familial relationship.[229] Marriage, childbirth and parenting became a powerful tool in building an effectively socialist society.[230] The necessity to promote family as 'a greater good' prompted the Soviets to re-introduce various draconian laws. For example, the Decree of the Presidium of the Supreme Soviet[231] provided that civil partnerships no longer had any legal force and the procedure of dissolution of marriage became more complicated. Those engaging in homosexual or polygamous

[223] Art. 133 of the Family Code 1918 № 76-77.
[224] Sharon Smith, 'Revolutionary Russia and the Challenges to Realising Women's Liberation' in *Women and Socialism: Essays on Women's Liberation* (Chicago, Haymarket Books 2015) 12-13.
[225] From 16 Nov 1920.
[226] Vladimir Lenin cited in Т. Фабричная «О некоторых аспектах семейного законодательства РСФСР в 1917-1926 годах (2014) *Юридическая наука и практика: Вестник Нижегородской академии МВД России* 55, 56. T. Fabrichnaja «O nekotoryh aspektah semejnogo zakonodatel'stva RSFSR v 1917-1926 godah (2014) *Juridicheskaja nauka i praktika: Vestnik Nizhegorodskoj akademii MVD Rossii* 55, 56. T. Fabrichnaya, 'On Some Aspects of Family Law in RSFSR in 1917-1927' (2014) Jurisprudential Science and Practice: the Herald of Nizhegorodsk Academy MVD of Russia *The Herald of Nizhegorodsk Academy MVD* 55, 56.
[227] Antokol'skaia (n208) 637.
[228] Antokol'skaia (n208) 638.
[229] Ibid.
[230] Harold Berman, 'Soviet Family Law in Light of Russian History and Marxist Theory' (1946) 56 *Yale Law Journal* 26, 37, 38.
[231] From 8 Jul 1944.

relationship became subject to prosecution and repressions.[232] The concept of child illegitimacy was re-introduced, stripping children born outside wedlock of a right to bear a father's surname even if the latter consented.[233] After identifying decreasing population as a threat to the communist regime, in 1936 the State enacted the "Decree on the Prohibition of Abortions…"[234] criminalising abortions except where pregnancy would constitute a threat to health or life. At the same time, motherhood was more valued than ever: childbirth was encouraged through orders and benefit payments. Yet, by interfering with citizens' reproductive sphere, the Soviets completely blurred the distinction between private and public domains.[235] The state's position was well-explained by Sverdlov, a Soviet family lawyer: "the socialist State reserves for itself wide latitude for direct and active infringement into family relationships… [The State] denies the qualification of relations between sexes as individual, intimate, and of no interest for State and society [...]. It dictates, determines rules to guaranty the interests of the collective, to force individuals to fulfil their duties towards the collective."[236] It is clear that in its pursuit of a 'forceful stabilisation of family'[237] the Stalinist period signified ambivalence – the state actively seeking to preserve the traditional family values while at the same time trying to promote what was seen as a modern model of familial relationship.[238]

The clampdown on private life was again partially relaxed after Stalin's death in 1953, marking the new era for family policies – "the Soviet Socialist model."[239] The hitherto actively pro-family initiative has reverted to allowing more freedom in family relationship formation and dissolution as well as the area of reproduction. Divorce procedures were again simplified and abortions became widely available. Women's right to equal treatment in regards to family became a constitutional right: the USSR Constitution explicitly provided that "women and men shall have equal rights in the USSR. The realisation of these rights shall be ensured by granting women opportunities equal to men… the creation of conditions allowing women to combine labour with motherhood… legal protection… and

[232] Homosexuality became a 'sex crime' punishable from three to eight years in prison. Art. 134 of the RSFSR Criminal Code 1934. See generally Dmitrii Okunev, 'Demoralises the Youth: Why the USSR Prohibited Homosexuality' (17 Dec 2018) *Gazeta* at < https://www.gazeta.ru/science/2018/12/17_a_12097333.shtml > accessed 22 Dec 2018.
[233] The Decree of the Presidium of the Supreme Soviet from 8 Jul 1944.
[234] From 27 June 1936.
[235] Antokol'skaia (n206) 638.
[236] Sverdlov in ibid 638
[237] The Legal Status of an Illegitimate Child in Russia' at https://studbooks.net/1113158/pravo/pravovoy_status_nezakonnorozhdennogo_rebyonka.
[238] А. Носкова «Эволюция государственной семейной политики в России: от советских к современным моделям (2013) *Вестник МГИМО Университета* 155, 157. A. Noskova «Jevoljucija gosudarstvennoj semejnoj politiki v Rossii: ot sovetskih k sovremennym modeljam (2013) *Vestnik MGIMO Universiteta* 155, 157A. Noskova, 'Evolution of State Familial Relationship in Russia: from the Soviet to Contemporary Models' (2013) *The Herald of MGIMO University* 155, 157.
[239] Ibid.

moral support for motherhood and children…"[240] The state's partial refrain from family affairs resulted in the discrepancy between the social need to increase the population levels and the population's ability to exercise its reproductive freedom. Thus, the data revealed that despite the plummeting birth rates, small families became the norm.[241] However, unlike the 'Stalinist model,' under the new approach the state chose to minimise its intervention into private life despite the worrying statistics. Instead, it focused on further promoting the gender equality, via establishing extra-curricular organisations, where children could develop various skills thereby assisting mothers with childcare.[242] This trend continued until the post-Soviet period. 1991 marked the regime transformation. After many decades of communism, the return to capitalism led to another wave of 'deformed' family morality and a variety of legal problems. Extreme poverty diverted the state's attention from the need to impose certain moral values.[243] Noskova observes that it is on this 'wobbly' foundation, the ruins of Soviet law, where the legislator had to create a completely new legal basis that would effectively operate in a reformed society.[244]

However, systemising the aftermath of the never-ending reforms was not the only difficulty faced by the drafters of the new Family Code. The Law Commission had to overcome various problems related to technical drafting and the legal taxonomy. The crux of the issues was rooted in the lack of clear theoretical basis for the Code's provisions which historically determined the peculiar relationship between family law and civil law.[245] Back in the early 20th century, in its pursuit to destroy all reminders, the then newly formed Soviet state did not realise the extent to which the existing capitalist values affected the imperialist legal system. During the imperialist times, family law norms were contained in the Collection of Civil Law Statutes, a document collating a variety of civil laws. When the Bolsheviks took over, the majority of the civil legislation was deemed ineffective, meaning that there has been hardly any civil provision that could have been relied upon in family law dispute. In fact, following the nationalisation of property and land, there was no need in civil law statutes whatsoever – civil transactions were seen as the enemy of communism and therefore of no effect.[246] Family law, by contrast, had to survive as this was the only way to diminish the influence of the Church and increase the role of secular provisions. Thus, while "civil law was proclaimed dead" by 1918, family law was

[240] Art. 35 of the USSR Constitution 1936.
[241] Noskova (n238) 157.
[242] Ibid.
[243] Antokol'skaia (n206) 639.
[244] Noskova (n238) 157.
[245] Antokol'skaia (n206) 639.
[246] Ibid.

'allowed' to continue its existence.[247] Nevertheless, the Soviets were forced to partially re-consider their policies in regard to civil law, with the introduction of the New Economic Policy in 1922. In its pursuit of economic prosperity,[248] the state had no other choice but to bring private transactions back to life.[249] The lack of a systemised approach resulted in calls for an urgent reform. The legal scholars strongly supported the idea of family law being separated from civil law in order to further entrench the communist ideology in familial relationships: in order to establish a fully socialist state even a remainder of capitalist values had to be destroyed.[250] The separation itself, however, proved problematic with further issues mushrooming fast. The lack of clear family law theory, created by the pendulum-like approach to familial relationships made family law inconsistent thereby still leading to partial incorporation of civil law, albeit without any reference to the latter.[251]

Overall it is clear that Russian family law is a result of a rich and unique history. Having shaken off the imperialist aftermath, it has undergone various ideological changes resulting in legislation swinging back and forth. This has led to firstly a complete separation and then an overlap with civil law before ultimately these two branches became separated again. Having been in such a confusing state until the Soviet collapsed, the increasing problems within family law made it apparent for the legislator that the call for a legislative change was real. Upon the completion of a careful, yet uneasy process of drafting of the Family Code, its position vis-à- vis the also freshly drafted Civil Code was finally clarified.[252] Thus, Art. 4 of the Family Code seems to settle the debate once and for all: it provides that as long as the Civil Code does not contradict "the nature of family relations," civil law norms may be applicable in the areas that are yet to be filled by family law.[253] For example, the reference to matrimonial property may be found in both the Civil Code and the Family Code. Art. 256 of the Civil Code provides for the division of matrimonial property as well as the marriage contracts whereas the Family Code builds upon the generic provisions with more detail.[254] The spheres of legal parenthood, parental responsibility as well assisted reproduction also came under the realm of the Family Code. Surrogacy received a statutory footing officially becoming a method of procreation allowed by the law.

[247] Ibid.
[248] Helen Glaza, 'Lenin's New Economic Policy: What it was and how it Changed the Soviet Union' (2009) 1 Inquiries Journal: Social Sciences, Arts and Humanities 1, 1.
[249] Antokol'skaia (n206) 639.
[250] See generally Antokol'skaia (n206) 640.
[251] Ibid.
[252] Ibid 642.
[253] Ibid.
[254] Chapters 7 and 8 of the Family Code 1995. Antokol'skaia argues that family law is, in fact, a branch of civil law. See Antokol'skaia ibid.

3.5. Failed proposals for legislative reform and a successful reform in 2021

Despite the government's generally favourable attitude towards surrogacy in the Russian Federation, the opposition occasionally puts forward various restrictive proposals. The opponents severely criticise the liberal approach by deeming it broadly uncivilised and unethical: "nowhere in the world there is the right to have a child in the same way as one may have a dog."[255] They usually cite the Western countries for having the 'civilised' approach to surrogacy and claim that Russia should follow the European footsteps. According to the authors of the proposals the laissez-faire position of the government is highly problematic as it only encourages the influx of 'surrogacy tourists' thereby transforming the state into a 'surrogacy Mecca.'[256] This, in turn, opens the Pandora box of problems for all parties involved – the intended parents, the surrogate mother and, crucially, the child. The intended parents may easily trick the surrogate into an unfair arrangement, the surrogate, in turn, may decide to keep the child she birthed. The child himself could be deprived of the care of the genetic parents or become a part of human trafficking arrangement. In order to address the gaps in the legislation, some major restrictive reforms were proposed in 2017, 2019 and in 2021, the last one following the COVID-19 pandemic. Interestingly, the latest one was successful and became law in December 2022, banning surrogacy for foreign nationals. This legislation will be addressed in 4.2 and 6.4 below. Indeed, these proposals[257] were introduced by the reactionaries, well-known for their extremely negative views on surrogacy. However, their views appear to be aligned with the prominent religious groups and conservative movements.[258] As these movements seek to undermine the state's liberal approach to surrogacy it is useful to examine the reasons behind the rejection of the proposals.

3.5.1 Anton Beliakov's proposal on complete prohibition of surrogate motherhood

In the beginning of 2017 Anton Beliakov proposed to introduce the amendments to all provisions covering surrogate motherhood,[259] In his view, since surrogacy is "analogous to prostitution and "child

[255] Tatiana Zamakhina, 'The State Duma explained the Prohibition of Surrogate Motherhood for single Russians' (20 Jan 2021) *Rossiyskaya Gazeta* at <https://rg.ru/2021/01/20/v-gosdume-obiasnili-zapret-surrogatnogo- materinstva-dlia-odinokih-rossiian.html> accessed 22 Jan 2021.

[256] 'Surrogate Motherhood is analogous to child trade and prostitution' (27 Mar 2017) Rambler News at https://news.rambler.ru/articles/36451023-surrogatnoe-materinstvo-analog-torgovli-detmi-i-prostitutsii/ accessed 27 Mar 2017

[257] Proposal №133590-7 "On Including the Amendments into the Separate Legislative Acts of the Russian Federation in the Context of the Prohibition of Surrogate Motherhood" from 27 Mar 2017.

[258] The list of religious groups and the information about them may be found here: 'Religious Organisations Active on the Territory of the Russian Federation' at https://whoiswhopersona.info/archives/47335.

[259] Namely the Federal Statute № 323-FL "On the Basics of Healthcare Protection of the Citizens of the Russian Federation," the Federal Statute № 143-FL "On the Acts of Civil Statuses" as well as the Family Code 1995.

trade,"[260] the term "surrogate motherhood" should be completely excluded from art. 1 of the Federal Statute № 323-FL. Albeit not opposing surrogacy practice as a whole, the senator observed that 'the current legal position is problematic for the surrogate mothers, the surrogate children and the intended parents, often leading to tragedies.'[261] Beliakov highlighted the importance of the bond that the child forms with the surrogate mother during the pregnancy as well as the dangers of the practice being commercialised as the main issues created by the poor regulation. The senator was adamant that surrogate motherhood constitutes a violation of the rights of the child, including the right to family and personal identity as well as the right to 'communication' with his mother.[262] He further contended that in a surrogacy arrangement a child is treated as an object for sale, rather than an autonomous human being. He argued that surrogate motherhood "contradicts the wishes of the child… when psychological and emotional relationship between the child and the mother carrying him is disturbed."[263] Lastly, he referred to the ethical concerns emphasised by the Russian Orthodox Church, such as moral unacceptability of surrogacy even on a non-commercial basis and the scientific data suggesting that surrogacy is not very popular anyway.[264]

While the suggestion for surrogacy to be suspended until a more advanced legal mechanism is put in place might seem understandable, the rationales underlying Beliakov's proposal are hardly convincing. First of all, the argument that surrogacy violates the child's identity rights may be questioned. The broad 'right to identity' is recognised by various international treaties, such as the UNCRC.[265] Art. 7(1) states that a child has the '*right to know* and be cared for by *his or her parents* … as far as possible.' It may be assumed that this means the method of the child's birth. If this is the case, there is nothing precluding the biological parents from explaining the child about surrogacy later in life. In fact, this is highly encouraged by the psychologists, noting that the earlier the child is aware the more casually and probably easily it would be perceived by him.[266] Some studies suggest that even the doubting parents who found this to be 'a difficult conversation,' never intended *not* to tell their children that they were born via surrogacy.[277] Furthermore, the parents choosing surrogacy tend to be more open

[260] Above (n256).
[261] Tamara Shkel', 'The Senator Proposed to Prohibit Surrogate Motherhood' (27 Mar 2017) *Rossiyskaya Gazeta* at https://rg.ru/2017/03/27/senator-predlozhil-zapretit-surrogatnoe-materinstvo-v-rossii.html accessed 27 Mar 2017.
[262] Explanatory note - proposal №133590-7 "On Including the Amendments into the Separate Legislative Acts of the Russian Federation in the Context of the Prohibition of Surrogate Motherhood" from 27 Mar 2017 3.
[263] Ibid 3-4.
[264] Ibid 4-5.
[265] It is also recognised by the ECHR jurisprudence. For example, in *Godelli v Italy* (app. no. 33783/09 ECtHR 18 Mar 2013) the Court observed: "the right to an identity, which includes the right to know one's parentage, is an integral part of the notion of private life." At [52].
[266] 'Does the Child Need to Know about the Surrogate Mother?' *Everything about Children* at <https://vseodetyah.com/article.html?id=4600&menu=parent> accessed 10 Mar 2017.

with their children about their use of assisted reproduction compared to those opting for other types of ART.[278] Although it would be speculative to assert that all surrogacy families are the same, with all parents being equally happy to disclose their engagement with assisted reproduction, it also seems those being 'ashamed' of it would be more unlikely to have children via this method in the first place.

The second rationale put forward in the explanatory note focuses on a violation of what Beliakov calls a 'peculiar *communication*' between the child and the surrogate mother during the pregnancy. Rooted in the legendary stories from across the world this assumption is based on the premise that a foetus may have some power of communication.[267] This seems to suggest that verbal communication starts to develop at the stage of conception and is advanced further during the foetal stage.[268] Whilst there are some reports that go as far as to suggest that there is evidence of children "crying or even speaking while they are still in the womb,"[269] this communication falls short of even the rudimentary type of speaking. Consistent speech, in in turn, cannot be developed until nine months of life.[270] Therefore, the claim that the child would be able to have *in utero* communication with the surrogate lacks any solid scientific basis.

The rationale based on child trafficking might appear to be the strongest one. Reducing the child to an object of a sale has been one of the reasons for careful approach to surrogacy within the less permissive jurisdictions and sometimes even was the basis for a complete prohibition. However, this view could have only been accepted if surrogacy involved the actual selling of a *human being*. Human trafficking is defined in art. 127 of the Criminal Code: in order for the trafficking to occur a 'human' must be present as an object for sale *at the time* the agreement between the parties is concluded. First of all, at the time the commissioning parents enter into a surrogacy agreement, the child does not yet exist – he is merely a population of cells that might (or might not) become a child in the near future.[271] This means that a population of cells or an embryo simply do not qualify for 'human' trafficking. Since the object for an alleged sale is non-existent, one of the crucial elements for the crime cannot be satisfied. The second part of the provision also proves problematic. Exploitation is defined in art. 127(1) part 2 as 'prostitution, sexual exploitation, slavery and the state of servitude.' Despite the few

[267] For further discussion on this see Walburga von Raffler-Engel, 'Further Evidence of Verbal and Non-Verbal Communication between the Mother and her Unborn Child' in Jan Wind, Abraham Jonker, Robin Allott and Leonard Rolfe (eds.) *Studies in Language Origins: Volume 1* (John Benjamins B. V. 1994) 91.
[268] Ibid 93.
[269] Ibid.
[270] Ibid 92.
[271] Part 2 art. 17 of the Russian Constitution does not see an embryo (or genetic material that will be used for the conception) as a 'human' being for legal purposes.

notorious instances of children being used by the intended parents for sexual exploitation (discussed in 4.2 below), it is hard to imagine the commissioning parents deciding to exploit their own child. Finding evidence that *at the time* of the surrogate's pregnancy the couple intended to use their child for indecent purposes would also be almost impossible. As practice indicates, although morally questionable cases may not be completely excluded, they are still relatively rare.[272]

The last rationales Beliakov relied upon are based on the Church's negative attitude on surrogacy as a whole, the questionable nature of commercial surrogacy as well as the overall lack of need in surrogacy in general. The first two points appear to be linked as they both focus on the idea of 'body-selling,' that is, 'relinquishing control of [the surrogate's] womb.'[273] As discussed above, the Russian Orthodox Church is famous for being one of the biggest critics of surrogacy. In the Church's view surrogacy amounts to some sort of 'reproductive prostitution' where women are being paid for the use of their bodies.[274] This is devoid of any sort of morality and contradicts the God's wishes. However, the Church fails to justify the analogy between the two practices, which means that it criticises surrogacy merely 'by emotion.'[275] Since prostitution is morally objectionable and illegal in the majority of states it seems only to be right for Russia to follow other states' steps and prohibit surrogacy too.[276] Clearly, however, both of them have different moral characteristics which means that it is virtually impossible for surrogacy to be equivalent to prostitution. Surrogacy bears the elements of 'temporal nurturing and caring'[277] whereas prostitution associates with sexual gratification, and in some instances diseases, abuse and crime.[278] In this sense, nothing else may be prostitution, except for prostitution itself.[279] In a broader sense, however, surrogacy and prostitution cannot be the same simply because they have different spheres of operation and pursue different aims: while the former's objective is to provide for sexual gratification, the latter assists with reproduction by providing an infertile couple or single parents with a child. It is hard to see how the aim of bringing the child into this world could mean the same thing as sexual gratification.

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[272] Vladislav Melnikov in 'Russia intends to Prohibit Surrogate Motherhood' (27 Mar 2017) at https://medrussia.org/2977-surrogatnoe-materinstvo/ accessed 27 Mar 2017.
[273] Jennifer Damelio and Kelly Sorensen, 'Enhancing Autonomy in Paid Surrogacy' (2008) 22 *Bioethics* 269, 270.
[274] Sann Ketchum, 'Selling Babies and Selling Bodies' in Helen Holmes and Laura Purdy (eds.) *Feminist Perspectives in Medical Ethics* (Indiana University Press 1992) 289.
[275] Tatiana Patrone, 'Is Paid Surrogacy a Form of Reproductive Prostitution? A Kantian Perspective' (2017) 27 *Cambridge Quarterly of Healthcare Ethics* 109, 112.
[276] Ibid.
[277] Elly Teman, 'Technological Fragmentation and Women's Empowerment: Surrogate Motherhood in Israel' (2001) 29 *Women's Studies Quarterly* 11, 21.
[278] Generally, Wim Huisman and Edward R. Kleemans, 'The challenges of fighting sex trafficking in the legalized prostitution market of the Netherlands' (2014) 61 *Crime, Law and Social Change* 215, 215-228.
[279] Patrone (n275) 113.

The last objection attacks surrogacy for monetisation and unaffordability. Beliakov asserts that it is the commercial surrogacy which is the most controversial. He questions the moral side of monetisation by linking it to human trafficking discussed above and improper treatment of surrogate mothers. According to him, the surrogates live in deplorable conditions somewhere in "Moscow suburbs," do not get any money and are only compensated by free meals. Apart from the truth of this statement being far from reality,[280] it contradicts his overall premise that it is the concept of payment that constitutes the 'root of all evil.' First of all, if the surrogate does not receive the remuneration, as he claims, this automatically removes the payment from the arrangement thereby transforming it into an altruistic one.[281] Secondly, if the concept of payment is problematic, this does not justify prohibition on surrogacy as *a whole*. Rather, it would have had been more logical for him to propose a ban on *commercial* surrogacy only or reduce compensation to some surrogacy-incurred expenses, like it is done in the UK.

It is clear that Beliakov's proposal is unconvincing: not only does it have inconsistencies but is also partially contradictory. It seems that in attempts to criticise surrogacy the senator was inclined towards a full prohibition simply because it would be easier than to modify the parts where the law is not perfect. Thus, the proposal was met with a very strong opposition in the State Duma with the most severe criticism coming from the leaders of various parties and the experts in assisted reproductive technology. Vladislav Korsak, one of the most renowned Russian specialists in reproduction, who previously petitioned against the proposal on behalf of the Russian Association for Human Reproduction and his patients, proclaimed the proposal to be 'an obscurantist.' A lawyer Konstantin Svitnev ironically called the proposal "exotic" and a "direct threat to the state's demographic safety" as well as a violation of the Russian Constitution. He also commented on the senator's lack of legal awareness.[282] The Legal Administration of the State Duma, by contrast, noted that, if enacted, the rights of children and parents who already entered into a surrogacy programme would be violated. The Administration concluded that by no means a complete prohibition of surrogacy was "a good basis" for

[280] See Konstantin Svitnev in Elena Afonina, 'Child Trafficking or Saviour from Infertility? Should Commercial Surrogate Motherhood be Prohibited in Russia' (17 Jan 2019) *Komsomol'skaya Pravda* at https://www.kp.ru/daily/26930/3980714/ accessed 17 Jan 2019.
[281] It is acknowledged that there might be instances where a surrogate entered into an arrangement by duress, however this is beyond the scope of this sub-chapter.
[282] Vladislav Melnikov, 'The Prohibition is not Happening. The State Duma Rejected a Legislative Proposal on Surrogate Motherhood' (7 Jul 2017) European Centre for Surrogate Motherhood at https://ecsm.ru/o- nas/news/zapreta-ne-budet.-v-gosdume-otklonili-zakonoproekt-o-zaprete-surmaterinstva/ accessed 10 Jul 2017.

the more holistic approach that Beliakov has advocated for.[283] Ultimately on the 6th of July 2017 the State Duma rightfully declared the proposal 'a dead parrot.'

3.5.2. Vitalii Milonov's proposal to ban commercial surrogacy

Despite the fact that the previous attempts to ban surrogacy ended unsuccessfully, the prohibition has remained the subject of a heated debate ever since. Thus, 2019 has 'started with the scandal'[284] when in early January another senator, Vitalii Milonov, submitted a proposal to prohibit commercial surrogacy. Commercial surrogacy, he argued, "is in essence an unregulated way of child trafficking,"[285] a completely immoral practice sought by those parents who "want a doggie to resemble them."[286] He also regretted that the state is well aware of the issues that surrogacy causes but does not try to address them: "[we need] the limits that would prohibit such trade of infants to be imposed… It is traumatising primarily for the child himself. We cannot take a child from a woman and give it to God knows who… We want to prohibit this."[287] He also proposed to prohibit the advertisement of surrogacy agencies on the basis of violation of public morals. The senator, however, did not oppose the compensation of reasonable expenses to be paid to the surrogate,[288] as long as 'the main 'function,' that is giving birth, is fulfilled for free.'[289]

Unfortunately, the original document outlining Milonov's legislative proposal is not accessible via the official database, therefore the gist of his argumentation was mostly retrieved from the secondary resources and the media outlets. According to the media, Milonov's proposal rests on two distinct premises: the first one is a psychological issue – the fact that a child might receive a mental trauma when he is handed over from a surrogate to the intended parents; and secondly, the inevitable reduction of a surrogate mother to a 'soulless biological incubator.'[290] Although he never directly refers to

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[283] Ibid.

[284] Vladislav Melnikov, 'Konstantin Svitnev on the Prohibition of Commercial Surrogate Motherhood in Russia' (8 Jan 2019) *European Centre for Surrogate Motherhood* at <https://ecsm.ru/o-nas/news/direktor-ryuk- konstantin-svitnev-podverg-rezkoj-kritike-zakonoproekt-deputata-milonova-o-zaprete-kommercheskogo- surrogatnogo-materinstva-v-rossii/> accessed 12 Jan 2019.

[285] Child trafficking has been discussed above in 3.5.1 and will not be considered in this subchapter.

[286] 'Getting Children like Dogs: Milonov suggested to ban surrogate motherhood' (6 Oct 2020) NTV https://www.ntv.ru/novosti/2436461/ accessed 8 Oct 2020.

[287] 'The State Duma has Prepared a Legislative Proposal to Prohibit Surrogate Motherhood' (7 Jan 2019) *Ria* Novosti at https://ria.ru/20190107/1549087037.html accessed 12 Jan 2019.

[288] Surrogate Motherhood is a Method of Child trafficking: Milonov proposes to ban paid pregnancy' (7 Jan 2019) *TsarGrad* at <https://tsargrad.tv/news/surrogatnoe-materinstvo-vid-torgovli-detmi-milonov-predlagaet-zapretit- platnoe-vynashivanie-rebenka_177505?utm_source=yxnews&utm_medium=desktop> accessed 8 Jan 2018.

[289] 'Milonov Does not want the Surrogate Mothers to get paid' (7 Jan 2019) *Gazeta.ru* at < https://gazeta.spb.ru/2078865-0/ > accessed 8 Jan 2019.

[290] Nika Rudneva, 'Treated as Piglets: the State Duma supported the ROC proposal to prohibit surrogate motherhood' (14 Jul 2020) *Radio KP* at https://radiokp.ru/otnosyatsya-kak-k-porosyatkam-v-gosdume- podderzhali-ideyu-rpc-zapretit-surrogatnoe-materinstvo_nid27491_au8073au accessed 14 Jul 2020.

exploitation, a common argument against commercial surrogacy, the idea of payment is clearly central to his second argument. The explanatory note reads that "the intended parents shall only compensate the expenses related the medical checks required by the programme of surrogate motherhood, that is… the expenses related to pregnancy."[291] Thus, he argues that a payment is morally not acceptable in the context of surrogacy as not only is the contract not deemed to be enforceable by the legislation[292] but also this would transform the arrangement into an entrepreneurial activity.[293]

While none of the arguments are new, it is the reasoning behind the senator's proposal that is particularly flawed. Milonov vulgarly refers to surrogate mothers as "semen containers" that are being paid to give away their children.[294] He seems to follow Beliakov's objections based on surrogacy being seen as nothing more than the 'use of the womb' for money – the so- called 'prostitution' argument albeit wording it differently. First of all, the accuracy of the equation of a surrogate mother to an 'incubator' merely based on the fact that she receives the payment is, at its best, questionable. According to Merriam-Webster dictionary, an incubator may be defined as "an apparatus with a chamber used to provide controlled environmental conditions especially for the cultivation of microorganisms or the care and protection of premature or sick babies."[295] The main purpose of an incubator is to "create ideal conditions for [the infant's] survival"[296] and growth. It provides a child with the oxygen and fluids through the tubes and maintains the correct temperature.[297] The data shows that incubators are widely used in intensive care and prevents various disabilities from developing in the future.[298] Therefore, it is clear that by saving prematurely born babies, the term 'incubator' carries no negative connotation and is seen as one of the greatest technological achievements.[299] Since the purpose of surrogate motherhood is to provide the fertile conditions for the full development of the

[291] Anna Lavrentieva, 'Milonov prepared a Legislative Proposal on the Ban on Surrogate Motherhood' (7 Jan 2019) *Ridus* at < https://www.ridus.ru/news/290640> accessed 20 Jan 2019. Unfortunately, the official document containing explanatory notes to the Bill is not available in public domain.
[292] 'The State Duma wants to prohibit Surrogate Motherhood' (9 Jan 2019) *Letidor* at https://letidor.ru/novosti/v-gosdume-khotyat-zapretit-platnoe-surrogatnoe-materinstvo-09-01-2019.htm accessed 10 Jan 2019.
[293] Е. Куриная, « Суррогатное Материнство Vs Предпринимательская Деятельность» (2019) *МНСК-2019. Государство И Право* 104, 104. E. Kurinaja, «Surrogatnoe Materinstvo Vs Predprinimatel'skaja Dejatel'nost'» (2019) *MNSK-2019. Gosudarstvo I Pravo* 104, 104. E. Kurinaia, 'Surrogate Motherhood vs Enterpreneurial Activity' (2019) *MNSK-19 State and the Law* 104, 104.
[294] Vitalii Milonov, 'A Woman is not a Semen Container' (8 Oct 2013) *Snob* <https://snob.ru/profile/25239/blog/66267 > accessed 9 Mar 2017.
[295] 'Incubator', *Merriam-Webster* at <Incubator | Definition of Incubator by Merriam-Webster> accessed 5 Jan 2019.
[296] Sunil Kumar Singla and Varuninder Singh, 'Design of a Microcontroller Based Temperature and Humidity Controller for Infant Incubator' (2015) 5 *Journal of Medical Imaging and Health Informatics* 704, 704.
[297] Jeffrey P Baker, 'Between Foetus and Weakling' in Jeffrey P Baker, *The Machine in the Nursery: Incubator Technology and the Origins of Newborn Intensive Care* (Baltimore and London John Hopkin's University Press 1996) 7.
[298] 'His organs and systems are just not ready: Why in Russia children that have almost no chances are attempted to be saved' (12 Sep 2019) *Lenta.ru* at <https://lenta.ru/articles/2019/09/12/mladenets/> accessed 30 Sep 2019.
[299] Nataliia Maikova, 'An Incubation Apparatus – the First House for a Premature Baby' (19 Aug 2018) *MedAbout Me* at <https://medaboutme.ru/articles/kuvez_pervyy_domik_nedonoshennogo_krokhi/> accessed 4 Apr 2019.

foetus, it may be agreed that the processes occurring in a surrogate's womb during the pregnancy would bear *some* of the characteristics of an incubator. In fact, the latter an imitation of a womb,[300] for the babies that could not be carried inside the body to a full term. Some medics even refer to an incubator as an "artificial womb" or a "second womb" which would mimic the natural body temperature and its functions: "the incubator can… offer a safe womb-like environment… [they are] like a safe bubble surrounding the baby."[301]

Milonov's last argument is no less absurd. He refers to surrogate motherhood as a "form of perversion" traumatising a child's mental wellbeing.[302] In his view, the process of relinquishment would have a long-lasting adverse psychological impact that would hinder his further development in life. He further contends that "the real mother, in the child's eyes would be the one who carried him, not the one who passed on her genes 'after using drugs, alcohol and went through 30 abortions."[303] Instead, he argues, it would be much more morally correct to opt for adoption – something that he has already done and 'with no regrets.'[304] Having adopted three children,[305] the senator believes in adoption as an opportunity to change the world for a child that otherwise would have no loving and caring family. Yet, although Milonov's actions are commendable, his disdain towards surrogacy can hardly be explained by the importance of the bonding between the mother and the child. If surrogacy leads to the destruction of the link between the surrogate and the child, so does adoption, where the child is being introduced to a 'new' family. Adoption, unlike surrogacy, involves "fixing" one's origins,[306] often at the time of a child's understanding, whereas in cases of surrogacy, unless the intended parents choose to disclose the method of his birth, it is highly unlikely that the child would find out.

The issue of a potential psychological trauma as well as the nature of the intended parents' character, the other grounds for Milonov's attack, has been previously acknowledged elsewhere.[307]

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[300] Elena Babicheva, 'An Incubator instead of a Mother: Why Scientists are creating an Artificial Womb?' (14 Jan 2014) AiF at <https://aif.ru/health/children/1080263> accessed 4 Mar 2017.
[301] Carissa Stephens, 'Incubators for Babies: Why They're Used and How They Work' (25 Jun 2020) Healthline Parenthood at < https://www.healthline.com/health/baby/incubator-baby > accessed 30 Jun 2020.
[302] Lavrentieva above (n292).
[303] 'Milonov called to stop the use of surrogate mothers as bioincubators' (19 May 2021) *Ria Fan* at < https://riafan.ru/1447565-milonov-prizval-prekratit-ispolzovat-zhenshin-v-kachestve-bioinkubatorov > accessed 22 May 2021.
[304] Ibid.
[305] Elena Livsi, 'Milonov showed the Child: Illia Vitalievich, our fifth' (30 Mar 2017) *Komsomol'skaia Pravda* at < https://www.spb.kp.ru/daily/26657.4/3681379/ > accessed 30 Apr 2017.
[306] Margaret Homans, 'Adoption Narratives, Trauma, and Origins' (2006) 14 *Narrative* 4, 4.
[307] For example, the Brazier Report, some works of Susan Golombok, Fiona MacCallum, Clare Murray, Emma Lycett, Vasanti Jadva, Surrogacy families: parental functioning, parent–child relationships and children's psychological development at age 2' (2006) 47 *Journal of Child Psychology and Psychiatry* 213-222.

Yet, despite the limited data available, there is evidence that the risks of the children being born into unmeritorious families and suffering from psychological problems do not tend to materialise. A study of two-year-olds born out of surrogacy arrangement conducted by Golombok and others revealed almost no differences in terms of both socio-emotional and cognitive development[308] between surrogacy born and naturally born children. Moreover, the authors argue, "[there is] a more positive representation of the child among the surrogacy than the natural conception mothers [which] leads to the expectation that the surrogacy children would show more positive adjustment than their naturally conceived counter parts."[309] Driven by a stronger desire to have children than the couples capable of conceiving naturally, the future parents 'have gone lengths' and appeared to be more 'motivated' by the birth of the desired child.[310] Thus, the fathers also showed less stress and more appreciation of their fatherhood. The intended mothers, realistic about their lack of prospect to become birth mothers from adolescence, were 'over the moon' about the opportunity to have a child with a surrogate's assistance.[311] Therefore, not only does this seem to discard Milonov's argument that a surrogate child would necessarily become psychologically traumatised as being completely unfounded but also doubts the existence of any connection between the child and the surrogate beyond the one provided by the umbilical cord. This accords with Golombok's study which seems to confirm that "pregnancy is not a prerequisite" for the quality of relationship between the mother and the child. Quite the opposite, 'positive maternal representations' seem to be far more important that the gestational bond.[312]

Milonov's proposal did not receive the required State Duma support that would enable it to become a viable piece of law. The proposal has been criticised by many, but most notably by reproduction lawyers such as Svitnev who labelled it as a 'post-holiday hangover talk:' "another crazy initiative… not even enough time has passed since Beliakov's proposal was binned…"[313] Svitnev observes that Milonov's overall aim has always been to ban surrogacy but 'his arms are too short.'[314] Having unsuccessfully attempted to campaign for a prohibition in 2013, he yet again tries to destroy surrogacy but now "through the back door," this time not explicitly putting a blanket ban on the opportunity to use the services of a surrogate mother. Yet, by depriving the surrogate mothers of their financial income,

[308] Ibid 220.
[309] Ibid.
[310] Ibid 219.
[311] Ibid.
[312] Ibid.
[313] 'Rosyurkonsalting Director Konstantin Svitnev severely criticised Milonov's Suggested Legislative Proposal on Prohibition of Surrogate Motherhood' (8 Jan 2019) Surrogacy at < https://surrogacy.ru/news/direktor-ryuk- konstantin-svitnev-podverg-rezkoj-kritike-zakonoproekt-deputata-milonova-o-zaprete-kommercheskogo- surrogatnogo-materinstva-v-rossii/ > accessed 9 Jan 2019.
[314] Ibid.

he would significantly reduce the number of those willing to engage in surrogacy: "not all women would be able to dedicate a year of their lives to carrying someone else's child even for a generous compensation, let alone for free."[315] It may be argued that Milonov's proposal posed wider danger of further affecting the demographic situation in the country, something that is already of a grave concern.

It can be concluded that family law has undergone a lengthy historical development before culminating in the resulting legislative framework. Currently located in the Constitution, the Federal Statutes, the Codes and supplementary Orders, navigation through it appears to be a complex task. The concepts of family and motherhood have always been cemented in the legislation. Through various initiatives, the state used to promote the concept of family that is based on traditional values, that included childbearing and child-rearing. During Soviet times motherhood received recognition from the state whereby mothers were the recipients of various awards, eligible for increased state benefits. The Church has also played a role in the promotion of familial values although its role in social and political life differed throughout the centuries. Whilst during the imperialist period it has been rather powerful, religion has been almost fully eliminated in the mid to late 20th century. After the collapse of the USSR, it attempted to reappear, seeking to have an impact on the government's decision-making. Yet, despite its growing influence in social life, its views seem to play no role in political or legislative choices. Procreation is one of the spheres where the views of the Church and the state appear to diverge: although both the Church and the state strongly support childbirth, the Church rather expectedly rejects untraditional family formations and means of reproduction including surrogate motherhood. The divergence between the state and opponents of surrogacy becomes even more apparent from the relatively recent rejections of the legislative proposals seeking to impose restrictions on surrogacy.

[315] Ibid.

4. CURRENT REGULATION: SURROGACY ARRANGEMENT AND LEGAL PARENTHOOD AT BIRTH UNDER THE FAMILY CODE 1995

Although surrogacy has been practiced in Russia from around 1996,[1] there is no separate legal framework dedicated to the practice. The law on surrogacy sits at the cross-roads of family, civil, constitutional, tax, administrative and medical law.[2] While the legal notion of surrogate motherhood did not exist until the Family Code 1995[3] was enacted, the regulatory approach has always been permissive, yet very vague and unclear. The 1995 Code followed-up the legal and political developments in the country – the liberal values brought by the UN Convention on the Rights of Child,[4] the so- called *Perestroika* Constitution and the then newly introduced Civil Code.[5] The aim of the Code was to preserve the Soviet laws to some extent and adjust them to post-1990 events making as little changes as possible.[6] Order № 67 on "Assisted Reproductive Technologies for Infertility Treatment for Female and Male Patients" from 2003 for the first time legally recognised surrogacy as a "method for infertility treatment."[7] In order to highlight the liberal nature of Russian surrogacy law, this chapter will be looking at the current legal framework governing surrogacy and the liberal features that it exhibits. In probing this premise the chapter will also evaluate the law. It will examine the eligibility criteria for surrogate mothers and the legal position of their husbands as well as the eligibility of the intended parents. It will also discuss process of registration of surrogacy births. Child registration requires minimum state intervention into the process: there is no need for the court's pre-authorisation. Post-mortem conception will also be discussed – the system permits advance consent to being treated as the legal parent of a posthumous child thereby appearing to promote individual self-determination above other potential interests. Furthermore, the chapter will explain the role of surrogacy contract. Although surrogacy contracts are not treated as legally binding, their role is increasing. This seems to indicate a certain degree of deference to private decision-making. Furthermore, a more nuanced issue of taxation will also be looked at. The state's approach to taxation is also rather liberal: despite the fact that surrogacy is treated as a job, so far there seems to be no

[1] I. Krasnopol'skaia in Ekaterina Mouliarova, 'The Legal Regulation of Surrogacy in Russia' (2019) 11 *Italian Journal of Public Law* 393, 407.
[2] Ibid 393-395.
[3] The Family Code came into force on the 1st of March 1996.
[4] Section 1 article 3, UNCRC 1990, which guarantees all the disputes shall be resolved in the best interests of the child. Ratified by the USSR in July 1990.
[5] See generally Olga Khazova, 'Five Years of the Russian Family Code: the First Results' (2002) *The International Survey of Family Law* 347, 347.
[6] Khazova ibid 349. Khazova notes that despite the stereotype that Russian laws are ultra-conservative in its legal state, post-1917 family law has been more liberal than in the West: the equalities between spouses, children born within and outside marriage and no-fault divorce were already existent.
[7] Schedule 1 to Order №67 Assisted Reproductive Technologies for Infertility Treatment for Female and Male Patients from 26 Mar 2003.

imposition of tax in practice.

At present, surrogacy is governed by the following legislation:

i. Arts. 51-52 of the Family Code 1995;[8]

ii. Federal Statute № 323-FL "On the Basics of the Healthcare of the Citizens of the Russian Federation" from 21 November 2011;

iii. The Federal Statute on the Acts of Civil Statuses (as amended) № 143-FL from 15 November 1997;[9]

iv. The Order № 107n from 30 August 2012 of the Russian Federation Ministry of Health "On the Application of Assisted Reproduction Technology, its Side- Effects and Limitations";[10]

v. The Order № 67 of the Russian Federation Ministry of Health "On the Application of Assisted Reproduction Technology in Female and Male Patients." Although this piece of legislation has been superseded by the Order № 107n, it still contains the guidelines that can be relied upon;

vi. And more broadly, the Constitution of the Russian Federation from 1993.

The main provisions on surrogacy are contained in the Family Code 1995. Arts. 51 and 52 set out the general rules on parenthood in cases of assisted reproduction. The legal basis for registration of a child born with assistance of ART is contained in art.51(4) of the Code. Albeit not referring to the surrogacy procedure explicitly, they enshrine the legal right of the commissioning parents to have recourse to the services of a surrogate mother and become the genetic parents. The respective provision states that "the parties to a marriage who have consented, in a written form, to the use of artificial insemination or IVF shall be recorded as the legal parents of the child born as the result of the use of this method." Art. 51(4) para 2 further provides that "the parties to a marriage who have consented, in a written form, to the implantation of an embryo into another woman for the purposes of its being carried [by that woman] may be recorded as the legal parents of the child only subject to that woman's consent." Art. 52 further provides that the parties that provided written consent for the procedure cannot contest their parenthood on the basis of the procedure. These provisions signify the distinctive feature of

[8] From 29 Dec 1995 №223-FL.
[9] The Federal Statute on the Acts of Civil Statuses № 143-FL.
[10] Replaced the Order №67 from 26 Feb 2003 of the Russian Federation Ministry of Health "On Use of Assisted Reproductive Technologies for Infertility Treatment for Female and Male Patients" translated by Konstantin Svitnev, 'Legal Regulation of Assisted Reproduction in Russia' (2010) 20 *Reproductive Biomedicine* 892, 892.

surrogate motherhood, compared to other forms of assisted reproduction.

Despite the explicit legal recognition of surrogacy in the Code, there are some shortcomings in relation to the definition of surrogacy arrangement as well as post-birth arrangements. The law would have benefitted from a more specific statutory definition of a surrogacy arrangement that would clarify the stages it entails. Tereshko, for example, suggests that art. 51(4) para 2 should be modified so as to recognise that surrogate motherhood implies artificial insemination, implantation of an embryo and the carriage for a married couple, for whom the baby would be genetically related while 'not being biologically related to a woman carrying him.'[11] Whilst touching upon all aspects of surrogacy, Tereshko's definition also seems to be slightly inaccurate as it overlooks the situations where a child is not genetically related to either one or both parents or could be related to a surrogate mother.[12] Therefore, the statute should explicitly provide that the child is supposed to be handed over to the intended parents after birth.[13] Furthermore, art.51(4) para 2 allows the establishment of legal parenthood of the intended parents to be overridden by the surrogate's wishes to keep the child.[14] It is the third party, the surrogate mother, who has the *prima facie* decision-making powers over the future of the surrogate child. Ivaeva adds that the Family Code should take into consideration the situations where a child might be handed over to third parties other than the intended parents – parties that are not involved into a surrogacy arrangement at all. For example, in a case of death of the intended parents or their refusal to accept the child, the surrogate might hand him over to the so-called 'baby-house,'[15] whereby the social workers accepting a baby would fall within the category of third parties, except they would not have parental status.

Despite the claims that the Family Code provisions are relatively comprehensive, at the same time it seems that little has been done regarding statutory consolidation. The Code fails to cover all aspects of a surrogacy arrangement, leading to a highly fragmented statutory coverage of this sphere of assisted reproduction. In order to fill the gaps left by the Code, other legislative Acts need to be referred to. For example, the definition of a surrogacy arrangement is provided in art. 55(9) of the Federal Statute № 323-FL which describes it as "bearing and giving birth to a child in accordance with a contract entered into by a surrogate mother and the intended parents whose gametes have been used for fertilization or by

[11] Y. Tereshko, 'An order for the Children' (2007) *Center Bereg* at http://www.center-bereg.ru/f1564.html.
[12] Traditional surrogacy is illegal in Russia.
[13] Tereshko above (n11).
[14] This will be further discussed in 4.4.1 and 5.5.
[15] In Russian "Dom Mal'utki" – a specific type of orphanage where children up to three years old are raised. They are divided into 'ordinary' baby-houses and the specialised which deal with children having issues with mental development.

a single woman who is not able to bear a child according to medical indications."[16] This definition builds upon the broad one provided by art. 51(4) of the Family Code. Art. 55(9) is the only section of the Federal Statute that deals specifically with surrogacy, with the rest of it regulating other healthcare issues. The structure of other relevant norms is also patchy – with only one or two sections being dedicated to surrogacy. Thus, the Order № 107n has been introduced to provide more clarity on the methods and requirements for the ART procedure. The Order contains the instruction on the methods, a patient's medical card of a sperm donor, a medical card of an oocyte donor, a register of artificial insemination procedures. The Order sets certain requirements for the medical centres - it provides with detailed recommendation on the structure, and its list of equipment. Similarly to the other pieces of legislation regulating surrogacy, only parts of the Order are dedicated to systematisation of medical institutions specialising in ART, with the rest being dedicated to other medical issues.

It is also clear that the current legislation fails to address the interests of the parties affected by death of a surrogate mother and is in urgent need of reform. The automatic presumption of paternity and maternity does not take into account the situations where the surrogate is unable to provide consent for the registration of the intended parents whereby the husband becomes the child's legal father despite neither having any genetic connection with the child nor the intention to be legally related. The legislative gap also leaves the genetic mother in a disadvantaged position: while there is an opportunity for the genetic father to dispute paternity, no such option seems to be available for the mother.[17] Some scholars suggest that surrogate's consent should remain in place, yet an opportunity for the genetic parents to establish their legal parenthood must be provided. Telegina and Gras'ko, for example, suggest that art. 48 of the Code should remain intact; yet a supplementary paragraph could be added to art. 49, which would provide for the possibility to dispute paternity *and* maternity before the court in cases of surrogacy specifically.[18] Consequently, the law on post-birth registration also should be subject to modification. Thus, the Federal Statute 143-F3 should be supplemented with the provision setting out the administrative procedure in cases of surrogate's inability to provide consent. Zhilyaeva argues that the interests of the intended parents would receive greater protection if they could be

[16] Federal Statute No.323-FL "On the basics of the health protection of the citizens of the Russian Federation" from 21 Nov 2011.
[17] There is no corresponding provision in the Family Code. Neither there seems to be any examples of judicial approach to the issue. See also Е. Телегина и А. Грасько, «Проблемы установления родительских прав и прав ребенкав институте суррогатного материнства» (2018) 6 *Вестник Нижегородского университета им. Н. И. Лобачевского* 150, 151. E. Telegina i A. Gras'ko, «Problemy ustanovlenija roditel'skih prav i prav rebenkav institute surrogatnogo materinstva» (2018) 6 *Vestnik Nizhegorodskogo universiteta im. N. I. Lobachevskogo* 150, 151. E Telegina and A Gras'ko, 'The Problems of Establishment of Parental Rights in the Institute of Surrogate Motherhood' (2018) 6 *The Messenger of Nizhegorodsk University* 150, 151.
[18] Ibid 153.

automatically registered as the legal parents as long as they can present the surrogacy contract and the death certificate confirming the death of the surrogate mother.[19] Kirova and Ablyatipova assume that legal fatherhood should be granted by application only. They suggest amending the Federal Statute 143-F3 by introducing the requirement for genetic fathers to apply to the registry. The matter was partially clarified in the *Ruling № 33-5744/2017* of Sverdlovsk District Court in 2017. It suggested that in such situations the parties to the agreement must supplement the original surrogacy contract with an advance directive, verified by a notary, which would record the intentions of the parties in case of a surrogate's death. This would allow to provide some written proof that the parties intended the biological parents to be registered as the legal parents. This shows imperfections in Russian surrogacy regulation that places undue emphasis on the presumption of maternity and the notion of a gestational mother. However, in practice the only way for the intended parents to become the legal ones is if the surrogate's husband gives the child up. This would allow the intended parents to adopt their own child. Despite the popularity of assisted reproduction, Russian law still does not seem to recognise surrogacy as a separate aspect of family law and does not provide a concrete compilation of norms. The statutes governing other aspects of surrogacy arrangements will be analysed below.

4.1 Eligibility criteria for surrogate mothers and the legal position of her husband

The term 'surrogate' comes from Latin "*surrogatus*" – 'substitute'[20] or [partial] replacement.[21] A surrogate mother, therefore, may be defined as a substitute of the biological mother for the period of pregnancy and birth. Art. 51(4) only broadly refers to a surrogate mother as "... a woman who has been implanted with an embryo… of the parties to a marriage… [who have] consented [to the implantation of an embryo] for the purposes of its carriage…"[22] The Family Code's reference to a surrogate therefore is very broad, devoid of any specific eligibility criteria. This does not mean that *any* woman would be suitable to become a surrogate mother. The law also provides for an important reservation: art. 55(9) of the Federal Statute № 323-FL does not allow the use of the surrogate mother's genetic material. This means that the surrogate mother must not be the genetic mother of the child. This is

[19] Светлана Жиляева, «Законодательное Регулирование Суррогатного Материнства» (2019) 2 *Научный Вестник Орловского Юридического Института МВД России Имени В.В. Лукьянова* 30, 32. Svetlana Zhiljaeva, «Zakonodatel'noe Regulirovanie Surrogatnogo Materinstva» (2019) 2 *Nauchnyj Vestnik Orlovskogo Juridicheskogo Instituta MVD Rossii Imeni V.V. Luk'janova* 30, 32. Svetlana Zhilyaeva, 'Legal Regulation of Surrogate Motherhood' (2019) 2 *Scientific Messenger of Orlov Lukianov Legal Institute of the MIA of Russia* 30, 32.
[20] Oxford Dictionaries, available at https://en.oxforddictionaries.com/definition/surrogate.
[21] Official Thesaurus Dictionaries available at http://www.thesaurus.com/browse/surrogate.
[22] The Family Code 1995. it should be noted that there is no single legal definition of surrogate motherhood.

further reinforced by art. 55(10) which states that a surrogate mother cannot be an egg donor.[23] Trusted, for example, argues that such approach is appropriate. If a surrogate mother also provides her eggs *in utero*, she would have given a part of herself, which could make her psychologically vulnerable.[24] Korolev, by contrast, notes that another reason why the surrogate mother cannot be the egg donor is to avoid confusion when establishing the baby's origins.[25] Furthermore, the absence of genetic connection might reduce the possibility of psychological traumas to surrogates; knowing that she is not genetically related to the child, she would not feel attached to the baby she is carrying. Indeed, the absence of a biological link did help some surrogate mothers not to form any attachment. Some of them agree that this is the main reason to consider surrogacy as a job. A third-time surrogate mother confessed: "I have never felt compelled to keep the child – even after they let me give the first baby a post-birth hug. I did not even look at the second one. With the third one, I was just notified that he is healthy and alive."[26]

However, this limitation is not the only one that is imposed on surrogate mothers. Due to the extreme sensitivity of the arrangement and potentially life-changing consequences for all parties implicated, the legislation does not take the eligibility criteria for a surrogate mother lightly. The eligibility requirements are contained in the abovementioned Order № 107n. The Order explicitly prescribes that a surrogate mother must be 'a woman between 25 and 35 years of age who:

a) Has given birth to at least one child of her own;
b) Has received a satisfactory medical report;
c) Has given written informed consent for the medical reproductive treatment;[27]

On the one hand, such restrictions seem to be beneficial: the age requirement of 25-35 years maximizes the chances for a healthily developing foetus as this age is usually seen as a reproductive

[23] This approach has been criticised by Edgar Page who argues that if using donor gametes is allowed, there must be no reason why the use of donor eggs should be prohibited. In Page's view, what happens in traditional surrogacies amounts to egg donation *in utero* which follows by gestation for the intended parents. See Edgar Page, 'Donation, Surrogacy and Adoption' (1985) 2 *Journal of Applied Philosophy* 167, 167-172.
[24] Jennifer Trusted, 'Gifts of Gametes: reflections about surrogacy' (1985) 3 *Journal of Applied Philosophy* 123, 123- 126
[25] А. Королев, *Комментарий К Семейному Кодексу Российской Федерации (Постатейный)* (Юстицинформ 2003). A. Korolev, *Kommentarij K Semejnomu Kodeksu Rossijskoj Federacii (Postatejnyj)* (Justicinform 2003). A. Korolev, *A Commentary to the Family Code of the Russian Federation (by article)* (Yustitsinform 2003) a commentary to article 51.
[26] Two stories of surrogate mothers interviewed by *Afisha Daily*, "How is it – to be a surrogate mother?" available at https://daily.afisha.ru/relationship/383-kakovo-eto-byt-srrogatnoj-matery/.
[27] Articles 77-78, the Order №107-N from 30.08.2012 of the Russian Federation Ministry of Health on the Application of Assisted Reproduction Technology, its Side-Effects and Limitations.

peak.[28] As medical professionals claim, this would protect both the surrogate and the commissioning couple. The majority of the physical or other problems would have been discovered by the age of 25 making it much clearer whether a woman would be able to carry her own children.[29] The second requirement appears to help a surrogate mother to make an informed choice – if she has at least one child of her own, she would be well aware of the risks that a pregnancy could carry and she could be less likely to keep the child. As Borisova argues, "since [a surrogate] is familiar with what is labeled as 'maternal instinct' she would be able to control her attitude towards the child."[30] Therefore, overall, the law seems to require that the surrogate must be young, yet with children of her own, to have no previous pregnancy complications, and, as some add, also have serious intentions about the family traditions and values and unable to imagine her life without children.[31]

At the same time, these restrictions also make the law significantly less liberal towards both the intended parents and the surrogate mother. The age restriction significantly narrows down the number of women potentially capable of successfully joining the program. The rationale underlying such a restriction, based on the fact that the older the surrogate mother is the lesser chances she would give birth to a healthy child are, has been criticized. The experts in reproductive sphere insist that if a woman is physically healthy, "she can still give birth to a perfectly healthy baby even at the age of menopause."[32] Furthermore, the requirement of 'at least one child' is also questionable. This requirement is controversial and leads to a vicious circle. The women that choose to enter into surrogacy arrangements are usually those who do not have sufficient financial means for self-sustainability. Consequently, they also do not possess means for the basic maintenance of their own child. Their very choice to become surrogate mothers is made to realise the opportunity to earn at least some income. Yet, by law they have to have at least one child of their own, irrespective of whether they can support that child. It should be noted that had these restrictions been in place during the early

[28] Н. Трифонова, Э. Жукова, А. Ищенко, Л. Александров, «Суррогатное материнство: исторический обзор. Особенности течения беременности и родов» (2015) 15 *Российский Вестник Акушера-Гинеколога* 49, 49-55. N. Trifonova, Je. Zhukova, A. Ishhenko, L. Aleksandrov, «Surrogatnoe materinstvo: istoricheskij obzor. Osobennosti techenija beremennosti i rodov» (2015) 15 *Rossijskij Vestnik Akushera-Ginekologa* 49, 49-55. N. Trifonova, E. Zhukova, A. Ischenko and L. Aleksandrov, 'Surrogate Motherhood: a Historical Overview' (2015) 15 *The Russian Herald of Gynaecology* 49, 49-55.

[29] O. Pulia and N. Nesterova, 'An order for the Baby' available at https://rg.ru/2009/01/26/surrogat.html.

[30] Татьяна Борисова, *Суррогатное материнство в Российской Федерации. Проблемы теории и практики. Монография* (Москва Проспект 2016) 152. Tat'jana Borisova, *Surrogatnoe materinstvo v Rossijskoj Federacii. Problemy teorii i praktiki. Monografija* (Moskva Prospekt 2016) 152. Tatiana Borisova, *Surrogate Motherhood in the Russian Federation: Problems in Theory and Practice* (Moscow Prospekt 2016) 152.

[31] Ibid.

[32] Morgan Holcomb & Mary Patricia Byrn, 'When your Body is your Business' (2010) 85 *Washington Law Review* 647, 655.

years of surrogacy arrangements back in 1990s, the first two successful programmes would have never been completed. Svitnev provides an example of a successful surrogacy arrangement carried out in St. Petersburg, where the surrogate mother was only 24 years old and yet the child was born alive and healthy. The requirements are also detrimental for the intended parents. The rules significantly narrow down the options of surrogate mothers to choose from. While it might be relatively easy to find a woman of a certain age, it would be harder to find a surrogate *of a certain age with* a child *and* willing to enter into surrogacy arrangement.

Apart from the legislative requirements set out in the Order above, there are also some additional criteria laid down in the Order № 67. These constitute a further non-mandatory administrative medical guidance for the intended parents during the selection process of the surrogate mother.[33] While choosing a surrogate the commissioning couple is recommended to pay attention to the following:

1) "Normal" body structure of the surrogate mother; this means that the surrogate should not be suffering from any obesity-related disease. This is explained by the effect a hormonal treatment might have on her weight.
2) Her previous births should have been natural, i.e. the caesarian section, leaving a scar, may prevent an embryo from being successfully implanted;
3) She should stop using any contraception 3-4 months in advance;

Whilst the requirements for a surrogate mother might appear to be precise and restrictive, they were, in fact, introduced to assist the commissioning couple with choosing a surrogate that they could trust. She should be a perfect match biologically and, possibly, personally. The requirements, however, were not welcomed by everyone. Some assert that such legislative intervention in this sphere is excessive, superfluous or even harmful.[34] Zdanovsky, for example, argues: "the law usually has forbidding power. We have been dealing with assisted reproduction for more than twenty years and this is not forbidden by law. There is a healthcare Order from the Ministry of Health and the instructions, containing the details, attached to it. Due to rapidly developing medicine, the instructions quickly become outdated, and we would be left in an awkward

[33] Further on the nature of the administrative guidance in Russian medical law see generally Olga Khazova, 'Genetics and Artificial Procreation in Russia' in *Biomedicine and Human Rights* (Brill Nijhoff 2002) 377.
[34] В. Здановский в М. Тольц, Л. Оберг и О. Шлюпко, «Начальные Этапы Реализации Женской Репродуктивных Функций(2003) 7 *Здравоохранение в Российской Федерации* 13, 13. V. Zdanovskij v M. Tol'c, L. Oberg i O. Shljupko, «Nachal'nye Jetapy Realizacii Zhenskoj Reproduktivnyh Funkcij(2003) 7 *Zdravoohranenie v Rossijskoj Federacii* 13, 13. V. Zdanovskii in M. Tolts, L. Oberg and O. Shliupko, 'The early stages of realisation of women's reproductive functions' (2003) 7 *Healthcare in the Russian Federation* 13, 13.

situation where the permission for surrogacy is followed by a hopelessly outdated procedure of its realization. Since these instructions [amount to guidelines only] and are not [legally] obligatory, why do we need them at all?"[35]

A further limitation is imposed by a surrogate's marital status. A married woman also may not legally exercise her choice to become a surrogate. Thus, art. 55(10) explicitly states that if a potential surrogate mother is married, she may only enter into the arrangement with the written consent of her husband. This requirement may be explained by the fact that the husband confirm that he is aware of the legal risks stemming from a failed arrangement as well as the medical complications that the surrogate might face. A surrogate would need to provide proof of her marital status (a physical copy of marriage registration).[36] This requirement might prove very problematic for a surrogate whose husband objects to the procedure or is nowhere to be found. Some women report that their decision to become a surrogate led to escalated tensions between them and their husbands, whereby the husbands categorically refused to consent to the arrangement, sometimes even resulting in divorce.[37] The cases of missing husbands are no less complicated – a surrogate would need to seek consent from someone with whom she may not be living for decades but for some reason has not formalised the separation. This complexity discriminates between married and unmarried surrogates by depriving the former from the ability to exercise her right to bodily autonomy protected as by art. 23 of the Russian Constitution.

If a surrogate is married, however, the position of her husband may be equally as precarious. If he consented, it may well be the case that he would be tied in a legal quagmire, having only a limited avenue for redress. Art. 17 of the Family Code provides that "[a husband] cannot initiate divorce proceedings during the pregnancy and a year after a child's birth." For example, he might not be able to obtain a divorce if his relationship with the surrogate deteriorates either during the surrogate pregnancy or a year after the child's birth. It should be noted that it is also unclear whether this provision applies only to husbands who are also genetic fathers of the child or *all* husbands irrespective of the genetic connection. If it is the former, then the surrogate's husband would be released from an obligation to remain married to the surrogate for another year. However, since the restriction seeks to protect a new mother from depression during the pregnancy and for a year after birth, something that may be induced by a painful divorce process, it can only be assumed that a

[35] Ibid.
[36] Art. 30 of the Federal Statute "On the Acts of Civil Statuses" № 143-FL.
[37] 'I decided to become a surrogate mother when I was 50. My husband was against this and I got divorced' (8 Feb 2018) at https://gubdaily.ru/sociology/chastnoe-mnenie/ya-reshilas-stat-surrogatnoj-mamoj-kogda-mne- uzhe-ispolnilos-50-muzh-byl-protiv-no-ya-ego-ne-poslushala/.

husband of a surrogate would also fall within the scope of the provision.

There is also a possibility that the husband could unknowingly or unwillingly accept parental responsibility for a child that he has no connection to. If the surrogate mother decides to keep the child, something the Family Code allows her to do, her husband would automatically become the father of a surrogate child.[38] Art.1 of the Family Code, promoting familial equality between the spouses, explicitly states that "The matters of motherhood, fatherhood, a child's upbringing, his education and other matters should be resolved based on the principle of equality between the spouses."[39] Thus, as soon as the surrogate's husband consented to the arrangement, he undertook the responsibility to participate in the major decision-making regarding the child's welfare and the law seeks to ensure that the best interests of the child are observed. Hence, he would have to undertake the relevant obligations, such as financial support for the child's upbringing. This would be the case even if a surrogate mother enters into the arrangement unbeknown to her husband, for instance if the couple is formally married, but live separately. Whilst this does not seem to be a fair outcome for the surrogate's husband, it seems that the law seeks to protect the interests of the child, for example, financial arrangements and housing. Determining parenthood is a time-consuming process, which means that a child might have been left out without support maintenance until the process is complete.[40]

There is a limited way for a surrogate husband to contest his parenthood. Art. 52(3) of the Family Code explicitly excludes artificial insemination as a ground for contesting fatherhood. The legislation assumes that the surrogate's husband already knew that he is not biologically related to the child, which means that the burden of proof would be placed on the husband.[41] Technically, this would mean that he is automatically and involuntarily becoming the father to a child he has no link with. Yet, the surrogate's husband may try to rely on other grounds. For instance, in case of misrepresentation or a signature forgery, a husband may contest his fatherhood by showing that at the moment of registration he had had no knowledge of the surrogacy arrangement.[42] He may also try to dispute his paternity in court by asserting that a child has been conceived through the sexual intercourse rather than artificial insemination.[43] The Decree of the Plenum of the Supreme Court confirmed that art.52 precludes neither

[38] Art 51(1) of the Family Code 1995.
[39] Art 1 The Family Code 1995.
[40] Commentary to art. 52(3) of the Family Code 1995 at < https://skodeksrf.ru/rzd-4/gl-10/st-52-sk-rf.
[41] Ibid.
[42] Korolev above (n25).
[43] This justification is unlikely to work as he would have known about the arrangement. The surrogate would also not be able to rely on surrogacy here as traditional surrogacy is illegal. This approach has been criticised by Edgar Page who argues that if using donor gametes is allowed, there must be no reason why the use of donor eggs should be prohibited. In Page's view,

the legal mother or father nor the biological mother or father as well as the child upon reaching the age of adolescence[44] from contesting paternity on the basis of the lack of biological connection between the surrogate's husband and the child.[45] If the court accepts the contract as evidence of the latter, it may order the surrogate's husband to be removed from the relevant entry on the child's birth certificate.

It is apparent that the current state of law on legal parenthood in surrogacy cases is not entirely satisfactory. Instead of applying the automatic presumption of paternity to the surrogate's husband and providing him with limited avenues for rebutting the presumption, it would be beneficial to exclude the presumption of automatic fatherhood altogether. Thus, a provision governing the establishment the origins of the child born out of the surrogacy arrangement needs to be inserted into art. 48 of the Family Code. It should provide that the intended father should be automatically recorded as the legal father of the child, thereby protecting the husbands of the surrogates who entered into the arrangement either without their consent or those who decided to keep the child against their husband's will, thereby imposing parental responsibility on them.

4.2 Restrictions on the eligibility of commissioning parents

While the Russian surrogacy regime does not provide a universal right to enter into the arrangement, it is perceived to be one of the most liberal ones in the world.[46] Technically surrogacy is said to be open to 'any patient,'[47] but the law imposes certain requirements limiting the eligibility of commissioning parents, on 'medical' as well as 'social' grounds. Thus, art. 7 of the Healthcare Order № 67 "On the Use of Assisted Reproduction Technology (ART) as Treatment of Female and Male Infertility" requires the commissioning couple to provide a medical 'conclusion' that the intended mother is *physically* unable to carry the child. This has subsequently been reinforced by art. 55(9) of the Federal Statute № 323-FL "On the Basics of Healthcare Protection of the Citizens of the Russian Federation,"[48] which reiterates that "carrying and birth [must be] impossible for *medical* reasons."[49] These are 'filtering' provisions that see surrogacy as a way of addressing infertility, thereby excluding

what happens in traditional surrogacies amounts to egg donation *in utero* which follows by gestation for the intended parents. See Edgar Page above (n23) 167-172.

[44] The list also includes a child's guardian, or the guardian of a parent who lacks mental capacity as well as the child who has not reached the age of adolescence but obtained capacity by virtue of marriage or emancipation. See 'Consultant Plus' at http://www.consultant.ru/document/cons_doc_LAW_216881/7e20ad5b6eec349f8c138e9a5c5ea3c3ef6f89d5/.

[45] The Decree of the Plenum of the Supreme Court №16 from 16 May 2017 "On The Judicial Application Of The Legislation When Considering The Cases On The Establishment Of The Child's Origins' para 26.

[46] 'Senator: Liberalism has made Surrogate Motherhood the Russian Tragedy' (27 Mar 2017) *First Russian TsarGrad* at https://tsargrad.tv/news/senator-liberalizm-sdelal-surrogatnoe-materinstvo-tragediej- rossii_55424 accessed 1 Jun 2017.

[47] 'Who is entitled to Surrogate motherhood?' *Nova Clinic* at <https://nova-clinic.ru/komu-podkhodit- surrogatnoe-materinstvo/> accessed 1 Jun 2017.

[48] From 21 Nov 2011.

[49] Ibid.

any couple that does not need to be treated for infertility from its scope of application.[50] Art. 55(3) of the abovementioned Federal Statute further states that "a man and a woman, either married or unmarried have a right to the use of assisted reproductive technology… A single woman also has a right to use assisted reproductive technology." This wording seems to have the discriminatory effect of limiting access to surrogacy for certain minority groups, such as single fathers and same-sex couples. As of December 2022, surrogacy is also prohibited for foreign nationals, unless they are dual citizens, holding the Russian nationality or are married to a Russian citizen.[51]

Prima facie the legal approach to surrogacy seems to be purely 'medicalised' treating surrogacy merely as a method of infertility treatment.[52] Art. 79 of the Order of the Health Ministry "On the Order of the Use of Assisted Reproduction Technologies" № 107n further narrows down the criteria that the commissioning mother must satisfy in order to be eligible:[53]

a) absence of uterus (congenital or acquired);
b) uterine cavity or cervix deformity due to congenital malformations or diseases;
c) uterine cavity synechia, which cannot be treated;
d) somatic diseases contraindicating any child-bearing;
e) repeatedly failed IVF attempts;
f) other way of reproduction is impossible; to qualify for the programme;[54]

The incorporation of the checklist as opposed to unlimited access to surrogacy services seems to be reasonable. By focusing merely on the fulfillment of the 'healthcare checklist,' the legislator seemingly sought to prevent or at least reduce the abuse of the right to use assisted reproductive

[50] This would also accord with art. 41 of the Russian Constitution which providing for a universal right to healthcare and treatment. It follows that if a woman does not have fertility problems she would not need to be treated. For discussion see Альфия Забирова, «Правовые Проблемы Определения Показаний К Использованию Вспомогательных Репродуктивных Технологий» (2016) 2 *Медицинское Право: Теория И Практика* 280, 280. Al'fija Zabirova, «Pravovye Problemy Opredelenija Pokazanij K Ispol'zovaniju Vspomogatel'nyh Reproduktivnyh Tehnologij» (2016) 2 *Medicinskoe Pravo: Teorija I* Praktika 280, 280. Alfiya Zabirova, 'Legal Problems of Eligibility to the Use of Assisted Reproductive Technologies' (2016) 2 *Medical Law: Theory and Practice* 280, 280.
[51] Federal Statute №538-FL "On the Introduction of Amendments into Certain Legislative Acts of the Russian Federation" from 12 Dec 2022.
[52] Ксения Кириченко, «О Двух Подходах К Пониманию Правовой Сущности Вспомогательных Репродуктивных Технологий» (2011) *Медицинское Право* 35, 35-40. Ksenija Kirichenko, «O Dvuh Podhodah K Ponimaniju Pravovoj Sushhnosti Vspomogatel'nyh Reproduktivnyh Tehnologij» (2011) *Medicinskoe Pravo* 35, 35-40. Ksenia Kirichenko, 'On the Two Approaches to the Understanding of the Essence of Assisted Reproductive Technologies' (2011) *Medical Law* 35, 35-40.
[53] Whilst not explicitly stated in the Order, these are presumably not cumulative, apart from f) which must be satisfied in all cases.
[54] From 30 Aug 2012.

technology[55] as well as to limit the ability to provide ART services by unqualified or 'greedy' doctors on a large scale. As practice shows, these concerns are not completely unfounded. The Healthcare Ministry revealed that in more than half of the cases of alleged medical misconduct referred for investigation in 2017, the victims have received inappropriate standards of medical care.[56] This includes medical professionals engaged in assisted reproduction whose practice also resulted in either party's personal injury or death.[57] Some institutions, more driven by greed, claim to be 'holistic' agencies. Under the cloak of 'simplifying' the burdensome pre and post-birth procedures for the commissioning parents, they try to cross-sell their services by claiming to be the legal representatives, state officials authorized to deal with the child's registration upon the end of the programme, as well as licensed clinics.[58] If the restrictions were eased, the increasing popularity of surrogacy in recent years might lead to more aspiring parents falling victims of improper standards of medical care. Tischenko and Frolova add that the area of assisted reproduction is particularly more prone to abuse due to patchy and already lax regulation. This means that an unrestricted access to surrogacy could open the Pandora box for crimes other than medical negligence, such as abuse of power, corruption, extortion and human trafficking.[59] There are already known instances where women were selling their own infants by pretending to be surrogate mothers and producing falsified evidence.[60]

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[55] Ibid (n50) 287.

[56] Дмитрий Венев, «Криминалистическое обеспечение расследования преступлений против жизни и здоровья, совершаемых при оказании медицинских услуг» (2016) *Работа выполненная в федеральном государственном бюджетном образовательном учреждении высшего образования «Московский государственный юридический университет имени О.Е. Кутафина (МГЮА)* 1, 6. Dmitrij Venev, «Kriminalisticheskoe obespechenie rassledovanija prestuplenij protiv zhizni i zdorov'ja, sovershaemyh pri okazanii medicinskih uslug» (2016) *Rabota vypolnennaja v federal'nom gosudarstvennom bjudzhetnom obrazovatel'nom uchrezhdenii vysshego obrazovanija «Moskovskij gosudarstvennyj juridicheskij universitet imeni O.E. Kutafina (MGJuA)* 1, 6. Dmitrii Venev, 'Criminalistic Safeguarding of Investigations of Crimes against Life and Health committed during the Provision of Healthcare Services' (2016) *Kutafin Moscow State University (MGUA*) 1, 6.

[57] Н. Кручинина, «Юридическая ответственность за злоупотребления и преступления в сфере искусственной репродукции человека» (2019) *Lex Russica* 48, 50. N. Kruchinina, «Juridicheskaja otvetstvennost' za zloupotreblenija i prestuplenija v sfere iskusstvennoj reprodukcii cheloveka» (2019) *Lex Russica* 48, 50. N Kruchinina, 'Legal Liability for Abuse and Crime in the Sphere of Assisted Reproductive Technology' (2019) *Lex Russica* 48, 50.

[58] 'Doctors – Fraudsters of Surrogate motherhood' (15 Oct 2016) *European Centre for Surrogate Motherhood* at <https://ecsm.ru/ostorozhno/vrachi-moshenniki/> accessed 2 May 2017.

[59] Е. Тищенко и Е. Фролова, «Особенности Преступной Деятельности В Сфере Государственных И Муниципальных Закупок: Уголовно-Правовые И Криминалистические Аспекты» (2018) 3 *Юридический Вестник Самарского Университета* 69, 69. E. Tishhenko i E. Frolova, «Osobennosti Prestupnoj Dejatel'nosti V Sfere Gosudarstvennyh I Municipal'nyh Zakupok: Ugolovno-Pravovye I Kriminalisticheskie Aspekty» (2018) 3 *Juridicheskij Vestnik Samarskogo Universiteta* 69, 69. E Tischenko and E Frolova, 'The Risks of Criminal use of Biotechnology: A Criminology Discourse' (2018) 3 *Legal Herald of Samara University* 69, 69.

[60] Н. Кручинина и А Холевчук, «Фальсификация Как Объект Криминалистического Исследования» (2010) 1 *Актуальные Проблемы Российского Права* 15, 15. N. Kruchinina i A Holevchuk, «Fal'sifikacija Kak Ob"ekt Kriminalisticheskogo Issledovanija» (2010) 1 *Aktual'nye Problemy Rossijskogo Prava* 15, 15. N Kruchinina and A Kholevchiuk, 'Falsification as a Source of Covering up for a Crime and its Relationship with other Ways of cover up: "Staging", "Masking", "Annihilation", "Disinformation" and "False Alibi" (2010) 1 *Actual Problems of Russian Law* 15, 15

However, it appears that the possibility of the increase in crime was not the only rationale for the restrictive legislative choice. Rather, it also seems to have been driven by wider considerations, more focused on the much-preferred orthodox methods of reproduction in light of consistent demographic decline. Thus, by restricting access to surrogacy to the medical grounds only, the legislator tried to strike a careful balance between the conservative preservation of natural methods of procreation favoured by the society and the urgent need to address the concerning demographic situation calling for a more laxed approach to assisted reproduction. It is understood that by default a healthy and fertile woman would prefer to undergo pregnancy and natural birth. If she is not physically capable of giving birth naturally, she will fall back on assisted reproduction.

In the recent years, the governmental promotion of conservatism within family relations has intensified,[61] claiming more room in political and social discourse. Addressing the Federal Assembly back in 2013, Vladimir Putin emphasised that in stark contrast to other states, where the understanding of morality is being re-considered, he would continue to uphold traditional family relationships.[62] A family, in the eyes of the President, is the pronatalist institution concentrating on procreation as a means of improvement birth rate.[63] It is acknowledged that for some surrogacy remains an 'alien' concept, with some even labelling it as "a version of satanism,"[64] a rebellion against the nature. For example, Mizulina, the Head of the Committee for Family, Women and Motherhood, even compared surrogacy to nuclear weapon – the disaster seeking to destroy planet Earth.[65] She argues that the use of technologies in assisted reproduction does not reflect the overall position of Russian society, which only adheres to 'moral values and the natural family as the carrier of these values.'[66] While some values have become less rigid under the influence of various factors, the idea of natural reproduction and

[61] See generally Марианна Муравьева, «Традиционные Ценности И Современные Семьи: Правовые Подходы К Традиции И Модерну В Современной России» (no year) 12 *Журнал Исследований Социальной Политики* 625, 626. Marianna Murav'eva, «Tradicionnye Cennosti I Sovremennye Sem'i: Pravovye Podhody K Tradicii I Modernu V Sovremennoj Rossii» (no year) 12 *Zhurnal Issledovanij Social'noj Politiki* 625, 626. Marianna Muravieva, 'Traditional Values and Contemporary Families: Legal Approach to Traditions and Modern in Modern Russia' (no year) 12 *The Journal of Social Policy Studies* 625, 626.

[62] 'Putin will Defend Traditional Family Relationships' (12 Dec 2013) *Vesti.ru* at https://www.vesti.ru/article/1993206 accessed 2 Mar 2017.

[63] Muravieva (n60) 628.

[64] Liudmila Kuzmina, 'Milonov: Surrogate Motherhood is a Version of Satanism' (17 Oct 2019) *Radio KP* at <https://radiokp.ru/milonov-surrogatnoe-materinstvo-eto-vid-satanizma_nid2677_au414au66> accessed 20 Oct 2019. V. Milonov is a member of the State Duma and one of the biggest opponents of surrogacy amongst the state officials.

[65] 'E. Mizulina compared surrogate motherhood with nuclear weapon' (10 Nov 2013) *RBC* at <https://www.rbc.ru/society/10/11/2013/5704128e9a794761c0ce3859> accessed 2 Mar 2017.

[66] E. Mizulina in Ю. Лебенко, «Современные Взгляды На Суррогатное Материнство» (2017) *Современные Исследования В Области Технических И Естественных Наук* 133, 137. Ju. Lebenko, «Sovremennye Vzgljady Na Surrogatnoe Materinstvo» (2017) *Sovremennye Issledovanija V Oblasti Tehnicheskih I Estestvennyh Nauk* 133, 137. Y. Lebenko, 'Contemporary Views on Surrogate Motherhood' (2017) *Contemporary Explorations in the Sphere of Technical and Natural Sciences* 133, 137.

conservative reproductive attitude seems to become deeply engrained within society. Despite the limited empirical data available, the view that natural childbirth is generally favoured seems to be prevalent amongst the academic body.[67] The study on the methods of procreation conducted by Gatina, for example, reveals that 100% of the respondents were born without any medical interventions and their own children were born this way.[68]

The legislator has realised that had it been strictly adherent to the traditional values and this could have translated into an almost certain prohibition of surrogacy as a practice, completely overlooking the fact that an increasing number of couples is *physically unable* to have children.[69] This would have contributed to a further demographic decline, thereby contradicting the government's own agenda. Allowing surrogacy but with some minor restrictions, however, appears to be the middle-ground: it provides childless couple with an opportunity to have children thereby contributing to demographic growth, while simultaneously avoiding the outcry amongst the opponents of surrogacy. Zabirova, for example, observes that such confinement to the criteria would help to preserve the traditional concept of family that is so rooted in the Russian culture.[70] The careful confinement to medical grounds also escapes social criticism that might negatively affect the trust in the government. Despite the occasionally apparent signs of aggression directed towards their own fellow citizens,[71] Russian society tends to be empathetic[72] and merciful in the situations of desperation, such as severe illness or childlessness.[73] A childless couple is generally seen as "unlucky, unhappy and unfortunate" as it is unable to fulfil the role assigned to a family.[74] Therefore, from the legislator's perspective, it would be

[67] It should be noted that natural childbirth was preferred to 'interventionist' methods, such as Caesarean section. The studies did not include surrogacy.
[68] Д. Гатина, «Результаты Изучения Отношения Рожениц К Родоразрешению Путем Операции Кесарево Сечение» (2016) 3 *Современные проблемы науки и образования* 38, 38. D. Gatina, «Rezul'taty Izuchenija Otnoshenija Rozhenic K Rodorazresheniju Putem Operacii Kesarevo Sechenie» (2016) 3 *Sovremennye problemy nauki i obrazovanija* 38, 38. D Gatina, 'Results of the Study of the Attitude towards Birth via Caesarean Section' (2016) 3 *Contemporary Problems of Science and Education* 38, 38.
[69] Ibid.
[70] Zabirova above (n50) 280-289
[71] Gennadii Orlov, 'Great Russian People forgot about Empathy and Compassion' (4 Feb 2021) Rambler News at https://news.rambler.ru/disasters/45747854-gennadiy-orlov-velikiy-russkiy-narod-zabyl-o-sochuvstvii-i- sostradanii/ accessed 4 Feb 2021
[72] Aleksandr Valdimirov, 'The Basis of the Russian Culture – Empathy, Compassion and Condolence' (25 Jan 2015) *Art Rosa* at <http://art-rosa.ru/news/newsread/news_id-5178> accessed 2 Mar 2017.
[73] О. Стрелкова, «Психологические Установки И Отношение Современного Студенчества К Созданию Будущей Семьи» (2018) 5 *Вестник Научных Конференций* 91, 91. O. Strelkova, «Psihologicheskie Ustanovki I Otnoshenie Sovremennogo Studenchestva K Sozdaniju Budushhej Sem'i» (2018) 5 *Vestnik Nauchnyh Konferencij* 91, 91. O Strelkova, 'Psychological Setting and Attitudes of Modern Studentship towards the Creation of a Future Family' (2018) 5 *The Herald of Scientific Conferences* 91, 91
[74] This conclusion is based on the opinions expressed on various discussion forums debating the purpose of a family. The comments suggesting that parenthood should not necessarily be the purpose of every family were very rare. See e.g. 'Why a childless woman is seen as unhappy?' (2019) at <http://www.bolshoyvopros.ru/questions/3045549-pochemu-bezdetnuju-zhenschinu-schitajut- neschastlivoj.html> accessed 20 Apr 2019

most likely to be compassionate with those whose choice of surrogacy would be the last plea for procreation, rather than a whim. Indeed, a study conducted by Lebedev confirms that while the society is becoming more tolerant of the ART, the majority of the participants clarified that the recourse to it must be no less than 'absolutely necessary.' Thus, he concluded that 60% of those participating in the survey expressed a generally favourable attitude towards surrogacy but strictly in a complicated situation where a woman is unable to carry the child by herself.[75] Therefore, it seems that in the eyes of the legislator the main purpose of surrogacy must be trying to 'mimic' the natural reproduction.

While confining eligibility strictly to medical grounds might seem understandable from the viewpoint of the policymakers at the time, it does not fully take into consideration other medical reasons, such as age-related infertility, that might prompt one to choose surrogacy over other ways of assisted reproduction. However, even if one is able to overcome the hurdles set out by art.55(9), this also does not necessarily imply automatic eligibility. Thus, art. 55(3) of the Federal Statute explicitly states that "a man and a woman, either married or unmarried have a right to the use of assisted reproductive technology… A single woman also has a right to use assisted reproductive technology."[76] The wording of the provision narrows the eligibility to three specific groups of commissioning parents: a married couple, an unmarried couple and a single mother. Presumably, the marital status and nationality of the intended parents do not seem to be important as long as they are heterosexual and satisfy the so-called 'lengthy relationship requirement.'[77]

Whilst the law on single mothers seems to be fairly clear it ignores certain groups, such as same- sex or single intended fathers. This shows the legislator's myopic attitude to those who might need to access surrogacy on the grounds other than the ones provided in the two pieces of the legislation. This position is also discriminatory: not only is it contrary to art. 19 of the Russian Constitution, which guarantees the equality of rights, irrespective of gender,[78] but also retreats from the overall goal of gender equality which has been one of the main constitutional ideas since the early 20th century.[79] Depriving single fathers of an opportunity to have genetically-related offspring is nothing more than a 'perpetuation of

[75] Anatolii Lebedev, '3/4 of Russians are in Favour of Surrogate Motherhood' (30 Dec 2013) *Probirka* at https://www.probirka.org/surrogatnieprogrammy/6325-tri-chetverti-rossiyan-za-surrogatnoe-materinstvo accessed 2 May 2017.
[76] From 21 Nov 2011.
[77] The couple must have cohabited for 5 years. See generally the Federal Statute "On Cohabitation" from 2019.
[78] Art. 19 of the Russian Constitution from 12 Dec 1993.
[79] See generally С. Ворошилова, « Развитие конституционной идеи равенства полов в России XX века» (2016) 2 *Вестник Саратовской Государственной Юридической Академии* 26, 26-30. S. Voroshilova, « Razvitie konstitucionnoj idei ravenstva polov v Rossii XX veka» (2016) 2 *Vestnik Saratovskoj Gosudarstvennoj Juridicheskoj Akademii* 26, 26-30. S Voroshilova, 'The Development of the Constitutional Idea of Gender Equality in XX Century' (2016) 2 *the Herald of Saratov State University* 26, 26-30.

the failure of the law to recognise the many non-traditional forms of the family that exist nowadays.'[80] If single motherhood is accepted, it is only logical for the single fathers to have the same right to fatherhood.

The omission of a single father leaves this grey area open to interpretation. Some lines of judicial authorities suggest that single fathers are legally entitled to access the surrogacy programme on the same basis as single mothers. Yet, while the judicial approach has been far from being consistent, offering little to no clarification as to the eligibility of single fathers. A revolutionary ruling was made by the Babushkinskii District court in 2010.[81] The issue arose around the decision of the Civil Registry to refuse the registration of a single father on the birth certificate of a child born out of a surrogacy arrangement. Upon the Registry's refusal, the father applied for a court order which was granted. This was the first instance where the birth certificate recorded the single father as the legal father of a surrogate child whilst leaving the 'mother' entry blank.[82] The Court seems to have based its decision to exclude the surrogate on intent – it has never been intended that she would become the legal mother. The Court also ruled that the Civil Registry's refusal of the registration had no legal basis and violated the principle of equality and the respondent's right to fatherhood.[83] The Court's progressive decision was welcomed by the lobbyists of single parents' rights for its protection of the right to procreate irrespective of marital status and gender.[84] The precedent has been followed by the St. Petersburg district court in 2011 when there was no "mother entry" for surrogate twin babies.[85]

However, the general attitude towards single fathers seems to remain lukewarm: despite the alleged 'precedential' status of the Babushkinskii District court ruling, a completely opposite decision was reached some three years later.[86] In 2014 a single father applied to be registered as the legal father of twin children born to a surrogate mother. Similarly to the case above, he requested for the "mother"

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[80] Richard Storrow, 'Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage' (2002) 53 *Hastings Law Journal* 579, 639-40.
[81] *Case № 2-1601/11* from 4 Aug 2010.
[82] К. Свитнев, «Вспомогательные Репродуктивные Технологии: Правовые Коллизии» (2011) Правовые Вопросы Здравохранения, 53, 53. K. Svitnev, «Vspomogatel'nye Reproduktivnye Tehnologii: Pravovye Kollizii» (2011) *Pravovye Voprosy Zdravohranenija* 53, 53. K Svitnev, 'Assisted Reproductive Technologies: Legal Collisions (2011) *Legal Issues in Healthcare* 53, 53.
[83] In fact, it would violate a few articles: article 7 – right to motherhood and fatherhood; article 19 part 2 - right to equality and freedoms; article 19 part 3 – gender equality; article 55 – prohibition on the laws, limiting human rights. See in general, В. Цветков, «Правовое Регулирование Суррогатного Материнства» (2012) *Сибирское Юридическое Обозрение* 47, 48. V. Cvetkov, «Pravovoe Regulirovanie Surrogatnogo Materinstva» (2012) *Sibirskoe Juridicheskoe Obozrenie* 47, 48. V.A. Tsvetkov, 'Legal Regulation of Surrogate Motherhood' (2012) *Sibir' Legal Overview* 47, 48.
[84] K Svitnev 'ART and spousal status' (8-10 Sep 2011) St Petersburg PowerPoint Presentation at http://www.rahr.ru/d_pech_mat_konf/Svitnev.pdf accessed 7 Mar 2017.
[85] Ibid.
[86] *Case № 2-1472/2014* from 19 Mar 2014.

entry to be either left blank or to state that she is "not known." The Registry refused to issue the birth certificate on the basis that the father was not married. The Court of First Instance followed the traditional interpretation of the registration provision and agreed with the Registry. It ruled that legal fatherhood is based on the marriage certificate of the parents. Alternatively, he could be registered as a legal father upon the application of the legal mother, which was also impossible in the present instance as the surrogate has already given up her legal motherhood. The Court ignored the medical certificates proving the father's biological relationship with the children. The Court of Appeal also deemed the application inadmissible.[87] This lack of uniform approach shows the difficulties that single fathers face post-birth. Some scholars welcomed the Court of Appeal decision by claiming that, contrary to the progressive judicial approach, this does not undermine marriage as the foundation of family. It would also discourage aspiring parents from cohabitation by indirectly requiring to enter into a marriage. This, in turn, would be beneficial for the future child as only married couples are capable of providing a child with the necessary environment for his upbringing and promote marriage as a precondition for a traditional family.

Although at times the courts seem to take the "what is not prohibited is allowed" stance, the same cannot be said about the surrogacy agencies.'[88] Svitnev explains that despite the absence of explicit restrictions on the eligibility of single fathers, many agencies are reluctant to enter into an arrangement with them. Some even force them to enter into a sham marriage before contacting the agency,[89] contrary to the explicit provisions of the Family Code.[90] The Registries are also hesitant in issuing the birth certificates, leading to the fathers having to undergo a lengthy procedure through the court. This approach clearly stigmatises those commissioning fathers, who either chose not to get married or have not met someone they would like to have children with.[91] Some fathers fear losing contact with their children if the marriage ends in divorce.[92]

The exclusion of single fathers from the legislation seems to be intentional and rooted in a historically shaped social perception of single fathers. Although the term single motherhood sounds fairly habitual for the Russian ear, single fatherhood remains more unusual and is still treated with

[87] The Application for Appeal № 33-29316/2014 from 22 Jul 2014.
[88] 'Surrogate Motherhood for Single Men' (no date) European Centre for Surrogate Motherhood at https://ecsm.ru/surrogacy/dlya-odinokih-pacientov/surrogacy-for-single-man/ accessed 2 May 2017.
[89] 'Moscow: The Court ruled the Single Father to be the Legal Father of a Test-tube Baby' (16 Aug 2010) Pravo.ru at https://pravo.ru/news/view/36047/ accessed 2 May 2020.
[90] Art. 12 of the Family Code 1995 explicitly prohibits "marriages against one's will."
[91] Surrogate Motherhood for Single Fathers' *Mama-Poisk* at <https://mama-poisk.ru/news/muzhchinam.html> accessed 2 Mar 2017.
[92] Ibid.

apprehension. Large-scale male depopulation caused by the Second World War led to the firm establishment of social feminisation in the sphere of reproduction and child upbringing.[93] It is socially accepted that upon the parents' separation the child would remain with the mother.[94] In fact, single mothers account for 30% of all mothers in Russia.[95] The state recognises single mothers also have various legal rights and benefit entitlements. The female dominance in parenthood seems to have resulted in single fatherhood having almost a negative connotation. At times single fathers are seen as 'skilled manipulators' 'using' the children in a conflict with the former partners.[96] In contrast to single mothers, who are usually empathised with or pitied, fathers are often accused of 'forcefully taking the child so as not to pay child support.'[97] In the context of surrogacy, however, they are treated with even more caution, if not suspicion. Those strongly opposing single fathers' eligibility to surrogacy often question the commissioning fathers' ability to raise and provide a loving and supportive environment for the child. Dashkova, a famous Russian detective story writer, goes as far as to argue that 'a person who is not able to build a relationship with a man or a woman, create a family is unlikely to raise children. After all, a family is mainly the ability to build human relationship, a sense of a partner, a sense of another person, equal to you. And a person is not capable to it just from the beginning, even if he made some flat attempts he decided to live without a woman, ordered children, "bought" them and is going to bring them up. From the standpoint of ordinary morality this looks problematic."[98] Unfortunately, Dashkova is not alone in seeing the recourse to surrogacy as a symptom of a single father's deep social trauma, stemming from the inability to create a 'traditional' relationship. Kuchmaeva echoes these concerns: "in a family where the only parent is the father, all he wants is to satisfy his own "parental motivations". His decision [to become a single father] is often based on the blatant unwillingness to spend the time or make an effort to build up a relationship with a woman, create a family and taking into consideration the interests of the second half. They are severely bothered by the issue of

[93] E Kudriavsteva, 'To Give birth without a Mother' (6 Sep 2010) *Kommersant* at <https://www.kommersant.ru/doc/1493569> accessed 2 Mar 2017.
[94] Ibid.
[95] Е. Дорошенко и Е. Гурова, «К Проблеме Изучения Феномена «Отец-Одиночка» (2019) *Возможности И Риски Цифровой Среды: Возможности И Риски Цифровой Среды Сборник материалов VII Всероссийской научно-практической конференции по психологии развития* 271, 271. E. Doroshenko i E. Gurova, «K Probleme Izuchenija Fenomena «Otec-Odinochka» (2019) *Vozmozhnosti I Riski Cifrovoj Sredy: Vozmozhnosti I Riski Cifrovoj Sredy Sbornik materialov VII Vserossijskoj nauchno-prakticheskoj konferencii po psihologii razvitija* 271, 271. E. Doroshenko and E. Gurova, 'On the Issue of Exploring the Phenomenon of a Single Father' (2019) *VII All- Russian Scientific-Practical Conference on the Psychology of Development* 271, 271.
[96] А. Михайлова, «Суррогатное материнство как способ создания монородительской (отцовской) семьи» (2012) 1 *Аспирант* 59, 59. A. Mihajlova, «Surrogatnoe materinstvo kak sposob sozdanija monoroditel'skoj (otcovskoj) sem'i» (2012) 1 *Aspirant* 59, 59. A Mikhailova, 'Surrogate Motherhood as a Way of Creation a Monoparental Family' (2012) 1 *Aspirant* 50, 59.
[97] 'Stories of Single Fathers in Russia: What Woman would need me?' (14 Dec 2018) MK Ru at <https://www.mk.ru/social/2018/12/14/istorii-otcovodinochek-v-rossii-kakoy-babe-ya-nuzhen.html> accessed 2 Mar 2019
[98] Polina Dashkova in K Arslanov and O Nizamieva, 'Surrogacy: Legal and Moral Dimension of the Problem from the Perspective of Russian, Foreign and International Perspective' (2015) 10 *Research Journal of Applied Sciences* 841, 843

ownership. Economic life strategies tend to prevail."[99] However, this view completely ignores the changing role of a father in modern Russian society. Single fatherhood is becoming more prominent, with the number of single fathers steadily increasing. Thus, the data suggests that out of 9 million of 'incomplete' families, 2,5 million children are being raised by single fathers.[100] There is also an increasing number of fathers who claim that they are happy with the role of a single parent,[101] and do not see the task of child upbringing as a burden.

The lack of opportunity/ or lack of desire to build a family does not mean incapability to do so. Some of the single fathers are simply not motivated to (re) marry as they are "afraid" of the potential divorce, where most likely they would have to surrender a child to the former wife. In fact, not only is the majority of them able to provide for basic parental functions, some even manage to compensate for the absence of a mother by performing childcare tasks generally assigned for her, such as braiding or attending school meetings.[102] They also willingly make certain sacrifices in order to ensure the best quality upbringing for their children.[103] Although the risk of an unmeritorious father cannot be completely ruled out, evidence suggests that those seeking to enter into a surrogacy arrangement do so consciously and upon extensive deliberation. A typical father choosing surrogacy is in his forties, financially secure and seeks to ensure that the child has a comfortable standard of living.[104] He has stable income and the ability to progress upon the career ladder, with the only piece of the puzzle missing – the child. As Svitnev rightly argues, for these parents, it is a baby that transforms a 'non-family' into a family. For the children, an "incomplete family [without a mother would still be] better than its complete absence".[105] Therefore, it would be more beneficial for the child to be raised by a single yet loving parent rather than by two but incompetent or abusive parents. Nor does the fact that a child is born to a single father mean that "this is [exactly] how he is going to grow up."[106] Some men could re-consider their stance on single fatherhood and find their better halves after the child's birth

[99] O Kuchmaeva, cited in "Parental Instinct For a Million" at http://jurconsult.ru/smi/print/rusvoice/.
[100] Mikhailova (above n96) 59.
[101] Ibid.
[102] Above (n97).
[103] Н. Мельник и Ю. Афанасьева, «Неполная отцовская семья в России» (2016) *Молодой Ученый* 243, 243. N. Mel'nik i Ju. Afanas'eva, «Nepolnaja otcovskaja sem'ja v Rossii» (2016) *Molodoj Uchenyj* 243, 243. N. Mel'nik, Y. Afanasyeva 'Incomplete Paternal Family in Russia' (2016) *Young Scientist* 243.
[104] An interview with Konstantin Svitnev (4 Oct 2020) *Meduza* at <https://meduza.io/feature/2020/10/04/im- nuzhno-bylo-pridumat-geev-raschleniteley-kotorye-pokupayut-i-prodayut-nashih-detey> accessed 4 Oct 2020.
[105] This is the literal translation. In Russian language single-parent families are called "incomplete". This phraseology does not mean defective it simply means "not a full family", i.e. where one parent is missing; see Svitnev (n81) 56.
[106] Jamie L. Zuckerman, 'Extreme Makeover: Surrogacy Edition. Reassessing the Marriage Requirement in Gestational Surrogacy Contracts and the Right to Revoke Consent in Traditional Surrogacy Agreements' (2007) 32 *Nova Law Review* 661, 677.

which means that the latter could still be brought within a 'two-parent family unit.'[107]

The rationale based on the potential unfitness of a single father to provide a thriving environment is not satisfactory as single fatherhood has been accepted in other family relationships, such as adoption. Art. 127 of the Family Code provides that 'a single unmarried man as well as a single unmarried woman have the right to adoption."[108] Technically, surrogacy and adoption would not differ much in terms of the outcome – in both cases a single father would be registered as a legal father of the child. If surrogacy could be called a risky arrangement due to the potentially negative character of the intended parents, the same may be said about adoption. Despite the checks that the father has to undergo, there is always a chance that he will not be able to provide the caring environment for the child.

The legal position of same-sex couples is no less complicated: the legislation completely ignores them as a group potentially eligible for surrogacy. On the one hand, it might be suggested that such an omission may well have been unintentional during the legislative drafting process. Similarly to single fathers, same-sex couples' increasing recourse to surrogacy seems to have been simply not envisaged by the legislator, which means that there was no need to provide for their eligibility. Although the sex liberation marches were 'in full swing' somewhere in Europe, they seemed to be too distant to have any impact in Russia. Generally, perceived 'alien,' same-sex relationships have never been fully accepted by the Russian public. Widely seen as morally "repugnant" they have been long assailed for allegedly implanting 'ugly' ideals seeking to destroy morality and traditional Russian values.[109] Starting with Peter the Great's enactment of the legislation on sodomy back in 1716, homophobia ultimately became a part of the Russian widespread attitude when the Stalinist rule included same-sex relationship within the Criminal Code in 1934.[110] The repressions of homosexuals, led by Genrikh Yagoda, became more frequent and violent:[111] each year around from 800 to 1000 were subject to hard work at the forced labour camps or gulags.[112] Despite the fact that a slow progress towards a greater acceptance of same-sex couples was made in the late 20th early 21st centuries, it is clear that Russian society 'has a long way to go' before the LGBT community is fully integrated in it. The data gathered in February 2020 reveals that one out of five respondents still favours total exclusion of gay

[107] Ibid.
[108] Art. 127 of the Family Code 1995.
[109] Aleksandr Shurinov, 'Ugly Consequences of Surrogate Motherhood and Surrogate Motherhood' (2019) *Proza ru* at <https://proza.ru/2019/05/24/1728> accessed 2 Mar 2019.
[110] 'Viva the Rainbow or why is the Russian attitude to Homosexuals negative?' (18 Jul 2020) *The Lawyers of All Countries Unite* at <https://www.9111.ru/questions/777777777929979/> accessed 20 Jul 2020.
[111] 'LGBT and the Ultimate Decision on the Russian Question' (29 Mar 2021) *Edaily* at < https://eadaily.com/ru/news/2021/03/29/lgbt-i-okonchatelnoe-reshenie-russkogo-voprosa > accessed 24 May 2021.
[112] This followed a short period when homosexuality was decriminalised – from 1907 to 1911. See above (n110).

people from Russian society.[113] This is compared with a year earlier, when the statistics showed that at least 56% of Russians have a negative perception of the LGBT community with over 31% claiming that they will completely stop communicating with a homosexual person.[114] At the same time, there also appears to be a clear positive trend in the numbers of those lobbying for same-sex couples having equal rights. This seemingly contradictory development appears to be rooted in the specifics of Russian traditionalism. The more progressive and educated younger generation remains largely outweighed by the older one, with 75% of the older generation expressing less tolerant views on homosexuality.[115] Firsov reckons that Russia is very peculiar in its ability to be highly critical of homosexuality while at the same time voluntarily accepting the erosion of other traditional values such as premarital relationship: "this type of culture tends to blur the distinction between a social and a more fundamental biological norm thereby rejecting homosexuality despite the visible absence of legal and cultural limitations."[116]

However, Russian homophobia also seems to be driven by a wrongful association of homosexuality with abnormality, borderline perversion and paedophilia.[117] It is believed to be the direct outcome of the "malign influence" or "sexual misconduct" rather than something naturally inherent and unchangeable by external factors.[118] This, in turn, leads to call for any sort of legal state protection.[119] One of the senators remarked that inability to have children equates the so- called 'divine retribution' for promoting what he labels the 'Western Sodom and Gomorrah.'[120] He is confident that same-sex couples enter surrogacy in order to exploit their future children: "this is… perversion. This is going to be a child who will have no childhood or happy future…"[121] Some academics also fear that this would lead to child sexual abuse by the intended parents. One could remember the heartbreaking Australian case where the child of a homosexual couple became the victim of sexual exploitation by

[113] An interview with Karen Shainian: 'The Constitution asserts that a marriage is a union between a man and a woman' (8 Jul 2020) *Meduza* at <https://meduza.io/episodes/2020/07/08/v-konstitutsii-teper-skazano-chto-brak- eto-soyuz-muzhchiny-i-zhenschiny-govorim-o-gosudarstvennoy-gomofobii-s-zhurnalistom-karenom- shainyanom> accessed 8 Jul 2020.
[114] 'Almost half of the Russian population support equal rights for Gays' (23 May 2019) *RBC* <https://www.rbc.ru/politics/23/05/2019/5ce530039a7947172f79405d> accessed 23 May 2019.
[115] A Survey: Russians Became less tolerant to Homosexuality' (23 Mar 2020) *Ria Novosti* at <https://ria.ru/20160212/1373276470.html> accessed 23 Mar 2020.
[116] Ibid.
[117] 'In Russia the Fight with Homosexual Couples is almost official. This is what LGBT-couples can do to protect their rights' (26 Nov 2020) *Meduza* at <https://meduza.io/feature/2020/11/26/v-rossii-s-gomoseksualnymi- lyudmi-boryutsya-prakticheski-ofitsialno-vot-chto-lgbt-pary-mogut-sdelat-chtoby-hot-kak-to-zaschitit-svoi- prava> accessed 26 Nov 2020. Meduza is one of the very few media resources that is fully independent from the government. In April 2021 Meduza has been labelled "a foreign agent" by the Russian Ministry of Justice allegedly for exposing the issues surrounding Alexei Navalnii case– see 'Russia Labels Meduza Media Outlet As 'Foreign Agent' (23 Apr 2021) *Radio Free Europe* at <https://www.rferl.org/a/russia-meduza-labeled-foreign- agent-press-freedom/31219272.html> accessed 23 Apr 2021.
[118] Above (n113).
[119] Ibid.
[120] Above (n63).
[121] Ibid.

his own fathers, Peter Truong and Mark Newton.[122] The boy was born by a Russian surrogate in 2005 and subsequently adopted by a gay male couple. The family seemed to be 'just like any other' publicly pretending to be 'loving and caring.'[123] Later on, however, they transpired to be paedophiles with the 'crimes committed against their son being hard to comprehend.'[124] Following a close cooperation of the international police forces both parents were ultimately charged with conspiracy to sexually exploit the child and sentenced to 40 years in prison.[125] It is also argued that allowing same-sex couples to enter into a surrogacy arrangement would subsequently lead to the child's psychological problems, such as identity crisis and inability to identify his sexual orientation.[126] While the apprehension of the above concerns is not unfounded, it is hard to argue that the abovementioned Australian case is about homosexuality itself. Rather, "it's a story about two sexual predators who systematically abused their adopted son."[127] Paedophilia is neither a corollary of homosexuality nor it is confined to it. As Gorman rightly argues, "people who abuse children come in all shapes and sizes. They are gay, they are straight. They are everything in between. The only label you can possibly categorise them with is 'evil."[128]

Despite the assumingly disdainful attitude, it seems likely that initially the legislator might have intentionally left the question of eligibility open. As discussed above, homosexuality is becoming an increasingly sensitive area within the Russian society. The attitude towards what has been largely labelled as a "rainbow" community may be extremely negative, positive but it is hardly ever neutral. Interestingly, however, the government's approach does not show any attempt to promote solidarity for sexual minorities. Instead, quite on the opposite, it is usually the provocateur of the public outcry. Thus, the current stance fits the state's overall approach to homosexuality. For example, in 2013 the Federal Statute № 135-FL, prohibiting the propaganda of homosexuality amongst minors has been

[122] 'Australian surrogate boy abused by dads' (12 Dec 2015) *Fox News* at <https://www.foxnews.com/world/australian-surrogate-boy-abused-by-dads> accessed 13 Mar 2017.
[123] Ginger Gorman, 'A journalist's second thoughts' (10 Jul 2013) *ABC News* at <https://www.abc.net.au/news/2013-07-10/gorman-second-thoughts/4809582> accessed 10 Mar 2017.
[124] Ibid.
[125] Ibid.
[126] Александра Пушкарева и Регина Сытикова, «Возможности Использования Услуг Суррогатного Материнства Для Пар, Принадлежащих К Лгбт-Сообществу» (2019) *Технологии XXI Века В Юриспруденции* 123, 123. Aleksandra Pushkareva i Regina Sytikova, «Vozmozhnosti Ispol'zovanija Uslug Surrogatnogo Materinstva Dlja Par, Prinadlezhashhih K Lgbt-Soobshhestvu» (2019) *Tehnologii XXI Veka V Jurisprudencii* 123, 123. Alexandra Pushkareva and Regina Sytikova, 'The Opportunities to use Surrogate Motherhood for the Couples belonging to LGBT-Community' (2019) *Technologies of XXI Century in Jurisprudence* 123, 123.
[127] Gorman (n123).
[128] Ibid.

enacted,[129] firing up the extreme social attitude. As Volkov observes, the peak of intolerance is directly linked to the campaign surrounding the 2013 legislative proposal.[130] This seems to indicate that the government's reaction is usually very fast if it wishes to introduce a restriction.

Nevertheless, the antagonistic attitude does not mean that surrogacy for same-sex couples is completely illegal, at least not yet. Practice shows that the wording of the provision may be stretched so as to include same-sex couples in the same way as the courts 'read' single fathers in. This has called for an extensive involvement of lawyers carefully facilitating the smooth arrangement for same-sex couples during the recent years. Thus, in 2020 it transpired that Russia has become a popular 'underground' surrogacy destination for gay couples from Russia[131] and abroad[132] contrary to the Federal Statute № 323-FL and the Order № 107n. The news immediately made the national headlines, calling for the legislation to be amended so that same-sex couples would be *explicitly* excluded from the eligibility criteria, based on the violation of morals that homosexuality brings. The sensation was followed by the increased attention from the authorities, especially Investigation Committee that suspected a human trafficking case under part 2 art. 127 of the Criminal Code. The Committee emphasised that a homosexual man cannot legally be the sperm donor and arrested a few people on this ground. Based on these allegations, the men will face criminal charges for human trafficking.[133] This means that upon the end of the investigation the children will be taken from the intended parents and will be placed in a state institution for adoption.

The investigation itself received a strong public reaction. Whilst the majority of the public supported the prosecution of the fathers as well as the doctors involved in the arrangement,[134] some expressed their sincere disbelief in the Telegram-channel:[135] "in the absence of real allegations, it is

[129] "On Amendments of art. 5 of the Federal Law "On the Protection of Children from the Information that will cause harm to their health and Development" and Other Legislative Acts of the Russian Federation that seek to protect children from the information denying the traditional family values" from 11 Jun 2013.
[130] Above (n113).
[131] 'Russia will prohibit surrogate motherhood for single men' (20 Oct 2020) *Lenta.Ru* at <https://lenta.ru/news/2020/10/20/new_rools/> accessed 27 Oct 2020.
[132] Aleksandr Stepanov, 'Investigation: Russia became the Factory for Surrogate Children for Chinese and Gays' (3 Oct 2020) *First Russian Tsar'grad* at <https://nsk.tsargrad.tv/articles/rassledovanie-rossija-prevratilas-v- fabriku-surrogatnyh-detej-dlja-kitajcev-i-geev_285694> accessed 3 Oct 2020.
[133] Irina Mishina, 'Illegal but still Wanted: the Investigation Committee targets single gay parents' (6 Oct 2020) Novye Izvestiya at <https://newizv.ru/news/society/06-10-2020/nezakonno-no-ochen-hochetsya-sledstvennyy- komitet-vzyal-na-pritsel-odinokih-ottsov-geev> accessed 7 Oct 2020.
[134] 'A Father – in Prison, a Child – in an Orphanage: How is the Doctors' Prosecution going to Turn out for the Russians and What this has to do with Gays' (8 Oct 2020) *Lenta.ru* at <https://lenta.ru/articles/2020/10/08/surr/> accessed 8 Oct 2020.
[135] An instant messenger, similar to Whatsapp. It gained prominence after the creators were forced to hand over the encryption keys to Roskomnadzor, allegedly in the latter's attempts to combat terrorism.

unclear on what grounds arrests may be carried out here. All is left for these same-sex couples [and single homosexual parents] is to leave the country. That's what they [the government] hints at anyway…"[136] The defence of the accused agrees that sexual orientation played a key role for the state's unreasonable and unfounded actions.[137] Indeed, in its pursuit to eradicate homosexual parenthood, the government completely ignores the fact that it would be the children that would be the victims of this ordeal. Instead of being handed over to the intended fathers, who would provide a caring environment for them, they would have to spend their childhood in a state orphanage in deplorable conditions waiting for adoption, which might never happen.

Albeit sudden, sadly, the news did not come as a complete shock – it is clear that the Kremlin still had 'some unfinished business' from eight years earlier. Back in 2013 the government already admitted that it will "seek to fight any attempts of artificial imposition of non-traditional sexual behaviour."[138] A little later by virtue of amendments included in the Federal Statute № 167-FL "On the Introduction of Amendments into Separate Legislative Acts of the Russian Federation on the Question of the Arrangements for Orphaned children and those left without Parental Support"[139] and the Family Code in 2013 it became illegal for "[married] parties of the same sex" to adopt a child.[140] Although the government justified its actions by the necessity to protect Russian orphans from adoption by French same-sex couples (whose marriage got legalised slightly prior),[141] it also became clear that the state's fight against same-sex couple's opportunities to have children became almost official. In 2020, following a legal yet unsuccessful attempt of adoption by a single homosexual father, another proposal was put forward – this time prohibiting adoption by homosexual single persons.[142] The potential father, Egor Ovchinnikov, who passed a course on adoptive parenthood and received a medical assessment that he is suitable for adoption, observed: "the adoption commission became interested in my gay-related activities and interviews that I gave to LGBT prints. The judge spoke to me as if I am a criminal. This is when I realised they didn't give a damn about the child. All they cared

[136] Kozlenko in Mishina above (n133).
[137] Valeriia Kornienko, 'IC intends to Prosecute homosexual fathers for child trafficking from surrogate mothers' (1 Oct 2020) *Daily Afisha* at <https://daily.afisha.ru/news/42064-sk-sobiraetsya-zaderzhat-otcov- gomoseksualov-za-pokupku-detey-u-surrogatnyh-materey/> accessed 1 Oct 2020.
[138] 'The Prohibition of Adoption by Same-sex couples came into force: Vladimir Putin has signed the relevant order' (3 Jul 2013) Kommersant at <https://www.kommersant.ru/doc/2225475> accessed 2 Mar 2017.
[139] From 2 Jul 2013.
[140] Art. 146.
[141] Above (n137).
[142] Vlad Maksakov, 'Transgenders and Gays are prohibited from Adopting a Child in Russia' (14 Jul 2020) *OSN Media* at <https://www.osnmedia.ru/obshhestvo/rossijskim-transgenderam-i-geyam-zapretyat-usynovlyat- detej/> accessed 20 Jul 2020.

about was not to screw up and not to give the child to some pervert."[143] Yet, the commission has changed its mind after he managed to delete the materials that mentioned his name from the Internet and concluded a fictitious marriage with a girlfriend. He ultimately managed to bring the adopted child home.

Furthermore, the situation would not be different if a same-sex couple were married. First of all, it can be recalled that the relevant provision of art. 55 states that "*a man and a woman*, either married or unmarried have a right to the use of assisted reproductive technology…" This article confines marriage to a union between a man and a woman only. Indeed, in theory a court could take a progressive approach and take into account that heterosexual marriage might no longer be seen as a norm. Hence, the provision could be interpreted as "a union between two parties" or "two people" so as to avoid any reference to gender. Nevertheless, this would only offer a partial remedy to the problem that both married and unmarried same-sex couples would face trying to enter into the surrogacy arrangement. As stated above, married couples are more trusted by the surrogacy agencies which means that by entering into the marriage a couple would increase their chances of being accepted on the programme. The Russian legislation does not explicitly allow same-sex marriages, yet it does not explicitly prohibit them either. The state recognises marriages concluded abroad[144] which means that technically homosexual couples would be able to travel to a permissive country and upon return enter into a surrogacy arrangement in accordance with the legislation and return to Russia where their legal status *should* be recognised. However, the practical realities seem to be completely different and same-sex married couples often meet political obstacles. For example, in 2017 two homosexual men, Pavel Stotsko and Evgenii Voitsekhovskii, told a story about the registration of their marriage abroad. The story has been broadcasted via a private TV- channel. They showed the amazed host and the audience their passports with a stamp confirming their marriage. Next morning their flat was raided by the police on the grounds of causing intentional damage to the official document. Unfortunately, they were forced to flee from Russia.[145]

The government contends that the liberal approach to surrogacy remains unaffected - the changes in the legislation aim to protect the surrogate children from abuse by foreign couples, more specifically "to prevent them from being born into same-sex families."[146] The current events are nothing more than a

[143] 'Not to give a Child to a Pervert: Where and How LGBT couples are not allowed to Adopt children' (25 Jul 2019) *Wonder* at <https://www.wonderzine.com/wonderzine/life/life/244875-lgbt-adoption> accessed 27 Jul 2019.
[144] Art 158 of the Family Code 1995.
[145] Above (n116).
[146] Ibid.

logical continuation of the so-called 'antigay propaganda' initiated and supported by the government.[147] By excluding foreign same-sex couples or homosexual fathers from the eligibility criteria, the state does not seem to be attempting to make the surrogacy regime less liberal. Even in relation to the restriction on foreign intended parents, the government explicitly stated that it is foreign same-sex families that are of biggest concern.[148] Thus, it specifically targets homosexual minority that attempts to use surrogacy as means of reproduction. Therefore, the clampdown on surrogacy is not really a clampdown on it at all – it is yet another open attack on same-sex couples and homosexuality in general. As one of the politicians observed: "how can the state imprison gays if there is no legal basis, but they want to do it so much? The Investigation Committee found the way. A source from the state tipped TASS[149] off that all men of untraditional sexual orientation, who acted as sperm donors for the surrogate mothers, will be imprisoned."[150]

At the end of 2022 the state decided to "clamp down" on the intended parents from abroad. Following a two-year debate in the State Duma, the Federal Statute №538-FL finally became law, excluding foreign nationals from the list of the parents eligible for surrogacy. Art 1 of the Statute amends art 51(4) of the Family Code by introducing the requirement for "both of [the intended parents] or at least one to be the national of the Russian Federation." Whilst this change seems drastic, it is not completely unexpected. The discussions of the amendments commenced during the pandemic, in early 2020, when four dead surrogate children were discovered in a flat in Moscow outskirts. All children were born as a result of an arrangement with foreign nationals – the intended parents were from the Philippines and Thailand. All parties involved in the arrangement, including the translator and the courier were arrested and sentenced to minimum of six years.[151]

Some scholars rightly suggest that the approach to surrogacy eligibility criteria should be based on "familialised" grounds. In contrast to the 'medical' ones, the "familialised" is wider and focuses on elimination of discrimination between various groups of people. This more inclusive approach means that the eligibility criteria have to be extended even further to cover those with less obvious problems which might prevent them from undergoing through pregnancy. Unlike the 'medical' view, for the 'familial' one surrogacy is a means of realisation of reproductive rights, rather than a way of treating

[147] Above (n137).
[148] Above (n146).
[149] The Russian Federal Information Agency, owned by the government and headquartered in Moscow.
[150] Dmitrii Gudkov shared this view on his Facebook page.
[151] 'Putin signed the law on prohibition of surrogate motherhood for foreigners' (8 Dec 2022) *BBC Russia* at < https://www.bbc.com/russian/news-63902552 > accessed 29 Dec 2022.

infertility. The medical element is only of minor importance as the main purpose would be to achieve equality.[152] Levushkin, for example, argues that surrogacy should be seen as a private contractual arrangement, allowing the access to parties with e.g. sexual abstinence (for whatever reason); women suffering from pregnancy and birth phobia or trauma after an abortion; those with various deformities or a disability that for some reason preclude from entering into a relationship.[153] Mitryakova, however, finds this approach very problematic.[154] She is adamant that the abovementioned groups can always make a recourse to artificial insemination, rather than surrogacy. She is also uneasy about the extension of the eligibility to wider groups as this would mean that single fathers would also be taken into account. Such an extension, however, would lead to a slippery slope of the programme being abused. Interestingly, however, the major concern for her as well as some other scholars,[155] remain same-sex couples: "the social criteria are problematic…with the single man's wishes to become a father probably being the most ethically and legally controversial issue… there is always a chance that same-sex couples would want to use the services of a surrogate mother."[156] Yet, it seems that neither the legislator nor society is ready for the list of social criteria being broadened.[157]

4.3 *Post-mortem* conception: the courts' lack of sympathy to the plea of the desperate?

The rapid technological advancement allows conception to happen even after death of the genetic parent(s). The gametes may be harvested, frozen and later used for impregnation of either the other parent or the surrogate mother with the genetic material of deceased.[158] In contrast to posthumous reproduction,[159] where insemination occurs *during* the lifetime of the intended parent or parents, *post-mortem* reproduction allows for procreation to happen *after* their death.[160] While it is presumed that the

[152] Kirichenko above (n52) 287.
[153] А. Левушкин и И. Савельев, «Требования, предъявляемые законодателем к будущим родителям ребенка, рожденного с применением технологии суррогатного материнства» (2015) 9 *Современное Право* 92, 92-96. A. Levushkin i I. Savel'ev, «Trebovanija, pred"javljaemye zakonodatelem k budushhim roditeljam rebenka, rozhdennogo s primeneniem tehnologii surrogatnogo materinstva» (2015) 9 *Sovremennoe Pravo* 92, 92-96. A Levushkin and I Saveliev, 'The Requirements Imposed by the Legislator onto the Future Parents of the Child born with the Assistance of Surrogate Motherhood' (2015) 9 *Contemporary Law* 92, 92-96.
[154] See Елена Митрякова, «Социальные Показания К Применению Метода Суррогатного Материнства: Закон И Практика» (2018) 4 *Проблемы Права* 60, 61. Elena Mitrjakova, «Social'nye Pokazanija K Primeneniju Metoda Surrogatnogo Materinstva: Zakon I Praktika» (2018) 4 *Problemy Prava* 60, 61. Elena Mitryakova, 'Social Indications for the Use of Surrogacy Technology' (2018) 4 *Issues of Law* 60, 61.
[155] Kirichenko above (n52).
[156] Mitryakova above(n154) 61.
[157] Ibid 62.
[158] Ruth Zafran, 'Dying to be a Father: Legal Paternity in Cases of Posthumous Conception' (2007) 8 *Houston Journal of Health Law & Policy* 48, 50.
[159] Discussed below.
[160] Olga Isupova provides for a useful distinction between these seemingly synonymous terms and surrounding issues in Ольга Исупова, «Вспомогательные репродуктивные технологии: новые возможности» (2017) 4 *Демографическое обозрение* 35, 35-64. Ol'ga Isupova, «Vspomogatel'nye reproduktivnye tehnologii: novye vozmozhnosti» (2017) 4

idea was recognised as being feasible at least 2000 years ago,[161] the first successful post mortem sperm retrieval was performed in the US in 1980s with the first child being born 19 years later.[162] One of the most famous cases on *post-mortem* insemination, however, arguably, came from the UK when Diane Blood successfully argued the right to conceive a child using the sperm of her husband who had earlier died from meningitis.[163] Yet, in Russia, it was not until 2005 that the first *post mortem* reproduction was performed, agitating not only the medical but also legal community. Ekaterina Zakharova from a Uralian city of Yekaterinburg became the first woman to use the donor egg and a deceased son's sperm 8 years after he died from cancer. She entered into a surrogacy arrangement with a surrogate mother resulting in a baby boy who was genetically her deceased's son offspring. The grandmother described that she was so thrilled with the birth of the newborn, she felt 'close to fainting.'[164] The story has been instantly labelled as a 'miracle' for its plot, which seemed unique at the time.[165] Since then seven more cases gained public attention. On the one hand, *post-mortem* reproduction has been assailed for giving rise to a plethora of ethical issues, such as whether it would be morally acceptable to intentionally 'doom' children to be born as 'orphans.'[166] Some openly question the appropriateness of 'giving birth to a baby whose [parent]' is dead.[167] Nevertheless the practice has gained global popularity amongst the families that tragically lost loved ones,[168] realising the latter's children's only opportunity to come to

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Demograficheskoe obozrenie 35, 35-64. Olga Isupova, 'Assisted Reproductive Technologies: New Opportunities' (2017) 4 *Demographic Overview 35,* 35-64.

[161] Cindy Steeb, 'A Child Conceived After His Father's Death?: Posthumous Reproduction and Inheritance Rights. An Analysis of Ohio Statutes' (2000) 48 *Cleveland State Law Review* 137, 139.

[162] D Smolik, 'The Problems of Legal Regulation of Post-mortem Reproductive Rights: the Experience of Other Countries' (2019) 27 *Legal Sciences*: *Civil Law and Process* 231, 231.

[163] *R v Human Fertilisation and Embryology Authority ex parte Blood* [1997] 2 All ER 687. See also Jenny Kleeman, 'I want my late husband's children': the fight for posthumous conception' (18 Mar 2017) The Guardian at https://www.theguardian.com/lifeandstyle/2017/mar/18/late-husbands-children-posthumous-conception accessed 3 Apr 2017. It should be noted, however, that Diane's deceased husband could not have been entered in a birth certificate. The relevant entry was blank until the legislation was changed.

[164] 'Children have never been born this way in Russia' (20 Jan 2006) *NTV* at <https://www.ntv.ru/video/80488/> accessed 2 Apr 2017.

[165] 'Unique Cases of Childbirth' (22 Apr 2017) Feskov Human Reproduction Group at https://surrogate-mother.ru/unikalnye-sluchai-rozhdeniya-detej accessed 22 Apr 2017.

[166] Е. Бурдо и И. Гаранина, «Анализ Юридических Аспектов И Вопросов Этики При Решении Вопросов Посмертной Репродукции» (2014) 1 *Вестник Межрегионального Открытого Социального Института* 25, 25. E. Burdo i I. Garanina, «Analiz Juridicheskih Aspektov I Voprosov Jetiki Pri Reshenii Voprosov Posmertnoj Reprodukcii» (2014) 1 *Vestnik Mezhregional'nogo Otkrytogo Social'nogo Instituta* 25, 25. E. Burdo and I Garanina, 'The Analysis of Legal Aspects and Ethics Questions' by the Solution of Posthumous Reproduction Issues' (2014) 1 *MOSI Messenger* 25, 25.

[167] Alexander Capron in Константин Свитнев, «Правовые И Этические Аспекты Посмертной Репродукции» (2011) *Правовые Вопросы В Здравоохранении* 30, 43. Konstantin Svitnev, «Pravovye I Jeticheskie Aspekty Posmertnoj Reprodukcii» (2011) *Pravovye Voprosy V Zdravoohranenii* 30, 43. Konstantin Svitnev, 'Legal and Ethical Aspects of Posthumous Reproduction' (2011) *Legal Issues in Healthcare* 30, 43.

[168] Марина Шелютто, «Дети, зачатые после смерти родителя: установление происхождения и наследственные права» (2016) 4 *Журнал зарубежного законодательства и сравнительного правоведения* 91, 92. Marina Sheljutto, «Deti, zachatye posle smerti roditelja: ustanovlenie proishozhdenija i nasledstvennye prava» (2016) 4 *Zhurnal zarubezhnogo zakonodatel'stva i sravnitel'nogo pravovedenija* 91, 92. Marina Shelyutto, 'Posthumously Conceived Children: Determination of Parentage and Inheritance Rights' (2016) 4 *The Journal of Foreign Legislation and Comparative Legislation* 91, 92.

this world,[169] thereby trying to "mak[e] bad deaths good."[170] This sub-chapter will address the legal issues raised by *post-mortem* assisted reproduction, [171] such as the use of the genetic material if the deceased has not provided clear instructions, the need of establishment of the child's origins, post-birth registration as well as his inheritance status. This sub-chapter concludes that despite the lack of a clear regulation on postmortem reproduction via surrogacy, the court's approach appears to be rather sympathetic to those seeking to use this procreative method.

The legal responses to *postmortem* reproduction across the globe have not been uniform. Some countries, such as Germany and Denmark used to prohibit the practice, whereas Spain and Latvia[172] are explicitly permissive if the consent of the deceased has been provided. Russia generally positions itself as a relatively tolerant state, implicitly allowing *post-mortem* reproduction. Yet, despite gaining public support over the years,[173] Russia still does not have specifically-tailored legislation, leaving the area largely unregulated. *Post-mortem* reproduction is governed by the general provisions on assisted reproduction – arts. 55 and 68 of the Federal Statute № 323 and the Order of Healthcare Ministry № 107n[174] explained above, providing for general consensual cryopreservation of genetic material for specific purposes. Art.55 explains that cryopreserved genetic material (oocytes or sperm) may be used for the purposes of infertility treatment. The general provisions of the Order *verbatim* repeat the Federal Statute but also allow cryopreservation of biological material at the donor's own or state's cost.[175] Despite the absence of a precise wording, the above provisions are generally read together as allowing the use of the cryopreserved material for reproduction purposes.[176]

Whilst seemingly allowing postmortem conception to be carried out, the patchy regulation inevitably raises three connected issues: first of all, the question of the obligation to prove the

[169] N Grechishnikov, A Tian and A Svetlov, 'The Legal Aspects of Posthumous Reproduction' (2017) Student Scientific Forum IX International Student Scientific Conference at https://scienceforum.ru/2017/article/2017031386 accessed 27 Apr 2017.
[170] Bob Simpson, 'Making 'Bad' Deaths 'Good' (2002) 7 *Journal of Royal Anthropological Institute* 1, 2.
[171] Shelyutto above (n168) 92.
[172] Generally David Teitelbaum, 'Be Fruitful and Multiply After Death, but at Whose Expense?: Survivor Benefits for the Posthumously Conceived Children of Fallen Soldiers' (2016) 14 *Cardozo Public Law, Policy and Ethics Journal* 425 and 430.
[173] М. Джейранова, Д. Жданова, А. Рубизова, М. Солтаева, З. Шакбиева, «Исследование Отношения Российского Общества К Посмертной Репродукции» (2020) 1 *Международный Студенческий Научный Вестник* 35, 35. M. Dzhejranova, D. Zhdanova, A. Rubizova, M. Soltaeva, Z. Shakbieva, «Issledovanie Otnoshenija Rossijskogo Obshhestva K Posmertnoj Reprodukcii» (2020) 1 *Mezhdunarodnyj Studencheskij Nauchnyj Vestnik* 35, 35. M. Dzheyranova, D. Zhdanova, A. Rubizova, M. Soltaeva, Z Shakhbieva, 'Research into the Russian Society Attitude on Posthumous Reproduction' (2020) 1 *The Student Messenger* 35, 35.
[174] From 30 Aug 2012.
[175] The Order of Use of Assisted Reproductive Technology, Precautions and Limits of their Application, Chapter 1: General Provisions, art. 40.
[176] Dzheryanova and others above (n173).

deceased's consent for the genetic material to be used specifically for assisted reproduction, secondly, the parties that may be allowed to request the genetic material and thirdly, and most importantly, the establishment of the child's origins for the purposes of state registration.

It is unclear whether the mere decision to cryopreserve the genetic material is sufficient enough to indicate the deceased's intention to become a *postmortem* parent. Art. 68 part 1 of the Federal Statute[177] leaves this question unanswered. The provision explicitly allows the 'use of body, organs and tissue of the deceased *if a written consent* has been provided for this use during his life… that has been verified by a notary' but only in clearly defined circumstances. These circumstances are narrowed to the medical, scientific and educational purposes.[178] Albeit not mentioned explicitly, the scope of the statute seems to be narrowed down to clinical education. For example, it is argued that 'medical purpose' implies pathological anatomy.[179] The wording of the legislation seems to be rather precise, leaving no scope for inferring additional purposes for which consent might be required, thereby seemingly excluding assisted reproduction. Further reference to consent in the context of assisted reproduction may be found in art. 51(4) of the Family Code. It confirms that 'when the parties to the marriage that provided written consent to use the methods of artificial insemination or embryo implantation, if these methods are realised, the spouses will be recorded as the parents of the child.' However, the extent of the application of this provision to *post-mortem* reproduction is questionable. Art. 51 seems to refer to the expressed will of *live* intended parent before undergoing artificial insemination. Some scholars suggest that the exclusion of the requirement of consent for *post-mortem* assisted reproduction might have been intentional. This implies that not only is the proof of consent not an existing necessary pre-condition for assisted reproduction, but also it might not be needed at all. Sheluytto, for example, is amongst those who claims that there is no separate legal requirement for consent for *postmortem* reproduction in Russian law,[180] especially where the reproductive material was provided *during* the lifetime of the deceased. Robertson extends this view further by arguing that consent would not be needed in general as 'the dead would have no interest.'[181] If so, this would

[177] № 323-FL.
[178] Art. 68 part 1 of the Federal Law № 323 – FL "On the Basics of Healthcare Protection" from 21 Nov 2011.
[179] See e.g. В. Болсуновский, Г. Заславский, В. Сальников, И. Толмачёв, Я.Чёрный, «Необходимость совершенствования законодательства, регулирующего использование тела, органов и тканей умершего человека» (2020) *Юридическая Ответственность В Сфере Здравоохранения* 6-9. V. Bolsunovskij, G. Zaslavskij, V. Sal'nikov, I. Tolmachjov, Ja.Chjornyj, «Neobhodimost' sovershenstvovanija zakonodatel'stva, regulirujushhego ispol'zovanie tela, organov i tkanej umershego cheloveka» (2020) *Juridicheskaja Otvetstvennost' V Sfere Zdravoohranenija* 6-9. V. Bolsunovskii, G Zaslavskii, V Salnikov, I Tolmachev and G Chernyi, 'The need to improve legislation regulating the use of the body, organs and tissues of a deceased person' (2020*) Legal Liability in Healthcare* 6-9.
[180] Shelyutto above (n168) 93.
[181] John Robertson, 'Posthumous Reproduction' in R Kempers, J Cohen and A Honey (eds.) *Fertility and Reproductive Medicine* (Elsevier 1998) 255-259.

remove the necessity for those, intending to use the genetic material to prove that the deceased has actually consented for the material to be used for assisted reproduction.

This approach might open the door for using the deceased's genetic material in accordance with the wishes of other parties, the spouse or further relatives, rather than the wishes of the deceased himself.[182] This is not unproblematic, as their views might be biased, informed by what they believe the deceased would have wanted.[183] Yet, it may well be the case that the deceased would not have wanted for his gametes to be used had he known that he would not be able to participate in the child's upbringing.[184] As cryopreservation of the gametes in itself does not necessarily imply that the deceased had the intention to become a parent, a situation where his reproductive material was somehow used for this purpose would give rise to a violation of his reproductive rights.

If, however, consent is required, the question of proof arises. Unlike other jurisdictions allowing postmortem reproduction, the Russian law does not provide for the possibility to establish whether the deceased could have consented to *post mortem* reproduction prior to death before the court. This approach may be contrasted with the more explicit Spanish legislation, which provides more precision as to the requirements. Art. 9 of the Spanish Law № 14/2006 "On Technologies Assisting Human Reproduction" requires proof of informed written consent, verified by a notary, that the deceased wished for the reproductive material to be used *specifically* in order to inseminate the spouse. The material must be used within 12 months since the date of death. If the legal requirements are satisfied, the deceased father would be entered on a birth certificate as the father of the child. Similarly, the UK's Human Fertilisation and Embryology Act 2008 provides that a man wishing to be registered *postmortem* as a father of a child must provide informed written consent with the genetic connection or marital status being irrelevant.[185] This lack of clarity in Russian law should be addressed by requiring the institution that collects the reproductive material to obtain a signed certificate from the deceased that would record his wishes regarding *postmortem* reproduction. Anikina observes that, if recorded properly, the document would resolve the potential disputes between the deceased's relatives about his

[182] А. Улихина, «Правовые особенности посмертной репродукции человека» (2016) Совеременные Проблемы Социо-Гуманитарных Наук 271, 271-272. A. Ulihina, «Pravovye osobennosti posmertnoj reprodukcii cheloveka» (2016) *Soveremennye Problemy Socio-Gumanitarnyh Nauk* 271, 271-272. A. Ulikhina, 'Legal Peculiarities of Human Post-Mortem Reproduction' (2016) *Contemporary Problems of Socio-Humanitarian Sciences* 271-272.
[183] For example, the common stereotype that the married man automatically wants to become a father. See generally Carson Strong, Jeffrey R. Gingrich and William H. Kutteh, 'Ethics of Postmortem Sperm Retrieval' (2000) 15 *Human Reproduction* 739, 743.
[184] Ibid.
[185] s. 39(1)(c) and s. 40 of the HFEA 2008.

wishes.[186] The only way for the gametes to be used for reproductive purposes, however, would be if the deceased explicitly stated so. He could also clarify whether he consents to his sperm to be used for insemination of a surrogate mother.[187] In the absence of such, it might be more viable for the material to be destroyed.[188]

The establishment of the child's origins for the purposes of state registration constitutes another controversial grey area in *postmortem* reproduction. If the genetic material of the deceased has been used to inseminate the intended mother (the spouse), the situation appears to be straightforward: she would carry the child by way of traditional pregnancy and will be automatically seen as the child's mother in the eyes of the law. Art. 48 para 2 of the Family Code also clarifies on the position of the deceased father: "if the child was born to the parties to a marriage and also within 300 days from the day of the death of the mother's husband, the husband (ex-husband) of the mother would be deemed to be the father of the child."[189] While the registration might prove problematic if the 300-day time frame has been violated, paternity could still be established via a court order in accordance with art. 49 of the Family Code. The court will look at any evidence proving the biological relationship between the child and the deceased, as well as the written consent for his material to be used for reproductive purposes.[190] If, however, the child was born through a surrogacy arrangement, the usual danger of the surrogate mother refusing to provide consent still arises.[191]

However, the recent years have marked a new departure for *postmortem* reproduction. Reproductive medicine allows for the grandparental parenthood, making it possible for grandparents to have offspring genetically related to their deceased children. The fairly novel nature of the practice exacerbates the already existing issues caused by patchy legal regulation of surrogacy, such as establishment of the child's origins at the point of registration.[192] In other words, it gives rise to the question as to who, in the eyes of law, should be the child's mother: the potential grandmother herself or

[186] Галина Аникина, « К вопросу о правовом регулировании постмортальной репродукции» (2013) 2 Наука. Общество. Государство 1, 4. Galina Anikina, « K voprosu o pravovom regulirovanii postmortal'noj reprodukcii» (2013) 2 *Nauka. Obshhestvo. Gosudarstvo* 1, 4. Galina Anikina, 'On the Question of Legal Regulation of Postmortem Reproduction' (2013) 2 *Electronic Scientific Journal "Science. Society. State"* 1, 4.

[187] Some oppose surrogate motherhood as a matter of principle.

[188] Anikina above (n186) 5.

[189] From the 29 Dec 1996 Federal Statute № 223-FL.

[190] As discussed above, there is no legal requirement of written consent to be recorded but if the deceased has provided one, this would be taken into account by the court.

[191] The right of the surrogate mother to withhold consent discussed elsewhere.

[192] А. Шабанова, «Установление Происхождения Детей, Рожденных С Применением Вспомогательных Репродуктивных Технологий» (2017) 3 *Устойчивое Развитие Науки И Образования* 37, 40. A. Shabanova, «Ustanovlenie Proishozhdenija Detej, Rozhdennyh S Primeneniem Vspomogatel'nyh Reproduktivnyh Tehnologij» (2017) 3 *Ustojchivoe Razvitie Nauki I Obrazovanija* 37, 40. A Shabanova, 'Establishment of the Origin of Children Born of Assisted Reproductive Technologies' (2017) 3 *A Solid Development of Science and Education* 37, 40.

the surrogate. At first glance, it seems that in such an instance there would be no legal basis for the establishment of grandparental parenthood. Thus, the default position on legal motherhood remains the same as per traditional surrogacy: the surrogate will be deemed to be the legal mother. As there are only a few instances known to date, the courts have not had a chance to develop a consistent approach towards legal motherhood in such situations. One of the most famous instances is the case of Ekaterina Zakharova, briefly mentioned above. Zakharova's son, Andrei, has died of melanoma following an unsuccessful treatment in Israel. The only hope of the devastated mother to continue the legacy of her son was to use his genetic material. Having overcome various hurdles during the transportation of Andrei's cryopreserved gametes to Russia, she entered into an arrangement with a surrogate mother, who agreed to carry Zakharova's grandson.[193] The post-birth registration of the child proved to be problematic: the child's father died, and the biological mother was the anonymous oocyte donor. It took more than three months before the grandmother became the legal guardian of the child. The case of Natalia Klimova is factually similar.[194] Klimova's son, Artyom, was suffering from leukemia, a rare type of blood cancer. Prior to undertaking the course of chemotherapy he decided to preserve his gametes. Unfortunately, the treatment proved ineffective and Artyom died a few months later. Shortly after his death Klimova chose the oocyte donor and a surrogate mother in order to have a grandchild. The successful pregnancy resulted in a healthy grandchild. However, unlike Zakharova, Klimova did not wish to become the child's legal guardian, but wanted to be recorded as his *legal mother*. Yet, in the Civil Registry Office the delighted grandmother was met by an unexpected obstacle. The officials decided not to examine the peculiarities of the case at stake[195] and refused to register Klimova as the child's mother on the basis that she was not married. Klimova applied for a court order for an adjudication that such a refusal had no legal ground. Judge Matusiak ruled in favour of the appellant and observed that nothing in the law precludes the registration of a child carried by another woman and born with the assisted reproduction technology for the purposes of handing the child over to the single woman after his birth. The court admitted that the Registry Office's refusal had no legal basis and ordered for the immediate issuance of the child's birth certificate recording Klimova's legal motherhood. Thus, she became the legal mother to her own grandchild.

However, shortly after delivering the revolutionary decision allowing the grieving grandmothers to

[193] Svetlana Dobrynina, 'Life after Death' (27 Jan 2006) *Rossiyskaya Gazeta* at <https://rg.ru/2006/01/27/rebenok.html> accessed on 21 April 2017.
[194] *Case № 2-3927/10* from 6 Oct 2010, Saint-Petersburg Smol'ninskii District court.
[195] В. Колесникова и А. Хачатурова, «Посмертная Репродукция» (2017) 8 *Успехи Современной Науки И Образования* 96, 96. V. Kolesnikova i A. Hachaturova, «Posmertnaja Reprodukcija» (2017) 8 *Uspehi Sovremennoj Nauki I Obrazovanija* 96, 96. V Kolesnikova and A Hachaturova, 'Post Morterm Reproduction' (2017) 8 *Success of Contemporary Science and Education* 96, 96.

experience the joys of motherhood after suffering an irreplaceable loss, the judicial attitude has suddenly 'cooled off.' The case of Lamara Kelesheva, who followed Klimova's example a year after, shows the courts' regressive position towards *postmortem* conception. More specifically, the courts became unsure of single grandmothers obtaining legal motherhood over their grandchildren. Similarly to Klimova, Kelesheva lost her son, Mikhail, to leukemia when he was only 26 years old. He had also cryopreserved his sperm before starting chemotherapy which unfortunately was unsuccessful.[196] Heartbroken, Kelesheva spent years trying to find a suitable oocyte donor and almost lost hope after five attempts to implant the surrogate mother failed. Desperate to fulfil her son's dream to have a family, she subsequently entered into a surrogacy agreement not with one, but two surrogate mothers who gave birth to four children. The Civil Registry Office again refused to enter Kelesheva as the mother of the children and did not issue the birth certificate. It observed that in accordance with art. 7 of the Order of the Healthcare Ministry № 67 the surrogacy programme is only available for married couples.[197] Kelesheva applied for a court order. Yet, rather surprisingly the District court ruled in favour of the Registry Office. While not distinguishing the case at stake from the almost identical one of Klimova, the court observed that "the existent legislation contains the requirement for the commissioning parents to be *legally married*."[198] Later both the Cassation Tribunal of the Moscow City Court as well as the Supreme Court[199] have upheld the decision of the court of the lower instance.

Indeed, the rationale behind the District court's decision to approve the Civil Registry's refusal is questionable. Kelesheva's request to be registered as the child's legal mother has been declined on the basis of her status. While she was still married *when entering* the surrogacy arrangement,[200] she divorced shortly before the children were born, rendering her a 'single parent' at the time of the registration. This seems to accord with the general provisions of art. 16 of the Federal Statute "On the Acts of Civil Statuses"[201] which requires that "during the state registration of a child carried by another woman a married couple should provide a document which records the birth of the child as well as the confirmation that the surrogate consents for the *spouses* to be registered as the legal parents of the child. Nevertheless, it is unclear why the court agreed with the Registry's reading of art. 7. The

[196] 'A Grandmother tries to obtain the Right to Become a Mother to her four 'Surrogate Grandchildren' (9 Jun 2011) Ria Novosti at < https://ria.ru/20110609/386133361.html > accessed 21 Apr 2017.
[197] From 26 Feb 2003. Now superseded by the Federal Law № 323-FL from 21 Nov 2011.
[198] *Case № 2-2222/11* from 28 Apr 2011, Moscow Babushkinskii District Court per Judge O. Borisova.
[199] *Case № 5-B12-19* from 15 Feb 2012. Unfortunately, the material provided by the Supreme Court is confidential and cannot be circulated in public domain in accordance with the Federal Law "On the Provision of Access to the Information on the Activities of the Courts of the Russian Federation" № 262-FL from 22 Dec 2008. This provision prohibits publication of the decisions concerning the interests of minors in family sphere.
[200] O. Pulia and N. Nesterova, 'An order for the Baby' available at https://rg.ru/2009/01/26/surrogat.html.
[201] Federal Statute № 143-FL from 15 Nov 1997, discussed elsewhere in this thesis.

Healthcare Order has very limited normative force and explicitly states that the "legal aspects of surrogate motherhood are set out *elsewhere.*"[202] Svitnev observes that the reference to art. 7 is practically baseless as it does not regulate legal aspects arising in surrogacy arrangements.[203]

The decision also exposes wider problems caused by the lack of clear regulation in this sphere. It discriminates against single mothers' right to procreation, something that the earlier Healthcare Orders explicitly sought to address. Albeit not referring to surrogacy, art. 35 of the "Basic Law of the Russian Federation on the Protection of Health of Citizens" № 5487-I provides that "*every* woman that reached the age of adolescence and reproduction has *the right to* assisted insemination and embryo implantation."[204] It follows that the marital status should not, in practice, have made any difference.

However, the District court's generally skeptical position might be understandable. On the one hand, it seems that the court tried to refrain from making a decision that would support the disturbance of traditionally established family dynamics and lead to the identity confusion for a child, who would inevitably start questioning his origins later in life. Allamiarova and others argue that children born via *postmortem* reproduction are naturally more prone to psychological vulnerability and identity confusion: "it touches upon their physical and mental health, their self- identity. The realisation that they were born after his parent died cannot leave their mental health unaffected. The possibility that the child might doubt the legitimacy of his origins [as well as the extent] of his social protection cannot also be excluded."[205] Their vulnerability might further exacerbate with the realisation that they were conceived with the oocytes provided by an anonymous donor[206] and the gametes of the deceased parent. As the information is protected by medical privilege, the child would not be able to learn about a major part of his biological background. Furthermore, it is well-known that mothers and grandparents

[202] In fact, the Order cross-refers to arts. 51(4) and 52(3) of the Family Code as well as art.16(5) of the Federal Statute "On the Acts of Civil Statuses."
[203] Konstantin Svitnev, 'An Overview of Legal Application of Cases Related to Appeals of Civil Registry Office's Refusal to Register Children born out of Realisation of Surrogate Motherhood Programmes' (2012) 1 *Family and Housing Law* at <https://center-bereg.ru/f569.html> accessed 10 Apr 2017.
[204] From 22 Jul 1993 (ed. 20 Dec 1999).
[205] Н. Алламярова, Е. Санакоева и А. Гараева, «Этико-правовые аспекты постмортальной репродукции» (2018) 11 *Проблемы Стандартизации В Здравоохранении* 13, 17. N. Allamjarova, E. Sanakoeva i A. Garaeva, «Jetiko-pravovye aspekty postmortal'noj reprodukcii» (2018) 11 *Problemy Standartizacii V Zdravoohranenii* 13, 17 N Allamiarova, E Sanakoeva and A Garaeva, 'Ethical and Legal Aspects of Postmortal Reproduction' (2018) 11 *The Problems of Standardisation in Healthcare* 13, 17.
[206] Юлия Высочина, «Вспомогательные репродуктивные технологии как фактор кризиса идентичности личности» (2014) 1 *Вестник Совета Молодых Учёных И Специалистов Челябинской Области* 2, 2. Julija Vysochina, «Vspomogatel'nye reproduktivnye tehnologii kak faktor krizisa identichnosti lichnosti» (2014) 1 *Vestnik Soveta Molodyh Uchjonyh I Specialistov Cheljabinskoj Oblasti* 2, 2. Yulia Vysochina, 'Assisted Reproduction Technologies as a Factor for Identity Crisis' (2014) 1 *The Messenger of Young Scientists and Specialists of Chelyabinsk District* 2, 2.

are perceived by the children differently;[207] therefore, 'labelling' the grandmother as the child's mother might blend the functions assigned to their roles. The generation gap between the grandmother and the child might clearly indicate to the child that he was not carried and born by his alleged mother. For such a child, his grandmother would be 'both: grandmother and mother at the same time' whereas he will be her 'grandson and son.'[208] Yet, by leaving the 'mother' entry blank[209] the court acknowledged that despite the undoubted connection between a grandmother and a grandchild, biologically, the grandmother cannot fulfil the motherly role. Shabanova agrees that the court has reached the solution most reasonable in the circumstances: "if the parents of the deceased enter into the surrogate arrangement with a surrogate mother, there is no legal basis to acknowledge them as the actual parents of the child. *De facto*, they [still] remain grandparents."[210]

It is also suggested that in Kelesheva case the court decided to strictly adhere to the principle of *lex prospicit non respicit.* Codified in art. 4 of the Civil Code 1995, it provides that while the legislation itself might 'look into the future' the judge should interpret it in accordance with what it *already* provides,[211] rather than what it *would* provide at some point.[212] The Federal Statute № 323-FL explicitly stating that "both, a man and a woman are entitled to use assisted reproductive technologies irrespective of their marital status as long as such use is consensual" only came into force in 2011.[213] Thus, if Kelesheva's grandchildren had been born a year after, the outcome might have been completely the opposite. Afanasiev assumes that the new law was what Kelesheva was hopeful to rely on in her request to reverse the decision of the court of lower instance in the appeal to the Supreme Court.[214] Nevertheless, despite the fact that she 'missed' the eligibility only by less than a year, it

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[207] Generally Т. Кузьмишина, «Особенности Эмоционального Взаимодействия Дошкольника С Прародителями В Современной Семье» (2014) *Ярославский Педагогический Вестник* 249, 249-253. T. Kuz'mishina, «Osobennosti Jemocional'nogo Vzaimodejstvija Doshkol'nika S Praroditeljami V Sovremennoj Sem'e» (2014) *Jaroslavskij Pedagogicheskij Vestnik* 249, 249-253 T Kuzmishina, 'The Peculiarities of Emotional Interactions of a Pre-School child with Grandparents in a contemporary Family' (2014) *Yaroslavsk Pedagogical Messenger* 249, 249-253.

[208] Татьяна Коноплянникова, Наталия Кучуб и Индира Шагивалеева, «Правовые И Морально-Нравственные Аспекты Суррогатного Материнства»(2017) 4 Право и государство: теория и практика 99, 103. Tat'jana Konopljannikova, Natalija Kuchub i Indira Shagivaleeva, «Pravovye I Moral'no-Nravstvennye Aspekty Surrogatnogo Materinstva»(2017) 4 *Pravo I Gosudarstvo: Teorija I Praktika* 99, 103. Tatiana Konopliannikova, Natalia Kuchub and Indira Shagivaleeva, 'Legal, Moral and Ethical Aspects of Surrogate Motherhood' (2017) 4 *Law and State: Theory and Practice* 99, 103.

[209] Irina Pulia, 'A 'dash' in the 'mother' entry' (2 Jun 2011) *Rossiyskaya Gazeta* at <https://rg.ru/2011/06/02/surrogat.html> accessed 21 Apr 2017.

[210] S Shabanova above (n191) 41.

[211] Art. 4 of the Civil Code.

[212] Сергей Афанасьев, «ражданский процессуальный аспект реализации репродуктивных прав и обязанностей» (2013) 6 *Вестник Гражданского Процесса* 66, 70. Sergej Afanas'ev, «razhdanskij processual'nyj aspekt realizacii reproduktivnyh prav i objazannostej» (2013) 6 *Vestnik Grazhdanskogo Processa* 66, 70. Sergei Afanasiev, 'Civil Remedial Aspect of Realisations of the Reproductive Rights and Duties' (2013) 6 *The Messenger of the Civil Procedure* 66, 70

[213] Art. 55, however, came into force in January 2012.

[214] Afanasiev above (n212) 70.

seems that Court decided that extending the timeframe so as to include the applicant's situation would be beyond its powers. As it has been noted by the Constitutional court before – the power enabling the law to operate retrospectively remains with the legislator only.[215] The latter would need to specify that the legislation is to apply retrospectively at the time it comes into force. Either by omission or intentionally, by being aware of the peculiarities of this area, Parliament chose not to exercise this authority.[216] Therefore, this means that the courts of lower instance were fairly limited in their approach to the dispute in these circumstances: they simply tried to avoid being accused of creation some "secondary" norms, without according with the legislator.[217]

Although this might explain the court's reluctance to interpret the law retrospectively in the Kelesheva case, the reasons for the opposite conclusion to the identical Klimova case remain unclear. Smol'ninskii District court did not recognise the wording of the Federal Statute as having an effect of imperative prohibition to register the child born to a single parent.[218] Thus, it seems that the court has applied the general provisions allowing the use of assisted reproductive technology to couples irrespective of their marital status to the specific case of Klimova. Afanasyev opines that Kelesheva case could have been decided differently. He rightly thinks that the courts could have retreated from the traditional approach of rigidly adhering to the legal provisions and prioritise the valuable relationship between the mother and the child. Whilst the Russian courts do not appear to have previously referred to international legal instruments when deciding surrogacy cases, it seems that in the present instance the court could have incorporated a principle from the *Marckx.* Here, Strasbourg noted that respect for private life between the child and unmarried woman should impose a positive obligation on the state to integrate the child into her family from the moment of birth.[219] Therefore, in theory, Russia could have facilitated the integration of Kelesheva's four grandchildren into her family despite her status as a single woman.[220]

Whilst there is some jurisprudence covering the situations where the parent's death has been anticipated, the current legislative stance is completely silent on the situations where the death was

[215] Ibid 71. See also The Ruling of the Constitutional Court № 262-O-O from 15 Apr 2008.
[216] Ibid.
[217] Сергей Афанасьев, «Процессуальный Правовой Аспект Возбуждения И Рассмотрения Судами Дел О Применении Вспомогательных Репродуктивных Технологий» (2013) *Право. Законодательство. Личность* 7, 10. Sergej Afanas'ev, «Processual'nyj Pravovoj Aspekt Vozbuzhdenija I Rassmotrenija Sudami Del O Primenenii Vspomogatel'nyh Reproduktivnyh Tehnologij» (2013) *Pravo. Zakonodatel'stvo. Lichnost'* 7, 10. Sergei Afanasiev, 'Procedural and Legal Aspects of Judicial Adjudication of Cases on Assisted Reproductive Technologies' (2013) *Law Legislation Person: A Research Journal* 7, 10.
[218] Svitnev, above (n202) and Sergei Afanasiev above (n212) 70.
[219] *Marckx v. Belgium* (1979) 2 EHRR 330.
[220] Sergei Afanasiev above (n216) 11.

unexpected. Thus, it is unclear whether *post-mortem* sperm *retrieval* from the suddenly *deceased* would be legally allowed; if so, whether it would be possible to use this material for assisted reproduction. Unlike the situation where the deceased has *voluntarily* cryopreserved the sperm prior to chemotherapy or death, in the present instance the *unanticipated* nature of death means that there would be no evidence if he actually wanted for his genetic material to be collected.[221]

If in the former instance it may be *inferred* that he did so for the purposes of reproduction, in the latter it would be impossible to obtain any evidence of his intentions regarding the reproductive material as there would be no evidence that he wanted the sperm to be collected in the first place. If the answer to the above is affirmative, it is also not clear whether the deceased would have wanted his material to be used in reproduction via a surrogacy arrangement. Currently, there is no legal regulation clarifying the matter whatsoever, potentially leaving those who have not had an opportunity to cryopreserve their genetic material without any chance to have genetic offspring. Some suggest that the answer should be negative and any attempt to do so might automatically trigger criminal liability under art. 244 of the Criminal Code, prohibiting the 'abuse of corpse.'[222] *Post-mortem* sperm retrieval seems to be classified by the specialists as 'use of tissue'[223] falling within the scope of abovementioned art. 68, which not only requires the written consent but also must be verified by a notary to be legally valid.[224] Furthermore, art. 43 of the Order of Healthcare Ministry № 107n provides that "collection of tissue of male reproductive organs for the purposes of cryopreservation may only be performed with informed and voluntary consent during the provision of specialised medical aid… including high technological medical aid in medical organisations licenced to perform urological treatment."[225] Kolesnikova and Khachaturova assume that this provision would also allow post mortem reproduction by consent only.[226]

One of the most controversial issues, however, remains the order of succession. Art.1116 para 1 of the Civil Code provides that the "only citizens that may inherit are the ones who were alive *during the commencement of succession* or those *conceived during the testator's lifetime*." The provision almost explicitly identifies only those either live or at least conceived as being eligible for the deceased's estate. The provision does not seem to include children conceived by means of *post-mortem*

[221] See generally Strong, Gingrich and Kutteh (n183) 739.
[222] Mikhail Ivanov in Kolesnikova and Hachaturova above (n195) 98.
[223] Ibid.
[224] Part 1 of the Federal Statute № 323-FL.
[225] Art. 43 of the Order of Healthcare Ministry № 107n.
[226] Kolesnikova and Hachaturova above (n195) 98.

reproduction thereby leaving them outside the line of succession.[227] At the same time, the children could not be included in the will (if the testator makes one) thereby completely excluding them from the right to inherit. It is submitted that the current legislation is outdated and is out of touch with the current reality extensively shaped by technological advancement. It seems necessary to amend art.1116 to include a provision covering inheritance rights of children born via *post-mortem* conception. Niiakaia suggests that in order for postmortem inheritance rights to arise there is a need for informed voluntary consent to be provided by the testator. In essence, the parent whose genetic material will be used has provided consent not only for the purposes of conception of a child but also so that the child would be the successor of the estate.[228] Thus, the provision of the Civil Code would read that "children of the testator who was alive at the time of the commencement of succession, those conceived and born during the lifetime of the testator as well as those unconceived and unborn during at the after the commencement of the succession have the right to inherit with his informed and voluntary consent."[229] Although this would not offer default protection, this would ensure the testator that his yet unborn child would be protected under a will.

4.4 Administrative procedure for surrogacy births

4.4.1 The role of the contract

Despite the contract being central to surrogacy arrangement, the agreement itself is only partially regulated. Once it has been reached and recorded in writing,[230] there is no need for the further approval from any regulatory body.[231] In general, the parties have *carte blanche* regarding the terms of the agreement, which are drafted in accordance with the principle that "everything that is not forbidden by law is allowed."[232] Not only does this allow the parties to include the 'essential' clauses but also to tailor the contract to their specific circumstances. Thus, apart from general clauses requiring the

[227] See also Sheluytto, above (n168) 94.

[228] Мария Ниякая, « Проблемы Реализации Права Наследования Ребенка, Зачатого Искусственным Способом После Смерти Наследодателя» (2019) *25 Лет Гражданскому Кодексу Российской Федерации: Традиции И Новации Частноправового Развития* 719, 722. Marija Nijakaja, « Problemy Realizacii Prava Nasledovanija Rebenka, Zachatogo Iskusstvennym Sposobom Posle Smerti Nasledodatelja» (2019) *25 Let Grazhdanskomu Kodeksu Rossijskoj Federacii: Tradicii I Novacii Chastnopravovogo Razvitija* 719, 722. Mariya Niiakaia, 'The Problem of Realisation of the Right to Inherit of a Child Conceived with the Assisted Reproduction after the Death of the Testator' (2019) *25 Years of the Civil Code of the Russian Federation: Traditions and Innovations of Private Legal Development* 719, 722.

[229] Ibid.

[230] Technically there is no legal requirement for a contract to be in writing, but it would be good practice.

[231] Татьяна Борисова, *Суррогатное материнство в Российской Федерации. Проблемы теории и практики. Монография* (Москва Проспект 2016) 59. Tat'jana Borisova, *Surrogatnoe materinstvo v Rossijskoj Federacii. Problemy teorii i praktiki. Monografija* (Moskva Prospekt 2016) 59 Tatiana Borisova, *Surrogate Motherhood in the Russian Federation: Problems in Theory and Practice* (Moscow Prospekt 2016) Tatiana Borisova, *Surrogate Motherhood in the Russian Federation: Problems in Theory and Practice*, (Moscow, Prospekt 2017) 59.

[232] Ibid 58.

surrogate to comply with doctors' prescriptions and orders and the liability of the intended parents for withholding compensation, it is deemed beneficial for the parties to include the clauses covering force majeure, for example, (un)intentional termination of pregnancy or death of the intended parents. Although at first glance, clearly the contract gives rise to mutual obligations, which means that both sides to the contract must have a full appreciation of consequence of non-performance, in the eyes of the law it is unenforceable. Thus, the clause obliging the surrogate mother to hand over the child to the intended parents will be overridden by the provisions of the Family Code.[233] Whilst it has been suggested that such a liberal nature of the contract provides the parties with some room to breathe, this approach has also been assailed for being too laissez-faire, borderline 'foggy.'[234] Thus, in 2017 the Decree of the Plenum of the Constitutional Court ruled that the contract plays an increasingly important evidential role[235] but refused to elaborate on what impact this would have on the future cases. The unclear nature of surrogacy contract raises the question as to what remedies would be available to the parties if the obligations under the contract are not fulfilled. This chapter argues that surrogacy contract does not fall within the existing taxonomy provided by the Russian Civil Code. Furthermore, due to its ethical nature not only does surrogacy require legal recognition but also deserves a special place within the Civil Code.

The notion of freedom to contract finds its legal basis in art.421 of the Civil Code which provides that "the parties may conclude a contract envisaged by the law[236] or other legislative Acts."[237] According to this provision, the contract comes into existence as soon as it is signed and ceases to exist as soon as the obligations are fulfilled – the intended parents receive the child, and the surrogate obtains the compensation. The reference to the general legal provisions may suggest that this is a contract that surrogacy contract should be regulated 'by analogy.'[238] This means that the operation and remedies for a breach of such a contract should be determined by comparing it to an 'analogous' contract. The *prima facie* question, arising out of the concept of "analogy" – which contract could the surrogacy contract be analogous to. In notarial practice, surrogacy contracts are seen as contracts for

[233] Art. 51(4) of the Family Code 1995. See also Konstantin Svitnev, 'New Russian Legislation on Assisted Reproduction' (2012) 1 *Open Access Scientific Reports 1,* 3.
[234] 'There is no law for the test-tube babies. How Surrogate motherhood is regulated' (14 Aug 2019) Pravo.ru at https://pravo.ru/story/212918/ .
[235] №16 from 16 May 2017.
[236] i.e. the Civil Code itself.
[237] Art. 421 of the Civil Code 1995.
[238] С. Чашкова, «Свобода Формирования Условий Договора О Суррогатном Материнстве Как Нетипичной Договорной Конструкции» (2016) *Законы России: Опыт, Анализ, Практика* 59, 59-64. S. Chashkova, «Svoboda Formirovanija Uslovij Dogovora O Surrogatnom Materinstve Kak Netipichnoj Dogovornoj Konstrukcii» (2016) *Zakony Rossii: Opyt, Analiz, Praktika* 59, 59-64. S Chashkova, 'The freedom of surrogacy contracts as an atypical contractual construction' (2016) Law of Russia: *Experience, Analysis, Practice* 59, 59-64.

the provision of services for remuneration. Chapter 39 of the Civil Code provides the general legislative framework for the provision of paid services. Art. 779 defines such a contract as the one where one party undertakes an obligation to provide a service and the party for whom the service is provided undertakes an obligation to pay the remuneration. Art. 779(2) clarifies that the provision is applicable to contracts governing the provision of medical services.[239] Such a contract would be based on a consensual agreement, whereby both parties agreed on the basic terms. Indeed, surrogacy contract bears some resemblance to the 'service' contract – the obligations are imposed on both parties: the surrogate mother is obliged to carry and hand over the baby and the commissioning parents, in turn, must pay in return for the baby. Nevertheless, it would be incorrect to state that a surrogacy contract constitutes a medical service contract. First of all, while the majority of surrogacy contracts are remuneration-based, there is a limited possibility of altruistic arrangements where only reasonable expenses are paid to the surrogate mother. It would be an unnecessary complication to differentiate commercial and altruistic surrogacies as separate types of agreements for the purposes of civil contract classification. Secondly, it is the wording of the subsequent provisions governing medical services which makes the applicability of this chapter to surrogacy highly questionable. Arts. 782(1) states that the 'customer[240] has *the right to refuse* to perform his obligations under a contract if he agrees to pay the losses suffered by the executor.' Conversely, para (2) applies the same logic to the 'executor' – "the executor *has the right to refuse* to perform his obligations only if he compensates the customer's losses."[241] Surrogacy constitutes a morally controversial arrangement, which means that in some circumstances it would be inappropriate for any of the parties to have an explicit, legally recognised *right* to pull out if the procedure has already commenced.[242] Granting such a right would contradict the very purpose of the contract. Instead of 'disciplining' the parties "and minimis[ing] cases of violation or non-fulfilment of essential conditions, as well as protect[ing] the rights and interests of not only the subjects of the agreement, but also the child born to a surrogate mother," it would practically tell the parties that as long as they can pay the compensation, they are entitled 'to change their minds.' Thirdly, unlike other types of medical treatment, which would involve direct relationship between the patient and the hospital, the parties' to surrogacy arrangement are not limited to the intended parents – they would also include the agents and lawyers.

It has also been suggested that the surrogacy contract should be classified as an equivalent of either

[239] The Civil Code 1995.
[240] This is the literal translation. In a surrogacy context this would mean 'the intended parents.' The 'executor' by contrast, would be the surrogate mother.
[241] Art. 782(2) of the Civil Code 1995.
[242] Although it might seem acceptable for the arrangement to be terminated before the surrogate's impregnation. However, it seems that this would be better treated as a force majeure rather than a right.

'work agreement' or 'the contract on proprietary passing over.' Both types of contracts are also governed by the Civil Code. Art. 702(1) defines a work agreement as the one where "one side (a contractor) agrees to complete an assignment requested by another side (a customer) and present the completed work to the customer. The customer agrees to accept the result and provide the remuneration for it".[243] At first glance, it seems that a surrogacy contract fits well within the definition of a 'work contract.' The surrogate agrees to carry a child for the intended parents and the intended parents will provide remuneration for her services. She may also be paid on a monthly basis (periodic payment) or a lump sum at the end of the arrangement. Nevertheless, a surrogacy agreement differs from an employment agreement. Under an employment agreement an employee guarantees a particular result upon its completion. In surrogacy, by contrast, it is almost impossible to guarantee the intended outcome. Pregnancy is a natural process which may not result in a live child. Furthermore, the 'work agreement' usually implies the right to employ sub-contractors (unless contracted out) whereas in a surrogacy agreement a surrogate mother must perform her side of the agreement personally.

The classification of a surrogacy agreement as the "proprietary transfer" is also not entirely unsatisfactory. 'Proprietary passing over' is one of the many ways of dealing with property. This means that the person passing over must have the right for disposal (sale or rent), i.e. be the owner of the property. After the disposal is complete, the receiver becomes the owner of the property. If this is hypothetically applied to the surrogacy arrangement, the initial owner of the child would be the surrogate mother; the object for disposal would be the surrogate baby and the commissioning parents (the receivers) would become the legal owners when the passing over is complete. Alternatively, a surrogate mother would be seen as renting out her womb for the storage of the embryo. However, this classification would only work if a baby is seen as 'property' or the surrogate mother as an 'object for rent.' If this is true, an element of 'exploitation' might be present in relation to either the child or the surrogate. As Kirichenko observes, the child cannot be an object for sale as the law recognizes surrogate motherhood as a 'method of family creation.'[244] It is also unacceptable to classify the surrogate's services as exploitation. Whilst there might be cases where a surrogate is pressurised into an arrangement that is unfavourable to her, in the majority of cases surrogates are well-paid for their

[243] Art 702(1) of the Civil Code 1995.
[244] К. Кириченко, «Определение Предмета Договора Суррогатного Материнства» (2016) *Семейное И Жилищное Право* 9, 12. K. Kirichenko, «Opredelenie Predmeta Dogovora Surrogatnogo Materinstva» (2016) *Semejnoe I Zhilishhnoe Pravo* 9, 12. K. Kirichenko, 'The Determination of the Object of the Surrogacy Agreement' (2016) *Family and Housing Law* 9, 12.

services.[245]

Although the surrogacy contract contains various elements found in other types of civil contracts, it also has some major distinctive features. Therefore, it seems that in order to reflect the liberal nature of a surrogacy contract, it deserves a special place in the taxonomy of civil law contracts. Whilst still classifying surrogacy contract as a sub-type of 'mixed'[246] contracts, it would be plausible to insert a provision in the Civil Code that would explicitly define a surrogacy contract as a contract to "provide services of surrogate motherhood." The codification of the surrogacy contract in the Civil Code would provide the parties with more certainty as to the remedies available in case a contract is breached. One could look at the example of Ukraine's approach, where a surrogacy contract is concluded in accordance with the Ukrainian Civil Code. Whilst the Ukrainian Civil Code does not provide for a separate category for a surrogacy contract, it still must comply with the requirements of the Civil Code. Similar to the Russian Civil Code, art. 6 of the Ukrainian Civil Code allows the parties to conclude a contract that is not envisaged by the legislative Acts but is not prohibited by law. Art. 627,[247] providing the legal basis for the freedom to contract, allows the surrogate mother to undertake responsibility for carrying and giving birth to the child whereby the intended parents are required to remunerate her for the pregnancy and birth. The content of the contract is determined by art. 628 of the Code which stipulates that certain Civil Code requirements on conclusion of the contract, the parties' performance and remedies must be satisfied.[248] The obligatory nature of the contract is reinforced by art. 629 which codifies the principle of 'obligation' in contractual relationships whereby the parties must comply with their obligations under the contract. This approach would prevent either of the parties from abusing their bargaining power and relieve the courts from the pressure to rely on the established but sometimes socially outdated judicial practice.[249] This would also further perfect the legal regulation in the sphere of surrogacy.

4.4.2 Registration of a child born out of a surrogacy arrangement

[245] See generally in Юлия Морозова, «Договор Суррогатного Материнства» (2020) *Молодые Учёные России* 209, 210. Julija Morozova, «Dogovor Surrogatnogo Materinstva» (2020) *Molodye Uchjonye Rossii* 209, 210. Yulia Morozova, 'A Surrogate Motherhood Agreement' (2020) *Young Scientists of Russia* 209, 210.
[246] Art. 421(3) of the Civil Code 1995.
[247] Art. 627 of the Civil Code of Ukraine.
[248] Mariia Zeniv, 'Critical Reflections on the Regulation of the Surrogate Motherhood Agreement in Ukrainian Law' (2020) *European Journal of Law and Political Sciences* 38, 39.
[249] Виктория Борисова и Лариса Кудрявцева, «Договор Суррогатного Материнства: Понятие, Правовая Природа, Проблемы Правоприменения» (2020) 48 *Эпомен* 74, 76. Viktorija Borisova i Larisa Kudrjavceva, «Dogovor Surrogatnogo Materinstva: Ponjatie, Pravovaja Priroda, Problemy Pravoprimenenija» (2020) 48 *Эпомен* 74, 76. Viktoriia Borisova and Larisa Kudriavtseva, 'Surrogate Motherhood Agreement: the Notion, Legal Nature and the problems of Legal Practice' (2020) 48 *Epomen* 74, 76.

Birth registration constitutes 'one of the foundations of public health.'[250] Having appeared in ancient times as a way of 'compiling of vital statistics,'[251] nowadays ensuring the child's right to birth registration is deemed to be one of the most important commitments, not only on the national but also on the international level. Thus, "achieving 'legal identity for all, including birth registration, by 2030' constitutes one of the Sustainable Development Goals."[252] This commitment is also reflected in the provisions of various international instruments. For example, art. 7 of the United Nations Convention on the Rights of the Child provides that "the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality."[253] Similarly, art. 24 para 2 of the International Covenant on Civil and Political Rights states that "every child shall be registered immediately after birth and shall have a name."[254] According to UNICEF birth registration amounts to protection of various civil and political rights and freedoms by "establish[ing] the existence of a person under the law."[255] For the purposes of birth registration the states must also conform to the principle of non-discrimination and recognise the child irrespective of his parents' background, the child's race and other factors including the method of birth.[256] Although the specifics of the requirements may vary from state to state, generally, the procedure for the registration of the child born by means of traditional birth seems to be fairly straightforward. The states usually require the submission of proof of birth to the civil registry, which will subsequently record the event of birth as well as the child's name, date of birth, address, the names of the biological parents and their nationality.[257] In such cases the birth would determine legal parentage: the woman who gave birth to the child would be on the child's birth certificate and the person she is married to would be the child's legal father.

The registration of a child born out of surrogacy arrangement, by contrast, raises some issues regarding not only the recognition of surrogacy as a practice but also reconsideration of the legal parentage.[258] The states' registration requirements seem to differ in accordance with their attitude to

[250]HL Brumberg, D Dozor and SG Golombek, 'History of the birth certificate: from inception to the future of electronic data' (2012) 32 Journal of Perinatology 407, 407.
[251] Ibid.
[252] 'United Nations Sustainable Development Goals' at <https://sustainabledevelopment.un.org/sdgs > accessed 30 Jun 2018. See also Amiya Bhatia, Nancy Krieger, Jason Beckfield, Aluisio J D Barros, Cesar Victora, 'Are inequities decreasing? Birth registration for children under five in low-income and middle-income countries, 1999–2016' (2019) 4 *BMJ Global Health* 1
[253] Art. 7 of the UNCRC.
[254] Art.24(2) of the ICCPR.
[255] 'Birth registration and the right of everyone to recognition everywhere as a person before the law' (17 Jun 2014) UN Human Rights Council A/HRC/27/22 3.
[256] Bhatiya and others above (n251).
[257] Above (n254) 3.
[258] Elaine O'Callaghan, 'Surrogacy reform and its impact on the child's right to birth registration' (2021) 21 Reproductive Biomedicine and Science Online 46, 47.

surrogacy in general. The attitudes may be broadly split into three categories: the ones that do not recognise surrogacy as an acceptable practice, the ones with partial recognition and the permissive ones.[259] The states' approaches also differ depending on whether surrogacy is regulated or not regulated. Thus, the states where surrogacy is either not regulated or prohibited tend to treat the surrogate as the legal mother as per the presumption.[260] The surrogate's husband would automatically be treated as the child's legal father. By applying the general rules on legal parentage, the state requires the intended parents to proceed with adoption of the child. Unlike parental order for example, adoption order is available to any child, not just a surrogate one. Upon adoption, the surrogate child would be issued an adoption certificate. For example, in Belgium, which does not explicitly regulate surrogacy,[261] the intended parents can only adopt the child, born out of a surrogacy arrangement only after a two-month period lapses.[262] The regulating states seem to offer a more surrogacy-specific route to the recognition of intended parenthood. Their approach to birth registration may be split into two further categories: the 'liberal' ones, issuing a new birth certificate upon the transfer of legal parentage from the surrogate to the intended parents or 'ultra- liberal,' that enter the intended parents as legal parents straight away without mentioning the surrogate at all.[263]

The Russian Federation's liberal approach to surrogacy has translated into its seemingly straightforward child registration rules. The registration of birth of a child born out of a surrogacy arrangement is governed by the same overarching legal provision as the registration of the child born by a traditional birth. The basis for the registration is broadly provided for by the Family Code 1995 which states that a child's birth registration constitutes a means of establishing his origins.[264] The actual procedure of the registration of a surrogate child is governed by the 'default rules' – there is no need for any additional steps or a specific 'form to be filled in.'[265] The list of prescribed documents

[259] For more detailed discussion see 'A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements' (Mar 2014) *Hague Conference on Private International Law* Preliminary Document No.3 B 15.
[260] Art. 312 of the Belgian Civil Code.
[261] Laurence Brunet, Julie McCandless and others, 'A Comparative Study on the Regime of Surrogacy in EU Member States' 72.
[262] 'Belgian's surrogacy law under pressure after 'Men Having Babies' conference' (25 Sep 2019) The Brussels Times at <https://www.brusselstimes.com/brussels/69706/belgians-surrogacy-law-under-pressure-after-men- having-babies-conference/> accessed 30 Oct 2019.
[263] O'Callaghan above (n257) 47. The terminology is my own.
[264] Broadly art. 47 of the Family Code 1995.
[265] Е. Кагулян, «Институт Суррогатного Материнства В Современных Условиях» (2016) 1 Электронный Вестник Ростовского Социально-Экономического Института 182, 185. E. Kaguljan, «Institut Surrogatnogo Materinstva V Sovremennyh Uslovijah» (2016) 1 Jelektronnyj Vestnik Rostovskogo Social'no-Jekonomicheskogo Instituta 182, 185. E. Kagulian, 'The Institute of Surrogate Motherhood in Contemporary Realities' (2016) 1 *The Electronic Herald of Rostov Socio-Economic Institute* 182, 185.

may be found on the State Services website[266] and is openly available to the public.[267] The intended parents must submit the application for the registration, which must follow a specific prescribed format; a copy of medical certificate from the hospital confirming the birth of the child[268] (a compulsory document that will be kept indefinitely by the Registry);[269] a written statement from a surrogate confirming relinquishment of the child (optional, as the medical certificate would already contain the information of legal parents); the copies of the intended parents' passports (compulsory) and a copy of the marriage certificate if they are married (also compulsory). If the birth took place outside a medical institution a statement from a party present during the birth would also be required, usually this would be a private practice doctor. In the majority of situations, provided the list of documents is collated correctly,[270] the process of the child's birth registration should be relatively fast with the usual turnaround being approximately 50 minutes.[271] If successful, the intended parents would be issued with a birth certificate confirming their parental status as well as a certificate that entitles them to a one-off child benefit payment.[272] Unlike some other relatively permissive states that would require either adoption or a court order, Russia releases the commissioning parents from additional procedures if the legislative requirements are fully complied with – that is, the application is brought by a heterosexual married couple, the surrogate consents to relinquish the child and the application is brought no more than a month after the child's birth.[273]

As discussed elsewhere, in surrogacy arrangements the Russian law deems the surrogate mother to be the legal mother of the child. This means that in order for the intended parents' legal parenthood to be recorded on the birth certificate, there is a need for a surrogate to provide a written consent. As Art. 51(4) states 'the parties to a marriage who consented, in a written form, to assisted reproduction or embryo implantation, if resulted in a birth of a child as a result of these methods are to be recorded as the legal parents in the birth record book.' Para 2 of the article, however, contains a requirement that is surrogacy specific: "the parties to a marriage who have consented, in a written form, to an embryo implantation to another woman may only be recorded as the legal parents of the

[266] In Russia the Civil Registries have their own 'areas of coverage'. For example, in Moscow there is one Civil Registry branch per each district.
[267] 'The State Registration of a Child born to the Spouses who Consented to the Implantation of an Embryo in another woman' at https://www.mos.ru/pgu/ru/services/procedure/0/0/7700000000162881427/.
[268] Art. 14 of the Federal Law "On the Acts of Civil Statuses" № 143-FL from 15 Nov 1997. The copy of the contract, however, does not seem to be a requirement unless parenthood is disputed in court.
[269] Mos State Services above (n267).
[270] Mos State Services state that missing documents is the most common reason for the application refusal.
[271] Ibid.
[272] The format of the certificate is provided by the Order of the Ministry of Justice of the Russian Federation № 167 from 13 Aug 2018.
[273] 'Minjust clarified the Rules on the Registration of a Child born by a Surrogate Mother' (20 Nov 2019) Tass at < https://tass.ru/obschestvo/7160539 > accessed 3 Dec 2019.

child *upon the woman's consent*."[274] If obtained, the intended parents would also need to submit the document from the hospital confirming the surrogate's consent for the legal parentage to be transferred from the surrogate to the intended parents.[275] This makes the intended parents' registration as the legal parents contingent upon the surrogate's consent to continue with the surrogacy arrangement.

Russia's legal approach to the establishment of legal parenthood in surrogacy cases appears to be fairly 'liberal' – it does not require a court order or explicit (written) transfer of legal parenthood for the purposes of a child's registration. The transfer of legal parenthood is implicit: while the surrogate's postpartum consent is crucial, as soon as she has provided one in a written (documented) form, legal parenthood would automatically be vested with the intended parents. The surrogate would not even appear on the birth certificate – the intended parents would be registered as the legal parents straight away.[276] However, if the surrogate withholds consent (even for a short period of time) the child will remain unregistered until she consents to the parents' registration or confirms that she wishes to be the legal mother of the child. In this case the surrogate would have to apply to be entered on the birth certificate as the child's legal mother. Although the surrogate's wishes are final, there number of cases of disputed maternity are on the rise. This is discussed below in 5.1.5.

The Russian approach to legal parenthood constitutes a sharp contrast to some other Soviet countries where surrogacy 'is no longer [seen as] a taboo.'[277] For example, Ukraine seems to adopt a very permissive approach to surrogacy in general. Similar to Russia, Ukrainian law on a child's birth registration is also very straightforward with minimal yet strict administrative requirements,[278] mainly consisting of collating the relevant files.[279] However, unlike Russia, Ukraine follows what may be called an 'ultra-liberal approach' of the establishment of the intended parents' legal parenthood. Following art. 123 part 2 of the Family Code of Ukraine, the commissioning parents automatically become the legal parents of the child: "in case of the transfer of an embryo conceived by the spouses (a man and a woman) into another woman with the assistance of assisted reproduction technology, the

[274] Arts. 51(4) para 1 and 2 of the Family Code 1995.
[275] Para 5 art. 16 of the Federal Law "On the Acts of Civil Statuses" № 143-FL from 15 Nov 1997.
[276] McCandless and others above (n260) 54. The surrogate's statement of consent would most likely be kept at the hospitals or the Registry's archives.
[277] Claire Biggs and Courtney Brooks speaking to *Radio Free Europe* in Shany Noy Kirshner, 'Selling a Miracle: Surrogacy through International Borders: Exploration of Ukrainian Surrogacy' (2015) 14 *Journal of International Business and Law* 77, 79.
[278] 'A Ukraininan Surrogate Mother is not the Child's Mother. Unlike in Russia' (23 May 2020) Ukraina.ru at <https://ukraina.ru/interview/20200523/1027779571.html> accessed 1 Jun 2020.
[279] Kirshner above(n277) 85.

spouses would be deemed to be the legal parents."[280] This means that there is no need for a replacement certificate to be issued – since the surrogate has only been a legal mother in the interim, until the intended parents are registered, her consent simply is not required.[281] She also does not have to give up her parental rights after giving birth and prior to the handing the child over to the intended parents.[282] While Russia determines motherhood in accordance with gestation and birth, in Ukraine the legal status of the child born out of assisted reproduction is *pre*-determined in accordance with the contract which recorded the respective rights and responsibilities of the parties. As Kirshner notes, as long as the legal requirements are satisfied - the genetic material of the intended parents is placed in another woman, parental rights will automatically attach.[283]

It is clear that the Russian approach to legal parenthood is almost the opposite of the Ukrainian one: it provides an ultimate protection to the surrogate mother whilst leaving the intended parents in a precarious position. Whilst in Russia the surrogate retains the ultimate right to veto the transfer of legal parenthood, in Ukraine it is 'the surrogate [who] has no legal standing' whatsoever.[284] As Lehenka comments: "the [surrogate] can [try to] protect herself by making a civil law contract specifying the rights and obligations of the contracting parties: in fact, this is a services agreement. This document must be drawn up [and duly signed] before conception, because afterward it will be actually an assignment contract providing for the transfer to the customer of the baby who has been conceived or born. This agreement may entail criminal prosecution on charges of human trafficking or as an illegal agreement on transfer of a human being."[285] Despite the theoretical possibility of a surrogate being able to rely on civil law, the Family Code of Ukraine provides for an 'exclusion clause' which explicitly states that the dispute as to the maternity is not allowed in cases of surrogate motherhood.[286] Whilst attempts were made to make the existing legislation more protective towards the surrogates, none of the Bills were successful, rendering the Ukrainian approach to the establishment of legal parenthood in surrogacy cases probably the most liberal one in the world.[287]

The Russian approach providing the surrogate with the right to veto the child's birth

[280] From 10 Jan 2002 № 2947-III.
[281] See generally *IRTSA* at <http://www.irtsa.com.ua/en/questions-and-answers/legal-questions.html> accessed 5 Jan 2018.
[282] Mykola Gryshchenko and Alexey Pravdyuk, 'Gestational Surrogacy in Ukraine' in E. Scott-Sills (ed.) *Handbook of Gestational Surrogacy: International Clinical Practice & Policy Issues* (Cambridge University Press 2016) 251.
[283] Kirshner above (n277) 85.
[284] Ibid.
[285] Olha Zhyla, 'More women in Ukraine want to be surrogate mothers' (15 Dec 2009) Day at <https://day.kyiv.ua/en/article/close/more-women-ukraine-want-be-surrogate-mothers> accessed 5 Dec 2018.
[286] Art. 139(2) of the Family Code of Ukraine from 10 Oct 2002 № 2947-III.
[287] Zhyla above (n284).

registration, thereby affecting the determination of legal parenthood, may be explained by the historically attached importance to gestational motherhood. Traditionally, Russian society has placed emphasis on 'blood relationships.' Not only have these relationships always constituted the crux of familial relationships in Russia but they have also been relied upon as a means to establish a child's origins. Therefore, the relationship between the relatives have been defined by their blood affiliation. This has subsequently translated in the traditional family legislation recognising the blood relationship as the only connection.[288] Pregnancy is said to play the key role in the formation of these relationships, and it is the main process affecting the family dynamics.[289] Traditionally, pregnancy has been seen as a 'serious life test' that a woman must 'pass.' It is some sort of a 'specific step' of a woman's personality development, perfecting her intra-familial social status.[290]

Despite the burden that is attached to pregnancy, it is still viewed as a positive process: not only does it define the extent of a woman's femininity but also reaffirms the woman's identity within the family.[291] As Polianina argues, pregnancy in itself is sufficient enough to create certain rights for the woman carrying the child.[292]

Driven by the mission of controlling the population's migration and general control, not only has the state seen registration as means of policing but also as having a symbolic meaning. The 'new' authorities completely destroyed the tsarist registration system thereby realising the purpose of the revolution - the crushing of the Russian Empire.[293] The family law reforms also seem to be broadly

[288] A Levushkin, 'Legal Facts in Family Law of Russia and Other States – CIS Members' (31 Mar 2016) *Center Bereg* at < https://center-bereg.ru/d86.html > accessed 5 Mar 2018.
[289] А. Полянина, «Факт беременности как основание возникновения родительских обязанностей» (2012) 1 Семейное и жилищное право 229, 229. A. Poljanina, «Fakt beremennosti kak osnovanie vozniknovenija roditel'skih objazannostej» (2012) 1 *Semejnoe i zhilishhnoe pravo* 229, 229. A. Polianina, 'The Fact of Pregnancy as the Moment of Creation of Parental Responsibility' (2012) 1 *Family and Housing Law* 229, 229.
[290] Екатерина Мордас и Руфина Харисова, « Беременность Как Стадия Личностного Развития Женщины» (2018) 26 *Консультативная Психология И Психотерапия* 135, 136. Ekaterina Mordas i Rufina Harisova, « Beremennost' Kak Stadija Lichnostnogo Razvitija Zhenshhiny» (2018) 26 *Konsul'tativnaja Psihologija I Psihoterapija* 135, 136. Ekaterina Mordas and Rufina Kharisova, 'Pregnancy as a Step in a Woman's Personality Dvelopment' (2018) 26 *Counselling Psychology and Psychotherapy* 135, 136.
[291] D. Pines, 'Pregnancy and Motherhood: the Interrelationship between a Fantasy and Reality' at <https://psychol.pro/articles-and-books/40-sovremenyj-psichoanaliz/122-painz-beremennost-i-materinstvo-vzaimodejstvije-fantazij-i-realnosti> accessed 10 Mar 2018.
[292] A. Polianina, 'Fact of pregnancy as a ground for arising of parental rights' at <https://wiselawyer.ru/poleznoe/48911-fakt-beremennosti-osnovanie-vozniknoveniya-roditelskikh- obyazannostej> accessed 10 Mar 2018.
[293] В. Дибель, « Правовые предпосылки истории развития регистрации граждан по месту пребывания и по месту жительства в России» (2012) 7 *Вестник Московского университета МВД России 120*, 124. V. Dibel', « Pravovye predposylki istorii razvitija registracii grazhdan po mestu prebyvanija i po mestu zhitel'stva v Rossii» (2012) 7 *Vestnik Moskovskogo universiteta MVD Rossii* 120, 124. V. Dibel', 'Legal Predispositions to the History of Development of the Citizen Registration in accordance with the place of Residence' (2012) 7 *The Herald of the Moscow MVD University of Russia* 120, 124.

aligned with the political changes the country has been undergoing at the time. The law sought to eliminate the 'tsarist' notion of illegitimacy. Thus, a child's birth registration was seen as a way of equalising the rights of legitimate and illegitimate children,[294] thereby providing for the same rights for those who were registered in accordance with the law.[295] On the one hand, the actual Russian family setting inherited the tsarist 'authoritarian/ patriarchal style of inter-familial relationships.'[296] The notion of motherhood remained crucial to the concept of a family. At the same time, it has also undergone the radical re-structuring reflected in the legislative reforms. The Soviets made a sharp U-turn on the well-established religious traditions on child's birth registration by introducing the Decree of the Central Executive Committee (VTSYK) "On Civil Partnerships, Children and on Book - keeping of the Acts of Civil Statuses" in 1917. By abolishing the hitherto compulsory church registration of children it aligned the policy with the broader Soviet goal of elimination of the Church from all aspects of social life. The Decree introduced the so-called civil birth registration instead of the 'imperialist' religious ones, whereby a child could have been registered in accordance with the parents' religious requirements.[297] Mid- twentieth century marked further developments in birth registration. In the pursuit to make the registration simple and accessible, registration points were established in the local community clubs.[298] The process of registration was accompanied by a congratulating speech of the local officials. Despite the fact that the exact procedure has been changing in adjustment to political system, it is clear that the registration itself has always played a crucial role.[299]

4.3 The reproduction tax: taxing the surrogate's income

[294] The Decree of the Central Executive Committee (VTSYK) "On Civil Partnerships, Children and on Book- keeping of the Acts of Civil Statuses' from 18 Dec 1917.

[295] В. Прозорова, «Некоторые Проблемы Установления Происхождения Детей» (2015) *Реализация Концепции Развития Гражданского Законодательства Российской Федерации: Проблемы Теории И Практики* 154, 155. V. Prozorova, «Nekotorye Problemy Ustanovlenija Proishozhdenija Detej» (2015) *Realizacija Koncepcii Razvitija Grazhdanskogo Zakonodatel'stva Rossijskoj Federacii: Problemy Teorii I Praktiki* 154, 155. V Prozorova, 'Some Problems of the Establishment of the Child's Origins' (2015) *The Realisation of Concept of the Development of Civil Legislation in Russian Federation* 154, 155.

[296] Марина Рабжаева, «Историко-Социальный Анализ Семейной Политики В России XX Века» (2004) 6 *Социологические Исследования* 89, 89-98. Marina Rabzhaeva, « Istoriko-Social'nyj Analiz Semejnoj Politiki V Rossii XX Veka» (2004) 6 *Sociologicheskie Issledovanija* 89, 89-98. Marina Rabzhaeva, 'Historical and Social Analysis of Familial Politics in Russia in XX Century' (2004) *Sociological Explorations* 89, 89-98.

[297] Ibid.

[298] E.g. in Penza oblast' the registration of newborns took place in Civil Registry Office and the so-called 'A Palace of Culture' – a sort of a club house, common in the Soviet Union and the Eastern bloc. See Алла Вазерова, "Социалистическая Обрядность" В СССР В Середине 1960-Х г.» (2020) 1 *Образование И Наука В Современном Мире. Инновации* 21, 22. Alla Vazerova, "Socialisticheskaja Obrjadnost'" V SSSR V Seredine 1960-H g.» (2020) 1 *Obrazovanie I Nauka V Sovremennom Mire. Innovacii* 21, 22. Alla Vazerova, 'Socialist Rite' in the USSR in the Middle of 1960th (by Materials of the Penza Region) (2020) 1 *Education and Science in the Contemporary World* 21, 22.

[299] Л. Фионова и М. Катышева, «Оформление сведений о рождении: прошлое и настоящее» (2020) *Современные Технологии Документооборота В Бизнесе, Производстве И Управлении* 139, 143. L. Fionova i M. Katysheva, «Oformlenie svedenij o rozhdenii: proshloe i nastojashhee» (2020) *Sovremennye Tehnologii Dokumentooborota V Biznese, Proizvodstve I Upravlenii* 139, 143. L Fionova and M Katysheva, 'Registration of Birth Information: the Past and Present' (2020) *The Contemporary Technologies of Document Rotation in Business* 139, 143.

Taxation system is said to be one of the key tools ensuring the state's economic stability and appropriate allocation of budget and resources.[300] A taxation system exists in all developed countries, thereby compensating the outgoings from the state budget. Having undergone a variety of economic reforms in the early 1990s,[301] the Russian Federation introduced the first coherent legislative Act on taxation after the Soviet collapse: the 1991 Russian Federation Law "On the Basics of Taxation System in the Russian Federation."[302] This legislation paved the way for subsequent amendments and reforms resulting in a complete Tax Code of the Russian Federation. These novelties sought to 'perfect' the new tax system in the freshly reconstituted country that was torn by a massive debt of a Soviet legacy. Currently, similar to other countries with a developed tax system, Russia levies taxes on the possession of vehicles, property conveyance, investment and other activities.[303] Russia is said to be one of the most tax-liberal countries. In contrast to the Western world, where the taxes may go up to 40%, the state has been keeping the income tax fairly low - at the 13% threshold for many years.[304] However, the recent political crises have negatively affected the economic situation in the country, resulting in calls for implementation of a more economically stimulating tax system.[305] The services of surrogate motherhood have not escaped taxation. This sub-chapter is going to argue that whilst taxing a surrogate's income might be seen as an undue restriction, in practice, the majority of arrangements escape tax liability.

The imposition of taxation on surrogacy is hardly surprising. As a matter of history, Russia has always kept an eye on the sphere of reproduction for tax purposes. Historically, these taxes had an overarching aim of *promotion* of motherhood and families' welfare thereby imposing tax on the citizens that have refrained from reproduction. In the bid to increase the birth rate thereby encouraging the demographic growth Soviets have introduced the so-called "Tax on Childlessness" in 1941.[306] Aimed at both women and men of reproductive age, this law required voluntary childless citizens to

[300] Елена Шувалова, Марина Солярик и Джамиля Захарова, « Налоговые аспекты экономической безопасности в Российской Федерации» (2016) 3 *Статистика и экономика* 39, 39. Elena Shuvalova, Marina Soljarik i Dzhamilja Zaharova, « Nalogovye aspekty jekonomicheskoj bezopasnosti v Rossijskoj Federacii» (2016) 3 *Statistika i jekonomika* 39, 39. Elena Shuvalova, Marina Soliarik and Dzhamilia Zakharova, 'The Tax Aspects of Economic Safety in the Russian Federation' (2016) 3 *Economics, Statistics and Informatics* 39, 39.
[301] Ibid.
[302] From 21 Nov 2011 № 2118-1.
[303] 'Taxes for Private Entities 2021' *Komsomol'skaia Pravda* at < https://www.kp.ru/putevoditel/lichnye- finansy/nalogi-dlya-vizicheskih-lits/ > accessed 2 July 2021.
[304] This is the tax bracket relevant for the majority of income. See 'Income Tax in Russia. Brackets and Paying the PIT' *RBC* at <https://www.rbc.ru/companies/useful/podohodnyj-nalog-v-rf-stavki-i-uplata-ndfl/ > accessed 4 Jul 2021.
[305] See generally В. Коровкин, Основы теории налогообложения (Экономисть 2006). V. Korovkin, Osnovy teorii nalogooblozhenija (Jekonomist' 2006) V. Korovkin, The Basics of Theory of Tax Imposition (Economist 2006).
[306] The Order of the Presidium of the Supreme Soviet on Single and Childless Citizens of the Soviet Union' from 21 Nov 1941.

pay up to 6% of the salary to the state. The legislation also provided some limited exceptions for those lost children at WWII and full-time students under the age of 25. The measure, implemented as a way of supporting large families with many children, has never been explicitly repealed and survived until the Soviet collapse in 1992. The post-Soviet financial instability caused the demographic numbers to take a significant dip, making "Tax on Childlessness" subject to debates in the government – yet with no result.[307] The state discussed various measures that could stimulate birth rates, such as increasing the welfare benefits or maternity capital but never leaving the respective tax option completely off the table. One of the most recent considerations have been put forward by one of the most prominent advocates of such a tax - the Church. Thus, in 2013 archpriest Dimitrii Smirnov strongly argued in favour of re- introduction of the tax: "if you do not want to perform an act of bravery and have a child… or you [physically] cannot you have to financially participate in [child support of other families] by paying a small tax."[308] As the demographic situation has worsened following the COVID-19 outbreak the issue of declining birth rates came into the spotlight once again. In mid-2020 the "Soviet of Mothers," a pro-motherhood movement, also called for reforms in the taxation of voluntary childless citizens. This tax, argues Tatiana Butskaia, the founder of the movement, is a "necessity required by an appalling demographic situation in the country."[309] "We are talking about those who consciously refuse to have children. If they do not like [children] they should pay and continue to dislike them," – she claimed.[310] The government concluded that such an interventionist measure would be unconstitutional and amount to an interference with one's choice.[311] It was, however, acknowledged that the necessity to encourage childbirth still exists. As Inna Sviatenko, the Chair of the Committee of the Soviet of the Federation on Social Policies observes, the encouragement will be made by supportive means, such as increased maternity capital and social contracts – the support that has already proven to be effective.

Despite the fact that the state seeks to achieve a positive trend in demographics via various support initiatives rather than taxation, nevertheless, in 2019 Russian tax law "collided with a human body at an

[307] 'Childlessness Tax in 2021' (26 Dec 2020) Yur Gazeta at < https://yur-gazeta.ru/stati/nalogovoe-pravo/nalog-na-bezdetnost.html > accessed 6 Jul 2021.
[308] 'The ROC suggested to reintroduce the 'Childless tax' (11 Jan 2013) *Lenta.ru* at <https://lenta.ru/news/2013/01/10/nalog/ > accessed 4 Jul 2021.
[309] "The Soviet of Mothers" suggested to introduce a childless tax" (12 Oct 2020) Ria Novosti <https://ria.ru/20201012/bezdetnost-1579467918.html > accessed 4 July 2021.
[310] Ibid.
[311] 'Minfin excluded the introduction of childlessness tax in Russia' (13 Oct 2020) Federal Tax Service at <https://www.nalog.gov.ru/rn14/news/smi/10330591/ > accessed 5 Jul 2021.

unexpected juncture: surrogacy."[312] The Ministry of Finance concluded that the compensation received from a surrogacy arrangement, either a periodical or a one-off lump sum must be taxed. It referred to art. 210 part 1 of the Tax Code 1998 which provides that the relevant tax bracket is determined in accordance with *all* income received by a taxpayer.[313] Art. 41 of the Code provides that *all* monetary or other payments fall within the scope of the income. This applies to cash payments as well as bank transfers. Therefore, it appears that a surrogate's payment would be classified as an income for the taxation purposes. The surrogate would need to officially declare her income and submit the relevant form to the Revenue Services. The Code further outlines some exceptions, such as donation of biological material – e.g. blood, breast milk and some other cell- derived products.[314] This exception only seems to apply to donors: those who *provide* the biological material during their lifetime.[315] Since surrogacy constitutes '*carrying of and giving birth* to the child in accordance with the contract concluded between a surrogate mother and the intended parents whose genetic material was used…,'[316] the surrogate cannot be defined as a donor – she does not donate her genetic material.[317] Thus, there are no legal grounds to exclude a surrogate from tax liabilities. This means that surrogacy is treated in the same way as an employment in its traditional understanding – the surrogate's income would be taxable at the 13% bracket.

The exemption of surrogates from the tax obligation could drastically affect the state's budget. At first glance, there seem to be no clear short-term detriment, however, after a basic calculation long-term implications become more apparent. There is no record of surrogates' tax contributions available in the public domain, which means at the moment there is no specific way to calculate the exact losses. Nevertheless, at least the approximate fiscal implications can be speculated. In order to make an assessment, an average of a surrogate's income will be multiplied by the number of births followed by the deduction of tax. On average, as per 2018-2020 a Russian surrogate receives 1,500,000 RUR (£15,000) either as periodic payments or a lump sum payable upon birth. Unfortunately, the most recent data of surrogate births available is for 2018 only. The statistics revealed that in 2018 approximately

[312] The Letter from the Ministry of Finance of the Russian Federation № 03-04-06/65465 from 26 Aug 2019. See also Bridget J Crawford, 'Taxing Surrogacy' in Kim Brooks, Åsa Gunnarson, Lisa Philipps and Maria Wersig (eds) Challenging Gender Inequality in Fiscal Policy Making: Comparative Research on Taxation (Hart Publishing 2011) extract chapter 5, 95.
[313] № 146-FL from 31 July 1998.
[314] Art. 217 part 4 of the Tax Code 1998.
[315] Arts. 9 and 10 of the Federal Law № 180-FL from 23 Jun 2016.
[316] Art. 55 part 9 of the Federal Law № 323-FL from 21 Nov 2011.
[317] It is questionable whether the situation would have been different if traditional surrogacy was allowed in Russia.

895 surrogate births have been registered.[318] This brings the total of all 895 surrogates' income to 1,342,500,000 RUR (£13,425,000) for the 2018-19 fiscal year only. If applying the relevant tax bracket of 13%, the revenue losses would be estimated at 1,167,975,000 RUR (£116,797,500). In light of the overall budget revenue of 772, 5 billion RUR (£772,500,000,000) in 2018,[319] the losses from non-payment of tax on surrogacy income appear to be somewhat significant: around 15% of the total tax that did get paid into the state's budget. Whilst this number might be hardly seen as substantial in short term, if estimated in terms of cumulative loss it would make a drastic difference.[320] Over the years, the losses would certainly be more impactful and potentially become a real detriment to the state's budget.[321]

On the one hand, the measure may be detrimental for a surrogate's income potentially having a discouraging effect. Unlike the US, where the surrogates may come from middle-class and may be less motivated by the monetary payment,[322] it is widely submitted that Russian surrogate mothers usually engage in the arrangement in order to earn and improve the living conditions either for themselves or for their families. Surrogates tend to come from remote provincial regions, where the income is fairly low and the job opportunities are almost non-existent. They are driven by a dream of "getting out of poverty" and have a better life.[323] As one of the surrogates confesses, the only reason she decided to become a surrogate mother is to provide for herself and for her daughter. Being a single mother, she lived in inappropriate conditions – the accommodation is in a poorly state and has no central heating. She had no means to install a proper heating system increasing the chances of a cold-induced illness or even fatality during the winter periods. "[I came from a town] with the population of 60,000 people. [The only workplace] is a factory, with almost no workplaces. The places that pay well may be counted by the fingers on one hand" - another surrogate from Sverdlovsk Oblast[324] explains her decision to

[318] There is no conclusive data on this. The latest estimate is said to be 895 (2018). See Varvara Kolesnikova, 'What Regulation does the Surrogacy Market Require' (7 Jun 2021) Vademecum at <https://vademec.ru/article/v_kakom_regulirovanii_nuzhdaetsya_rynok_surrogatnogo_materinstva_v_rossii/> accessed 6 Jul 2021.

[319] The data is correct as of 2018. The conversion rate might be different at present, due to instability of the currency. See 'Revenue Income in 2018 is 772,5 billion roubles' (28 Jan 2019) Federal Tax Services at <https://www.nalog.gov.ru/rn16/news/activities_fts/8330018/ > accessed 8 Jul 2021.

[320] Crawford above (n312) 101.

[321] 'When does the Detriment to the Budget caused by non-payment of tax arise?' (17 Aug 2018) Klerk at < https://www.klerk.ru/buh/articles/476978/ > accessed 8 Jul 2021.

[322] Anabel Stoeckle, 'Rethinking Reproductive Labor through Surrogates' Invisible Bodily Care Work' (2018) 44 *Critical Sociology* 1103, 1110.

[323] 'A confession of a Surrogate Mother: Dreamed to get out of poverty but ended up being an incubator for someone else's child' (24 Nov 2019) *Komsomol'skaia Pravda* at < https://www.kp.ru/daily/27059.5/4127087/ > accessed 5 Jul 2021.

[324] The region lying in the Northern and Central Ural Mountains. See 'Sverdlovsk Region' at <http://council.gov.ru/en/structure/regions/SVE/> accessed 5 Jul 2021.

become a surrogate.[325] She used to live in a dormitory residence alongside horrible neighbours. One of the dorm mates treated the shared kitchen as her own property letting no one use it and another one was an alcoholic who murdered her husband that previously used to publicly beat her up. "I think it is understandable why I [was so desperate] to leave that place. I was sick and tired of it," – she bitterly says. The payment of 1,000,000 RUR from a surrogacy arrangement allowed her to sell the room in the dorm and buy a small flat in a bigger town. She admits that had it not been for surrogate motherhood she would have barely been able to feed her family. For these women, 'counting every single penny' the tax would constitute a significant financial burden: from a 1,000,000 RUR compensation a surrogate would only be left with 870,000 RUR.[326] As the same surrogate observes: "even 10,000 RUR[327] means something to me – this money would help massively." Yet, it is not all surrogates who are offered the abovementioned sum. Whilst in the capital the payment may go as high as 2,500,000 RUR,[328] in the periphery, the compensation for surrogacy is usually much lower, meaning that the impact of the tax would be even greater. For example, in Tuymen, Siberia, the average price for surrogacy is approximately 700,000[329] leaving the surrogate with slightly more than 600,000 after tax.

Furthermore, it is highly questionable whether the obligation to pay taxes for a hard, nine-month pregnancy is morally acceptable. Surrogates are not altruists, they do not opt for surrogacy because they seek "an easy life" – they are driven by debt, the need to be sustainable.[330] They experience a great degree of pressure stemming from the need to carry the child full term. The surrogates describe their experience from the perspective of injury, rather than something that is excessively beneficial for themselves. As one of the surrogate mothers states, surrogacy is not easy money.[331] The risk of complications, life-threatening conditions as well as risk of death should be taken into account. Therefore, no tax should be imposed for "'all the needles, sticks, stretch marks and pain and suffering."[332]

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[325] 'How does the Surrogate with an income of 30,000 RUR temporarily live' (15 Feb 2021) Journal Tinkoff at < https://journal.tinkoff.ru/diary-surmama-spb-30k/ > accessed 6 Jul 2021.
[326] Approximately £8,700.
[327] Approximately £100.
[328] 'How much do the surrogates get' (22 Mar 2020) at < https://zlojnachalnik.ru/surrogatnye-materi/ > accessed 6 Jul 2021
[329] Olga Nikitina, 'Openly on Surrogate Motherhood. How it happens in Tuymen' (30 May 2017) Vsluh.ru at < https://vsluh.ru/novosti/besedy/otkrovenno-o-surrogatnom-materinstve-kak-eto-proiskhodit-v-tyumeni_305755/ > accessed 6 Jul 2021.
[330] Juridical Social Network at < https://www.9111.ru/questions/18080601/ >.
[331] Katerina Frolova, 'I would never earn this money anywhere. Confessions of a surrogate mother' (27 Jan 2020) Gazeta at <https://gazeta.a42.ru/lenta/articles/72354-takih-deneg-ya-nigde-ne-zarabotala-otkroveniya- surrogatnoi-m> accessed 5 July 2021.
[332] Crawford above (n312) 105.

On the other hand, however, the effect of the measure is not as far reaching as originally envisaged. Although the lawyers insist that the tax still must be paid in accordance with the requirements of the Code,[333] the Ministry's clarification note does not have any formally normative force. Furthermore, neither the state nor the agencies keep an accurate record of the surrogate arrangements. Whilst some surrogacy birth rates are tracked by fertility clinics and surrogacy agencies, this data is limited. Some families prefer not to contract through the clinics or agencies at all and choose to have a direct unmediated arrangement with the surrogate. Such an arrangement would to be completely outside of public domain and only the respective parties involved would be aware of it. Since there is no definitive record of the surrogates engaged in the arrangements at the relevant moment, it is virtually impossible for the government to become aware of the amount of tax that could be due. This potentially allows a surrogate to avoid declaring the surrogacy- related income and therefore, taxation. The research carried up to date has not revealed any instances where a surrogate openly admitted paying tax from her surrogacy income. One of the prospective surrogates, however, categorically refused to pay tax if such an obligation transpires during her arrangement. She argued that by bringing the child into this world "she does not owe the state anything."[334] Crawford reports that American surrogates take a similar stance – for them, surrogacy is not a job in a traditional understanding, but an ultimate act of self-sacrifice, something that should be treated as generosity.[335] Although the taxes might have a discouraging effect on surrogacy, it is unlikely that it will make surrogacy disappear completely. Indeed, the law-obedient surrogates who think that tax unfairly rips them off a part of their legitimate payment may be less willing to enter into the arrangement. However, it seems that it will simply partially drag surrogacy underground.

Crawford observes that being taxed aligns surrogacy with other types of employment.[336] It also implies that a surrogate is trustworthy and privileged: she contributes to the national health system and other spheres of public expenditure. Yet, this position does not take into account the fact that surrogacy and traditional labour are not, in reality, identical. Whilst traditional labour mostly involves working away from home,[337] surrogacy implies the opposite – there is no commute, except for health checks. Traditional labour is routine, whereas surrogacy becomes progressively physically harder throughout the pregnancy. As the Russian law requires a surrogate to have at least one child of her own and be of

[333] Juridical Social Network at <https://www.9111.ru/questions/18080601/>. See also 'Do You need to pay tax from surrogate motherhood arrangement? at <https://pravoved.ru/question/964471/> accessed 3 July 2021.
[334] Above (n330).
[335] Crawford above (n312) 99-100.
[336] Crawford above (n312) 102.
[337] One may argue that this is not the case anymore and most workplaces offer flexible working/ work from home policies for their employees. In Russia, however, working from home is not very common.

the child-bearing age, most likely the surrogate will also have to juggle childcare, the house chores as well ensuring that her surrogate pregnancy is going as planned. Furthermore, surrogacy might potentially lead to reduction or loss of future income.[338] Once the surrogate leaves traditional work and takes time off for the pregnancy as well as the postpartum rehabilitation, it would be harder for her to return, thereby 'making it more difficult for her to achieve long-term financial parity with men [or women] of equivalent ability.'[339] In Russia, women who take maternity leave seem to voluntarily accept the risk that they might return to a lower-paid salary or a completely different position altogether.[340] Unlike the traditional pregnancy, which is usually a matter of the woman's choice, for surrogates it might be the only opportunity to earn. Furthermore, a woman will not always be eligible to act as a surrogate – age or health concerns might well prevent her from engaging in surrogacy. This means that her entrance to traditional labour market would be severely delayed resulting in lower pay, thereby negatively affecting her economic situation in the long term.[341] Given that for some women surrogacy may be the only way to be financially sustainable, taxation of the compensation seems to be, at its best, unethical.

As evident from above, Russia developed a rather liberal legislative framework governing surrogacy. There is no need for permission from the court or any other regulatory body prior to entering into the agreement. There is also no upper age limit imposed on the intended parents, as long as the eligibility criteria from the healthcare legislation are satisfied. Furthermore, becoming a surrogate is not a difficult process - a woman simply needs to be above a certain age, have at least one child of her own and have an appropriate health record. Although it may be argued that the age and the requirement to have at least one child of her own might unnecessarily limit the pool of surrogate mothers, these requirements are, in fact, a necessity that seeks to protect the surrogate's health. The process of child registration is also rather straightforward – it is a purely administrative process. Once the surrogate has given up her parental rights by formally consenting for a child to be handed over, the intended parents may be registered as the legal parents without a court order. The state respects the parties' autonomy and the principle of freedom to contract. As long as the contract is entered voluntarily, written in a simple form it will be deemed valid without a need for a notary's verification.

The law is also rather liberal in relation to postmortem and posthumous reproduction are the two

[338] Crawford above (n312) 102.
[339] Ibid.
[340] It should be acknowledged, however, that it is not just the surrogates that may be subject to such a treatment upon return to work. See 'Lower Pay after Maternity leave: is this legal?' (25 Oct 2019) Pravoved at <https://pravoved.ru/question/2563728/ > accessed 4 July 2021.
[341] Crawford (n312) 102.

very sensitive areas in the sphere of procreation. Currently, there is no legislative framework that would explicitly allow these methods – the law is silent on posthumous reproduction and postmortem retrieval of gametes. Nonetheless, Russia is one of the very few states where such arrangements can be made. The law also normalises surrogacy by imposing income tax on surrogate mothers. Surrogacy seems to be treated as full-time employment which means that default taxation rules are applicable. Yet, to date, the state seems to overlook surrogacy arrangements: there is no official registry of surrogates that would help trace their working months which means that they are outside the scope of the state's interest.

5. THE LEGAL RESPONSE TO THE PROSPECT OF FAILED SURROGACY ARRANGEMENTS

Having children is clearly one of the most important needs for the families.[1] Assisted reproduction technology has helped many families to overcome infertility and allowed the families to experience parenthood.[2] The data reveals numerous successful surrogacy arrangements, with hundreds, if not thousands of surrogate children being born annually.[3] Despite continuous attacks on moral grounds, surrogacy remains as popular as ever.[4] Russian legislation has been fairly responsive to rapid medical development and the country has been described as one of the "fortunate countries allowing to make the families happy with a baby that his relatives were waiting for a long time"[5] not only in Russia but also abroad. More broadly, it has successfully assumed the task of solving a complex social problem – improve the demographic situation in the country.[6] This positive outlook seems to suggest that Russia has created a perfectly functioning legal mechanism providing for a smooth surrogacy arrangement with a desired outcome for all parties at the end. However, in reality, it is hard to argue that the legislative response is complete.[7] At times it is incapable of addressing the existing nuances nor the ones that might arise in the future. The legislation appears to erroneously assume that all surrogacies are the same and will 'go according to the plan.' As Mayakova observes, the law as it is at the moment only states the requirements for the surrogate mother and the eligibility criteria for the intended parents.[8] Thus, a variety of questions raised by the current position are left unanswered by the legislator or answered partially by means of the default provisions on parenthood, which in the context of surrogacy may lead to anomalous results. She continues: "… the majority of legal aspects are only partially reflected in the actual law… it is usually the academic scholars who attempt to clarify [the intentions behind the law]

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[1] И. Демина, «Правовые Проблемы Суррогатного Материнства» (2020) 8 *Электронный научный журнал «Наука. Общество. Государство»* 152, 152. I. Demina, «Pravovye Problemy Surrogatnogo Materinstva» (2020) 8 *Jelektronnyj nauchnyj zhurnal «Nauka. Obshhestvo. Gosudarstvo»* 152, 152. I Demina, 'Legal Problems of Surrogate Motherhood' (2020) 8 *Electronic Scientific Journal: Science, Society, State* 152, 152.

[2] Д. Абрамовская, А. Волгина, Д. Серегин, «Суррогатное материнство. Современный взгляд» (2019) 12 Скиф. Вопросы студенческой науки 409, 410. D. Abramovskaja, A. Volgina, D. Seregin, «Surrogatnoe materinstvo. Sovremennyj vzgljad» (2019) 12 *Skif. Voprosy studencheskoj nauki* 409, 410. D Abramovskaia, A Volkova, D Seregin, 'Surrogate Motherhood: a Contemporary View' (2019) 12 *Questions of Student Science* 409, 410.

[3] Zarema Barakhoeva, 'Surrogate Motherhood: For and Against' (27 May 2020) Altravita at < https://altravita-ivf.ru/stati/168-surrogatnoe-materinstvo-za-i-protiv.html > accessed 28 May 2020.

[4] Konstantin Svitnev, 'Surrogate Motherhood: History and Modernity' (6 Sep 2006) Medical Newspaper at <https://jurconsult.ru/smi-o-nas/surrogatnoe-materinstvo-istoriya-i-sovremennost/> accessed 22 Jan 2019.

[5] Ibid.

[6] Ibid.

[7] Ibid.

[8] Мария Маякова, «Суррогатное Материнство: Пробелы Законодательства (2020) *Право Как Искусство Добра И Справедливости* 92, 92. Marija Majakova, «Surrogatnoe Materinstvo: Probely Zakonodatel'stva (2020) *Pravo Kak Iskusstvo Dobra I Spravedlivosti* 92, 92. Mariya Mayakova, 'Surrogate Motherhood: the Gaps in Legislation' (2020) *The Law as an Art of Kindness and Fairness* 92, 92.

by putting forward their personal views."[9] This left a large number of couples undecided or against a surrogacy arrangement.[10]

The current norms contained in the Family Code 1995, or any supplementing legislation do not take into account the complications that might arise out of a surrogacy arrangement. The legal response is rudimentary, creating gaps thereby not only leaving the parties without the necessary legal protection but on the contrary, at times interfering with their interests. There is no clarity as to the legal redress for the intended parents if the surrogate decided to keep the child. The law explicitly states that motherhood is established by virtue of gestation, yet it fails to consider the interests of the genetic parents who may well be left without any avenues for establishing their parenthood. The legislation is also silent on the issue of death of any of the parties: either the surrogate, the parents or the child. It does not specify the amount of compensation payable and what role the contract plays in the judicial decision-making. Most importantly, by placing emphasis on surrogate's protection the law seems to ignore the interests of other parties: it does not safeguard the best interests of the child, by potentially depriving him of the opportunity to be raised by his genetic parents and allowing the surrogate's husband to be registered as his legal father in case of a surrogate's death. While some steps forward have been made to fill in the in the past few years, they are not solid enough to provide clear-cut answers to these concerns. This chapter seeks to critically appraise the current law in order to reveal the gaps in the regulation of failed arrangements. It will also provide recommendations for a reform where the law is unsatisfactory.

5.1 Death of a surrogate mother

Maternal death is one of the tragedies in contemporary medical world. Not only does it have a far-fetching impact on a woman's family members but also the society as a whole.[11] The WHO estimates that around 300,000 women annually die during labour.[12] This may happen 'at any time during the pregnancy or 42 days after birth, sometimes due to the factors that cannot be attributed to

[9] Ibid.
[10] Barakhoeva, above (n3).
[11] В. Волков, М. Гранатович, Е. Сурвилло и О. Черепенько, «Ретроспективный Анализ Материнской Смертности От Преэклампсии И Эклампсии» (2017) 17 Российский Вестник Акушера-Гинеколога 4, 4-8. V. Volkov, M. Granatovich, E. Survillo i O. Cherepen'ko, «Retrospektivnyj Analiz Materinskoj Smertnosti Ot Prejeklampsii I Jeklampsii» (2017) 17 *Rossijskij Vestnik Akushera-Ginekologa* 4, 4-8. V Volkov, M Granatovich, E Survillo and O Cherepenko, 'Retrospective analysis of maternal mortality in preeclampsia and eclampsia' (2017) 17 Russian Messenger of a Gynaecologist 4-8.
[12] 'Maternal Deaths: The Statistics, Reasons and Prevention' at <https://yandex.ru/turbo/malyshok.net/s/materinskaya-smertnost-pokazateli-prichiny-i-profilaktika/> accessed 21 Feb 2020.

pregnancy.'[13] Some potential causes are said to be viral diseases,[14] preeclampsia during the pregnancy[15] as well as the birth complications. Surrogacy pregnancies are also not exempt from the latter – some suggest that the chances of complications only increase with the use of a donor genetic material.[16] Thus, in early January 2020 the US surrogacy community was shaken by the news of a death of a two-time surrogate mother, Michelle Reeves.[17] The 36-year-old surrogate went through a 'high risk pregnancy' to help a couple who could not have a second child. Having been revived a few times during labour she died of amniotic fluid embolism,[18] a condition when foetal material enters the mother's bloodstream.[19] The news came three years after the death of Crystal Wilhite, another surrogate also from the US, who died of a blood clot during preterm labour.[20] These devastating events prompted a fresh round of debate questioning the exploitative nature of fertility industry[21] as well as the inadequacy of medical care provided by the clinics potentially contributing to surrogate mothers' deaths.[22]

In Russia maternal death rates in general seem to be comparable to the ones in Europe.[23] As the Head of Ministry of Health proudly observes, at the moment the Russia is "the *global* leader in decreasing the rates of maternal deaths."[24] The more widespread availability of perinatal centres across the country, with an increased capacity for routine checks and ultrasound testing are said to have led to

[13] WHO: The WHO Application of ICD-10 to deaths during pregnancy, childbirth and the puerperium. ICD-MM (WHO Library Cataloguing-in-Publication Data, Geneva: 2012) 9. See also Volkov, above (n11) 4.
[14] Hantoushzadeh, Sedigheh, Alireza A. Shamshirsaz, Ashraf Aleyasin, Maxim D. Seferovic, Soudabeh Kazemi Aski, Sara E. Arian, Parichehr Pooransari et al, 'Maternal death due to COVID-19' (2020) 223 *American Journal of Obstetrics and Gynecology* 109, 109.
[15] Volkov, above 4 (n11).
[16] 'Surrogate Motherhood: Medical Risks and the Consequences for Healthcare System' (26 Feb 2020) at <https://netovar.org/2020/02/26/surrogacy-healthcare/> accessed 27 Feb 2020.
[17] Chloe Morgan and Carly Stern, 'Surrogate who died during childbirth, leaving behind two kids of her own, is praised as 'an amazing mom' and the family's 'rock' - as her brother-in-law shares their heartbreak over her death' (22 Jan 2020) Mail Online at <https://www.dailymail.co.uk/femail/article-7917587/Surrogate-died-childbirth- amazing-mother-real-light-familys-life.html> accessed 21 Feb 2020.
[18] The Center for Bioethics and Culture, 'Another US Surrogate Mother Has Died' (17 Jan 2020) *The Centre of Bioethics and Culture Network* at <http://www.cbc-network.org/2020/01/breaking-another-us-surrogate-mother- has-died/> accessed 21 Feb 2020.
[19] Amniotic Fluid Embolism at <https://www.mayoclinic.org/diseases-conditions/amniotic-fluid- embolism/symptoms-causes/syc-20369324 > accessed 21 Feb 2020.
[20] Kallie Fell, 'In Memory of Lost Moms' (14 May 2020) *The Center for Bioethics and Culture* at <http://www.cbc-network.org/2020/05/in-memory-of-lost-moms/> accessed 21 Feb 2020.
[21] Ibid.
[22] 'What happens when a surrogate mother's death remains undisclosed because of non-disclosure agreements imposed by her surrogacy clinic?' at <https://www.legalizesurrogacywhynot.com/crystal-wilhite-story> accessed 21 Feb 2020
[23] 'A Tragedy During Birth: What are the Reasons for Maternal Deaths?' at <https://dearmummy.ru/tragediya- pri-rodax-v-chem-prichiny-materinskoj-smertnosti.html> accessed on 21 Feb 2020.
[24] 'Maternal Deaths in Russia fell by 4,4 times since 2000' (16 Sep 2019) *Tass* at <https://tass.ru/nacionalnye-proekty/6889543> accessed 20 Feb 2020.

a "sharp decrease in maternal deaths in recent years."[25] Indeed, the data showing consistent downward trend reaching the number of 10 deaths per 100,000 in 2018[26] which is four times less than in 1990s.[27] The extensive database search has not revealed separate information on deaths from surrogacy complications, but it may be assumed that these are included in the general statistics. To date there are no known cases of surrogate mothers' deaths in Russia. Some agencies claim that a surrogate pregnancy is deemed to be of the same risk as the traditional pregnancy. Yet, the remoteness of the possibility of surrogate's death does not mean that the arrangement is completely risk-free. This raises an inevitable question as to the respective legal positions of the parties in case surrogacy does not go in accordance with the plan.

The fragmentation of Russian legislative response to surrogacy becomes apparent in the sphere of post-birth registration. The issue is vaguely governed by the general rules on administrative registration procedure: art. 16 of the Federal Statute 143-F "On the Acts of Civil Statuses"[28] states that the child's parents must apply to the Civil Registry in order to be registered as the child's legal parents. Part 5 article 16 further provides that "the state registration of a child… upon the request of the couple who consented to the implantation of an embryo in another woman[29] for the purposes of carrying it… alongside the document confirming the birth of the child the couple must provide the document issued by the medical organisation and confirming that consent from the surrogate for the registration of the intended parents as the legal parents has been obtained."[30] In other words, its imperative formulation[31] unconditionally requires proof of the surrogate's consent to be submitted by the hospital or medical organisation to the Civil Registry Office[32] and seems to implicitly preclude any other party to provide consent on her behalf. As Boiko notes, while there is a variety of instances where the consent may not

[25] 'Maternal Deaths have Reached a Historical Minimum' (27 Oct 2014) *Ria Novosti* at <https://ria.ru/20141027/1030349955.html> accessed 25 Dec 2019.
[26] 'Healthcare' at https://rosstat.gov.ru/folder/13721 accessed 25 Dec 2019.
[27] For the statistics 1990-2001 see 'Demoscope' <http://www.demoscope.ru/weekly/2002/085/barom04.php> accessed 25 Nov 2019.
[28] From 15 Nov 1997.
[29] That is the surrogate.
[30] Art.16 of the Federal Statute 143-FL. Translation my own.
[31] Ольга Сочнева и Надежда Тарусина, «Проблемы Регистрации Родительства: Традиции И Антитрадиции» (2017) *Теоретические И Практические Проблемы Государственной Регистрации Актов Гражданского Состояния* 141, 150. Ol'ga Sochneva i Nadezhda Tarusina, «Problemy Registracii Roditel'stva: Tradicii I Antitradicii» (2017) *Teoreticheskie I Prakticheskie Problemy Gosudarstvennoj Registracii Aktov Grazhdanskogo Sostojanija* 141, 150. Olga Sochneva and Nadezhda Tarusina, 'The Problems of Parenthood Registration: Traditions and Anti- Traditions' (2017) *Theoretical and Practical Problems with State Registration of Acts of Civil Statuses* 141, 150.
[32] А. Глебкина, «Рождение - Акт Гражданского Состояния - Как Юридический Факт В Гражданском Праве» (2017) *Вестник Молодого Ученого Кузбасского Института* 154, 159. A. Glebkina, «Rozhdenie - Akt Grazhdanskogo Sostojanija - Kak Juridicheskij Fakt V Grazhdanskom Prave» (2017) Vestnik Molodogo Uchenogo Kuzbasskogo Instituta 154, 159. A Glebkina, 'Birth – the Act of Civil Statuses – A Legal Fact in Civil Law' (2017) The Messenger of a Young Academic of Kuzbass Institute 159, 164.

be practically obtained, it is indeed the only way for the intended parents to be registered on the birth certificate.[33] Despite the clear possibility that sometimes the respective provision cannot be satisfied, the legislation does not specify the legal consequences that would follow in the circumstances where consent cannot be provided. For example, it does not take into account the fact that it could not be obtained if the surrogate entered a vegetative state or died during labour or before signing the consent form.[34] In this case, the problem lies in the fact that there is no *absolute* certainty whether the surrogate *intended* to provide consent after birth or whether she intended initially but would have changed her mind afterwards. Although the scenario is different compared to the situation where she *refused*, the legal treatment remains the same with the same legislative provisions being applicable. Thus, presumption of maternity will be applied by default,[35] automatically triggering the registration of a surrogate as the child's legal mother.[36] The non-conditionality of the surrogate's consent means that the intended parents cannot rely on 'any circumstances' in order to get registered as the legal parents, not even on genetic connection with their own child.[37]

Some speculations may be made as to whether there is a need for an advance directive recording the intended parents' intentions or whether the lack of consent could, in theory, prove the initial intentions of the parties i.e. that the commissioning couple were intended to be entered on the birth certificate as the legal parents. The more extensive account of the contract would have been logical following the Decree from the 16th of April 2017,[38] which provided some clarification on the weight of the contract when deciding on the importance of consent. It states that "the absence of the consent would not be an unconditional ground for declining the application [to be registered as the legal parents] of the parties, who entered into an agreement with a surrogate mother…" Whilst the Court will ultimately decide the

[33] Е. Бойко и А. Ефремова, «Особенности Правового Регулирования Суррогатного Материнства На Территории Российской Федерации» (2017) 7 *Донецкие Чтения* 153, 153. E. Bojko i A. Efremova, «Osobennosti Pravovogo Regulirovanija Surrogatnogo Materinstva Na Territorii Rossijskoj Federacii» (2017) 7 *Doneckie Chtenija* 153, 153. E Boiko, 'The Peculiarities of Legal Regulation of Surrogate Motherhood on the Territory of the Russian Federation' (2017) 7 *Donetsk Readings* 153, 153.

[34] Daria Voznesenskaya, 'Surrogate Motherhood: Human Trade or Helping the Childless' (6 Apr 2017) NewsNN at <https://newsnn.ru/article/general/06-04-2017/surrogatnoe-materinstvo-torgovlya-lyudmi-ili-pomosch- bezdetnym-6727087e-80fb-4f6f-b4e5-1bceaa2df698 > accessed 25 Feb 2020.

[35] Article 48(1) of the Family Code 1995.

[36] Article 14 of the Federal Statute 143-F "On the Acts of Civil Statuses".

[37] Нелли Иванова, «Проблемы Установления Происхождения Детей, Рожденных При Использовании Суррогатного Материнства» (2017) 1 *Журнал Актуальные проблемы государства и права* 64, 64. Nelli Ivanova, «Problemy Ustanovlenija Proishozhdenija Detej, Rozhdennyh Pri Ispol'zovanii Surrogatnogo Materinstva» (2017) 1 Zhurnal Aktual'nye problemy gosudarstva i prava 64, 64. Nelli Ivanova, 'The Problems of Establishment of the Origins of a Child Born with the Assistance of Surrogate Motherhood' (2017) 1 *Actual Problems of Law* 64, 64.

[38] The Supreme Court Decree №16 from 16 Apr 2017.

case in light of the best interests of the child[39] it will consider the following checklist of factors: 1) the conditions of the agreement; 2) the genetic relationship between the applicants and the child; 3) as well as the reasons for the surrogate mother *not providing consent.*[40] The scope of application of the Decree, however, seems to be dependent on the judicial interpretation of the precise wording of the third criterion. The instances illustrating the judicial operation of the Decree are not numerous – so far it has only been applied to the situations where the surrogate practically *could* provide consent but *refused* to do so.[41] A well-known example is the abovementioned *Suzdalev and Frolov* litigation. The court placed emphasis on the so-called natural parent presumption that is the biological connection between the children and the intended parents as evidenced in the contract as well as the surrogate's wishes to claim state benefits as the real reason behind her refusal to provide consent. In this instance, the court held that it would be in the best interest of the children to be handed over to the biological parents. It is very unusual for a natural parent to lose parental responsibility and the child to be removed. Even in adoption proceedings, this only happens as a last resort. It is questionable, however, whether the same outcome would be achieved if the surrogate could not provide consent by virtue of not *being capable* of doing so, rather than refusing. It is not clear whether the wording "*not providing* consent" may be stretched to include "*not being capable* of providing consent" instances. The academic body seems to unanimously agree that it could not.[42] Reznik, for example, notes that the scope of the Decree appears to be limited to the former cases: para 31 explicitly provides for the factors to be taken into account in case of *refusal* to provide consent. The effect of paragraph 31 is fairly constrained with the court facing an uneasy task of underlining the priority of the surrogate's consent as required by the Family Code, while at the same time having to balance the interests of the intended parents.[43] The legal nature of the Decree also means that it lacks any normative force. Any extension of the scope of the Decree's application could carry the risk of contradicting the intentions behind the Family Code, which calls for the changes to be implemented on the legislative level.[44]

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[39] There is no clear approach to the 'best interest of the child.' Unlike the UK, there is no statutory definition or a 'welfare' checklist of factors for the courts to consider.
[40] Para 31 of the Supreme Court Decree №16 from 16 Apr 2017.
[41] Abovementioned Suzdalev and Frolov litigation: *Case №33-16343/2017* (2017).
[42] See e.g. N Ivanova, above (n37) 64.
[43] Elena Reznik, 'From Project to Implementation: the refusal to the absolute right of the surrogate mother' (2018) 12 *Legal Explorations* at <https://e-notabene.ru/lr/article_27300.html>.
[44] В. Ашуха и Е. Невзгодина, «Пункт 4 ст. 51 семейного кодекса Российской Федерации - гарантия защиты материнских прав, повод для злоупотребления правом, анахронизм?» (2017) *3 Вестник Омского Университета. Серия* «Право» 111, 114. V. Ashuha i E. Nevzgodina, «Punkt 4 st. 51 semejnogo kodeksa Rossijskoj Federacii - garantija zashhity materinskih prav, povod dlja zloupotreblenija pravom, anahronizm?» (2017) 3 *Vestnik Omskogo Universiteta. Serija «Pravo»* 111, 114. V Ashukha and E Nevzgodina, 'Clause 4 of the art.51 of the Family Code of the Russian Federation – the Guarantee of the Protection of the Maternal Rights, a Reason for the Abuse of Rights, or Anachronism? (2017) 3 *Messenger of Omsk University* 111, 114.

The complexity in the area created by the legal patchwork is further exposed in the instances where the deceased surrogate was married. The avenue of the so-called 'voluntary registration' which would allow the genetic father to be registered on the birth certificate[45]would no longer be available to the intended parents by virtue of the inability of the surrogate to communicate her consent to the civil registry. Yet, since there is no specific provision tailored for the establishment of paternity in cases of surrogate's death,[46] this means that the default provisions of the Family Code are applicable. In accordance with para 3 art. 48 of the Code the presumption of paternity applies: "if a child was born to the parties that were married *at the time of the birth*, the spouse will be deemed to be the legal father of the child… unless proved otherwise."[47] The provision triggers the presumption of paternity and catches an *ex*-husband of a surrogate mother, if the child was born during a 300-day time-frame following the divorce. This means that the surrogate's husband is automatically deemed to be the legal father of the surrogate child, as soon as he is entered in the registry, irrespective of his wishes or knowledge of the arrangement.[48]

Such prioritisation of surrogate's consent entangles various parties to the arrangement into a complex situation. First of all, it places the surrogate child into a vulnerable position. If the surrogate died before providing consent and her husband does not wish to provide for the child's upbringing, the child would have to be placed in a state orphanage for adoption. The state does not prescribe any 'priority' route for the genetic parents which means that they would have to 'compete' with other potential adoptive parents, who are not genetically-related to the child. This would leave the intended parents with no rights to be registered as their child's parents and the necessity to overcome various hurdles required by adoption process, such as satisfying the requirement of suitability for adoption.[49] Unlike eligibility for surrogacy, which is based on medical conditions, the couple's financial stability,

[45] 'Voluntary registration' would allow the genetic father to bypass the presumption and be registered as the legal father but may only be done with the (surrogate) mother's consent – art.48 of the Federal Law 143-F3 on the "Acts of Civil Statuses" from 15 Nov 1997.

[46] И. Коголовский и Н. Никиташина, «Применение презумпции отцовства к отношениям суррогатного материнства» (2011) 6 Современное Право 97, 99. I. Kogolovskij i N. Nikitashina, «Primenenie prezumpcii otcovstva k otnoshenijam surrogatnogo materinstva» (2011) 6 *Sovremennoe Pravo* 97, 99. I Kogolovskiy and N Nikitashina, 'The Application of the Presumption of Paternity in Surrogate Motherhood' (2011) 6 *Contemporary Law* 99.

[47] Arts.48(1)-(3) and 52 of the Family Code 1995.

[48] Federal Statute №143 F3 "On the Acts of Civil statuses". Ольга Шелегова, «Особенности правового регулирования отцовства и материнства при применении методов вспомогательных репродуктивных технологий» (2019) *Квалификационная работа* 1, 26. Ol'ga Shelegova, «Osobennosti pravovogo regulirovanija otcovstva i materinstva pri primenenii metodov vspomogatel'nyh reproduktivnyh tehnologij» (2019) *Kvalifikacionnaja rabota* 1, 26. Olga Shelegova, 'The Peculiarities of Regulating the Establishment of Fatherhood and Motherhood by using the Assisted Reproduction Technology' (2019) *Qualification Work* 1, 26.

[49] 'In case of a SM's death' (11 Apr 2014) at <https://www.probirka.org/forum/viewtopic.php?f=206&t=58250> accessed 22 Feb 2020.

accommodation and character also play a role in eligibility for adoption.[50] If the social worker reaches a conclusion that the intended parents are not suitable, the child would either be placed with another family that is deemed suitable or placed in the orphanage. This is unfair not only to the intended parents but also the child as for the purposes of the procedure they will be treated as strangers, despite having genetic connection. Secondly, it potentially puts the status of the genetic parents in jeopardy, as their opportunity to become the child's *legal* parents would be fully dependent upon the intentions of the surrogate's (ex) husband. This might also prove especially problematic if the latter decides to keep the child and raise him alone. In such a situation, the wishes of the surrogate's husband, as a legal father of the surrogate child, *might be* absolute.[51] At the same time it also jeopardises the (ex) husband who was registered as the legal father on the birth certificate, but does not oppose giving up his parental rights. Each of these scenarios, however, would require the genetic father to rebut the presumption[52] of paternity by proving his genetic relationship with the child before the court.[53] After a child is born,[54] the court does not have powers to either compel or refuse a genetic test but if the genetic father refuses one, the court will draw adverse inferences.[55] DNA test proves the genetic relationship, the genetic father would then be able to apply for a court order so as to be registered as the legal father. It is unclear whether the court would refuse the application if there is no other contender. Alternatively, the surrogate's husband may apply for removal from the birth certificate. This comes in a sharp contrast with the situation where the surrogate was not married, which would allow the genetic father to be registered as the legal father via a court order.[56]

However, in the absence of clear guidelines from the legislator or the courts, it is not clear how much weight would be given to the lack of biological connection between the surrogate's husband and the child. The existent case-law shows consistency within the courts' approaches. For example, in case *№ 2-2141/2019* from Kirov district court the applicant disputed his legal fatherhood of a child born out of the surrogacy arrangement. He was automatically registered as the child's father by virtue of the

[50] Chapter 19 of the Family Code 1995. See also 'How to Adopt a Child – Instruction' at < https://rtiger.com/ru/journal/kak-usynovit-rebenka- instruktsiya-ot-r-tiger/>. Adoption is finalised via a court order – see art. 125 of the Family Code 1995.
[51] To date there are no known instances where a surrogate's husband decided to keep the surrogate child, hence the courts' approach to the situation is unclear.
[52] Диана Кирова и Наталия Аблятипова, «Установление Отцовства На Ребенка, Рожденного По Процедуре Суррогатного Материнства» (2020) 10 *Colloquium-Journal* 9, 9. Diana Kirova i Natalija Abljatipova, «Ustanovlenie Otcovstva Na Rebenka, Rozhdennogo Po Procedure Surrogatnogo Materinstva» (2020) 10 *Colloquium-Journal* 9, 9. Diana Kirova and Nataliya Ablyatipova, 'The Establishment of Paternity for a Child Born through Surrogacy Procedure' (2020) 10 *Colloquium Journal* 9, 9.
[53] Arts.49 and 51(1) of the Family Code 1995.
[54] The court has powers to refuse a DNA test before the child's birth – art. 134(1) of the Civil Procedural Code provides that the disputes as to the child's origins may only be triggered after the child's birth.
[55] Art. 79(3) of the Civil Procedural Code.
[56] Art.49 of the Family Code 1995.

marriage with the surrogate mother. He claimed that the arrangement has been entered unbeknown to him and there is no genetic connection between him and the child. The court accepted the above arguments and agreed that the applicant should be removed from the civil status registry.[57] A completely different outcome, however, has been achieved in case *№ 2- 1827/2019* from Noginsk city court. Similarly to the above, in the instant case having agreed to the surrogacy arrangement the husband of the surrogate disagreed with legal fatherhood of the children. Relying on the absence of genetic connection between himself and the child the applicant argued that he should be excluded from the latter's birth registration. The court, however, refused the application and ruled that the entry should remain on the basis that he provided his consent for surrogacy arrangement. It is clear that despite the apparent similarities between the two cases, for some reason the court decided to attribute some importance to the lack of biological connection between the surrogate's husband and the child *only insofar* the arrangement has been concealed from the former. In the second case, by contrast, the court seems to have erroneously implied the surrogate's husband's consent to the surrogacy arrangement as a consent to become a legal parent. The court seems to base its decision on the assumption that consent to the arrangement also implies accepting the risk that the arrangement might fall through.

The current legal position is also unsatisfactory in regards to inheritance rights. It seems that bespoke legislation specifying inheritance rights of surrogate children born in instances of a surrogate's death would be beneficial. At the moment, the law does not explicitly specify whether the surrogate child should presumably inherit after the legal parents. The area is broadly governed by art. 35 of the Constitution which seeks to guarantee the rights of inheritance.[58] The relevant law, relying on the notion of the child's origin, is set out by para 1 of art. 1142 of the Civil Code which provides that in the absence of a will the children of the testator (including those adopted) born in a marriage or an arrangement equated to a marriage would be deemed the heirs of first order.[59] The inability of the intended parents to establish their legal parenthood means that their genetic child would become one of the first heirs to the surrogate's estate[60] instead of to the one of their own.[61] First of all, such a failure to

[57] Case № 2-2141/2019 of Kirov District Court, the City of Sverdlovsk.
[58] The Constitution of the Russian Federation from 1993.
[59] Art.1142 of the Civil Code. See also С. Панина, «О Наследственных Правах Суррогатных Детей» (2016) *Актуальные Проблемы Современного Российского Законодательства Российской Федерации* 95, 95-99. S. Panina, «O Nasledstvennyh Pravah Surrogatnyh Detej» (2016) *Aktual'nye Problemy Sovremennogo Rossijskogo Zakonodatel'stva Rossijskoj Federacii* 95, 95-99. S Panina, 'On Inheritance Rights of Surrogate Children' (2016) *Actual Problems of Contemporary Legislation of the Russian Federation* 95, 95-99.
[60] By default children born outside of wedlock would inherit after their mother automatically. However, they may only inherit after the father only if paternity is established. This seems to imply that if the surrogate is not married, the child would not be

take into account the circumstances where a surrogate may not be able to provide consent amounts to a violation of the surrogate's and, if she is married, her husband's principle of freedom testamentary disposition as enshrined by para 2 art. 209 of the Civil Code. The principle implies that the testator(s) may voluntarily define the circle of heirs or may also deprive the heirs of the inheritance completely. Therefore, by forcefully introducing the surrogate child into the picture not only does the legislation not pay attention to the absence of the surrogate's or her husband's *consent to include* the child into the list of heirs but also potentially acts *contrary* to her intentions by unconditionally implying that she the child *was intended* to be included as a heir. The inability to exclude the surrogate child from the list of heirs also interferes with inheritance rights of the third parties – that is, the surrogate's own children who would be entitled to inheritance either by being put in the will or operation of law.[62] The surrogate child, however, by becoming 'one of the first in line' would be automatically entitled to an equal share.[63] Whilst this is a risk inherent in the arrangement itself, such an interference with the rights of the surrogate's children is hardly justifiable as the surrogates are not supposed to seek their permission or ask their opinion on the arrangement. Moreover, the surrogacy arrangements are usually entered into for the purposes of improving financial stability for the biological children which does not seem to be achievable if a portion of the estate is allocated to the surrogate child. Pestrikova argued that the situation is especially absurd in the cases of commercial surrogacies: "the surrogate, who entered into a surrogacy agreement in order to be financially remunerated… in reality either deprives or limits the inheritance rights of her own children in favour of a surrogate child, whom she has not initially intended to have any rights to."[64] The bizarre outcomes produced by the broad-brushed generalised legal approach shows the far-fetching effect caused by the undue weight that has been placed on the significance of surrogate's consent.

In order to avoid ambiguity and promote legal certainty, it seems more imperative to amend the Family Code 1995 itself, by inserting a clause which would address the discriminatory approach and provide for the automatic disapplication of the presumption of paternity and maternity in cases of surrogacy. Not only would this relieve the deceased surrogate's husband from responsibilities attached to his status as the legal parent but also allow the genetic mother to establish her maternity rights on the

able to inherit after her surviving partner. At the same time, it also seems that in such a case the child would be able to inherit after the genetic father if his paternity is established by a court order.

[61] Art. 1149 of the Civil Code. In order to safeguard his inheritance rights the child's interests may still be represented by the child protection workers from the local authority until the child reaches the age of adolescence – art. 1165 of the Civil Code.

[62] Chapter 63 of the Civil Code.

[63] Art. 1149 further provides that minors are entitled to the 'compulsory' share irrespective of the will.

[64] Anastasia Pestrikova, 'Inheritance Legal Relations arising in the Use of Surrogate Motherhood' (2007) 10 *The Law of Russia: Experience, Analysis and Practice* 132, 132-133.

basis of genetic connection. Therefore, art. 48 needs to be modified so as to give greater weight to the role of the contract which records the genetic relationship between the genetic mother and father and the child. This will also bound commissioning parents to the agreement so that they would not be able to reject the child. Fedorova agrees that the respective Family Code provision needs to be re-formulated: "[the contract] should be relied upon to prove the genetic connection and allow the genetic mother to apply for parental rights in respect of the child."[65] This approach has already been chosen by the Republic of Belarus. Art. 53 of the Code on Marriage and Family prioritises the genetic parents and automatically deems them to be the legal parents.[66] This helps to avoid the judicial disputes in cases of surrogate's death as the law assumes the status of genetic parents as soon as the surrogacy contract is signed.

The automatic disapplication of the surrogate's parental rights and registration of the intended parents as legal parents would automatically solve the issues related to inheritance. However, some amendments might need to be introduced to Civil Code so as to solidify the position of the surrogate child. One the one hand, there is a need to ensure that the surrogate child does not acquire any inheritance rights that would compromise the rights of the surrogate's own children or other relatives. On the other hand, the legislation also needs to be carefully drafted so as not to violate the surrogate child's constitutionally provided right to inheritance.[67] Therefore, it seems that the default provision of the Civil Code needs to be supplemented by a clause that would explicitly disapply the rule on the heirs of first order in cases of surrogate motherhood.

5.2 Death of a surrogate child

The first month of a child's life has been recognised as 'the most vulnerable period,' crucial for his

[65] Ю. Федорова, И. Гаранина и Ю. Дмитриева, «Проблемы Установления Родительских Прав При Реализации Договора О Суррогатном Материнстве» (2016) *Общество, Государство, Личность: Модернизация Системы Взаимоотношений В Современных Условиях* 333, 336. Ju. Fedorova, I. Garanina i Ju. Dmitrieva, «Problemy Ustanovlenija Roditel'skih Prav Pri Realizacii Dogovora O Surrogatnom Materinstve» (2016) *Obshhestvo, Gosudarstvo, Lichnost': Modernizacija Sistemy Vzaimootnoshenij V Sovremennyh Uslovijah* 333, 336. Y Fedorova, I Garanina and Y Dmitrieva, 'The Problems with Parental Rights in Realisation of a Contract on Surrogate Motherhood' (2016) *XVI All-Russian Scientific Practical Conference Volume II* 333, 336.

[66] Art.53 the Republic of Belarus Code on Marriage and Family. See also Виктория Рамзаева и Артем Микичан, «Проблемы Наследственного Права Эмбрионов» (2014) *Совершенствование Цивилистического Процессуального Законодательства И Законодательства Об Исполнительном Производстве: Теория И Практика* 167, 169. Viktorija Ramzaeva i Artem Mikichan, «Problemy Nasledstvennogo Prava Jembrionov» (2014) *Sovershenstvovanie Civilisticheskogo Processual'nogo Zakonodatel'stva I Zakonodatel'stva Ob Ispolnitel'nom Proizvodstve: Teorija I Praktika* 167, 169. Viktoriya Ramzaeva, Artyom Mikichyan, 'The Inheritance Problems of Embryos' (2014) Perfection of Civilistic and Procedural Legislation: Problems of Theory and Practice 167, 169.

[67] Art.35 of the Constitution. The provision is said to be of 'special' importance as it cannot be amended by an ordinary legislative procedure. Its amendment would equate to the amendment of the Constitution as a whole.

survival.[68] Despite the accomplishments in reducing overall child mortality achieved as part of Millennium Development Goals,[69] four million neonatal deaths are still recorded yearly.[70] A death would be classified as neonatal if it occurred during the first 28 days (or completed days of life) from the child's birth.[71] Undeniably, it is a tragic event with a profound effect on any parent,[72] "disrupt[ing] [the] familial relationship and [leading] to the feeling of shock and helplessness [for the future mothers and fathers]."[73] Neonatal death is traditionally attributable to a variety of factors, such as infectious diseases, respiratory illnesses as well as post-birth traumas.[74] While the beginning of the 20th century has been notorious for relatively high rates of neonatal deaths, a significant progress was made in late 1990s.[75] Neonatal deaths worldwide went down by 37% by 2013[76] and this number is expected to decline even further. The World Atlas reveals that as of 2018 Russia is ranked 50th out of 193 for neonatal deaths,[77] which is said to be relatively low taking into account the density of the country's population. Yet, the numbers remain worryingly high compared to the European countries.[78] In order to address the problem, various healthcare projects seeking to improve neonatal and post-natal care have been implemented.[79] The latest data confirms a positive trend: in 2020 neonatal mortality rate fell by

[68] World Health Organization, 'Neonatal and perinatal mortality: country, regional and global estimates' (World Health Organization 2006). See also Giacomo Guerrera, 'Neonatal and Pediatric healthcare worldwide: A report from UNICEF' (2015) 451 *Clinica Chimica Acta* 4, 5.

[69] Liisa Lehtonen, Ana Gimeno, Anna Parra-Llorca and Máximo Vento, 'Early Neonatal Death: A Challenge Worldwide' (2017) 22 *Seminars in Fetal Science & Neonatal Medicine* 153, 153.

[70] V Flenady, F Boyle, L Koopmans, T Wilson, W Stones and J Cacciatore, 'Meeting the Needs of Parents after a Stillbirth or Neonatal Death' (2014) 121 *An International Journal of Obstetrics Gynaecology* 137, 137.

[71] Neonatal mortality rate (per 1000 live births) WHO: The Global Health Observatory <https://www.who.int/data/gho/indicator-metadata-registry/imr-details/67> accessed 1 Oct 2020. It should be noted that the classification of deaths varies.

[72] Flenady, above (n70) 137.

[73] Ibid.

[74] Екатерина Кваша, «Младенческая смертность в России в XX веке» (2003) 6 Социологические исследования 47, 52. Ekaterina Kvasha, «Mladencheskaja smertnost' v Rossii v XX veke» (2003) 6 *Sociologicheskie issledovanija* 47, 52. Yekaterina Kvasha, 'Neonatal Death in the XX Century' (2003) 6 *Sociological Explorations* 47, 52.

[75] Ibid 47. It is suggested that Russia is still lagging behind the most European countries.

[76] Guerrera, above (n68) 4-8.

[77] The World Atlas at <https://knotema.ru/atlas/topics>. See also А. Баранов, В. Альбицкий и Л. Намазова -Баранова, «Смертность Детского Населения В России: Состояние, Проблемы И Задачи Профилактики» (2020) 19 Вопросы современной педиатрии 96, 97. A. Baranov, V. Al'bickij i L. Namazova -Baranova, «Smertnost' Detskogo Naselenija V Rossii: Sostojanie, Problemy I Zadachi Profilaktiki» (2020) 19 Voprosy sovremennoj pediatrii 96, 97. A Baranov, V Albitskii and L Namazova- Baranova, 'Mortality of Infant Population in Russia: The Current situation, problems and the tasks for prevention' (2020) 19 The Questions of Contemporary Pediatrics 96, 97.

[78] В. Илиади, В. Савельев, Ф. Константинидис, «Анализ Младенческой Смертности В Греции И России За 2015-2017 Годы» (2020) Modern Science 111, 111. V. Iliadi, V. Savel'ev, F. Konstantinidis, «Analiz Mladencheskoj Smertnosti V Grecii I Rossii Za 2015-2017 Gody» (2020) Modern Science 111, 111. V Iliadi, V Saveliev, F Konstantidis, 'The Analysis of Neonatal Deaths in Greece and Russia from 2015-2017' (2020) *Modern Science* 111, 111.

[79] А. Халикова и М Рузаева, « овершенствование основ законодательства об охране здоровья граждан Российской Федерации в вопросах развития медицинской помощи детям и службы родовспоможения: региональный аспект (на примере Оренбургской области)» (2014) 12 Фундаментальные и прикладные исследования: проблемы и результаты 237, 237. A. Halikova i M Ruzaeva, « overshenstvovanie osnov zakonodatel'stva ob ohrane zdorov'ja grazhdan Rossijskoj Federacii v voprosah razvitija medicinskoj pomoshhi detjam i sluzhby rodovspomozhenija: regional'nyj aspekt (na primere Orenburgskoj oblasti)» (2014) 12 Fundamental'nye i prikladnye issledovanija: problemy i rezul'taty 237, 237. A Khalikova and M Ruzaeva, 'Perfecting the Basics of Legislation on Healthcare of the Citizens of the Russian Federation and the

2.2% compared to the year before, making approximately 4.5 deaths per 1000 births.[80] Whilst it is revealed that infant diseases account for the majority of neonatal deaths,[81] the latter may be also attributable to other causes, such as accidental and intentional deaths. Until fairly recently there had been no known cases of neonatal deaths of surrogacy children. Yet, in January 2020 the media reported not one, but two cases in the same day. Both children were born in Saint Petersburg and were supposed to be handed over to their genetic parents from China.[82] The parents, stranded in the homeland because of the closed borders caused by Covid-19 pandemic, were unable to come back for the children after the surrogate mother provided consent for them to be handed over.[83] One of the children was placed into private accommodation organised by the Chinese intermediary agency[84] with the nanny, but soon died of a heart failure.[85] The news quickly made into the national headlines, with increased calls either to ban surrogacy for foreigners' altogether or create a specific legislative provision which would make the parties' rights and liabilities more explicit. This sub-chapter will explain the potential liabilities of the parties in case of accidental as well as intentional neonatal death. It will also argue that the legislative treatment of an intentional killing of a surrogate child is very liberal allowing the surrogate mother to escape liability for murder under certain conditions.

It is clear that the pandemic only exposed the potential problems caused by the legislative patchwork that fails to fully address natural deaths of the children born out of surrogacy arrangement. In fact, these deaths could have been happening more often than the numbers recently reported in the news, leaving numerous parties in an unclear position. Thus, it would be plausible to include a separate clause in the contract that would determine the rights and liabilities of the parties in

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Questions on Development of Medical Care for Children and Services of Natal Care: a Regional Aspect (Orenburg Oblast) (2014) 12 *Fundamental and Applied Explorations: the Problems and Result*s 237, 237.

[80] 'The coefficient of neonatal deaths in Russia from January to March 2020 fell by 2.2%' (11 May 2020) Tass at https://tass.ru/obschestvo/8442899.

[81] А. А. Баранов, Л. С. Намазова-Баранова, В. Ю. Альбицкий, Р. Н. Терлецкая, «Тенденции младенческой и детской смертности в Российской Федерации в 1990-2012 гг.» (2014) *Вестник Российской академии медицинских наук* 31, 31-38. A. A. Baranov, L. S. Namazova-Baranova, V. Ju. Al'bickij, R. N. Terleckaja, «Tendencii mladencheskoj i detskoj smertnosti v Rossijskoj Federacii v 1990-2012 gg» (2014) *Vestnik Rossijskoj akademii medicinskih nauk* 31, 31-38. A A Baranov, L S Namazova-Baranova, V Yu Albitsky, R N Terletskaya, 'Trends of infant and child mortality in the Russian Federation in the period of 1990-2012' (2014) *Herald of the Russian Academy of Science* 31, 31-38.

[82] Mariya Melnikova, 'Surrogate Deaths: Two in One week' (15 Oct 2020) *Spb Dnevnik* at <https://spbdnevnik.ru/news/2020-10-15/surrogatnye-smerti-dvoe-za-nedelyu> accessed 15 Oct 2020.

[83] Yekaterina Yasakova, 'Home not Alone: Why a Surrogate Child died in Gatchina?' (10 Oct 2020) *Izvestiya* at <https://iz.ru/1071658/ekaterina-iasakova/odin-ne-doma-pochemu-v-gatchine-umer-rebenok-ot-surrogatnoi- materi> accessed 10 Oct 2020.

[84] Galina Artemenko and Andrei Okun', 'The Surrogate Children of the Pandemic: Life and Death' (14 Oct 2020) *BezFormata* at <https://sanktpeterburg.bezformata.com/listnews/surrogatnie-deti-pandemii-zhizn/87981109/> accessed 14 Oct 2020.

[85] Vera Chereneva, 'The Reason of Death of a Surrogate Child in Lenoblast' Became Clear' (9 Oct 2020) Rossiyskaya Gazeta at <https://rg.ru/2020/10/09/reg-szfo/stalo-izvestno-otchego-umer-v-lenoblasti-rebenok-ot- surrogatnoj-materi.html> accessed 9 Oct 2020.

the event of a child's natural death. Whilst at first glance amounting to 'imperfect performance' it should also be recognised that in this scenario the death would not be attributable to either the surrogate's own actions her obligations under a contract would be performed. This is partially recognised in Ukraine - art. 906 of the Civil Code of Ukraine which provides that if 'imperfect performance' was not caused by the surrogate's own actions, e.g. her inappropriate lifestyle, the intended parents cannot claim any recovery of the losses. Therefore, the Ukrainian approach indicates that it would be inequitable for the intended parents to be compensated at the expense of the surrogate mother. Whilst this approach is clearly more satisfactory than the current Russian one, it still seems that the law should more explicitly protect the surrogate's mother right to compensation. This may take place via a contractual clause reflecting the fact that if the surrogate carried the child full term and gave birth to him, she should be entitled to full remuneration even the child died either during labour or shortly after. Iskhanov and Sviridonova compare surrogacy to an arrangement for the provision of services.[86] They argue that the intended parents, albeit being in a very unfortunate position, should appreciate that whilst all effort is made to successfully perform the duty, there is still a risk that the desired result would not be achieved. They claim that due to the very nature of surrogacy, the intended parents cannot be unconditionally guaranteed that the arrangement will end successfully with 100% certainty. Therefore, by entering into arrangement, they voluntarily accept the risk that the child may not survive labour or other unforeseen circumstances that might cause death post-labour. If the risk materialises, this means that the intended parents would not be able to receive the 'subject' to the contract (the child). The precise compensation would be dependent on the terms of the contract itself. For example, in recognition of the surrogate's diligent fulfilment of the obligations (carrying full term and delivering successfully) some contracts would stipulate that the surrogate should be paid the remuneration in full. Others could mirror the principle of restitution[87] which would require the parties to be restored in their original position.[88] This would require the intended parents to compensate the surrogate only for the expenditure directly linked to pregnancy up to the point where the successful performance under a contract is no longer possible,[89] e.g. if the child died during labour these would be the costs of medical checks, food and/ or transport. However, even if the contract does not

[86] Р. Исханов и Т. Свиридонова, «Некоторые гражданско-правовые аспекты ответственности сторон в сфере применения вспомогательных репродуктивных технологий» (2008) 4 *Юридическая наука и правоохранительная практика* 56, 56. R. Ishanov i T. Sviridonova, «Nekotorye grazhdansko-pravovye aspekty otvetstvennosti storon v sfere primenenija vspomogatel'nyh reproduktivnyh tehnologij» (2008) 4 *Juridicheskaja nauka i pravoohranitel'naja praktika* 56, 56. R Iskhanov and T Sviridonova, 'Some civil Aspects of Parties' Liabilities in the Sphere of Application of Assisted Reproduction Technologies' (2008) 4 *Legal Science and the Practice of Legal Protection* 56, 56.

[87] The authors' implicit comparison with restitution is somewhat problematic here – art. 167 of the Civil Code refers to restitution as a consequence of an 'invalid agreement.' It is hard to argue that a surrogacy agreement is an invalid one from the beginning or that death would render it invalid.

[88] R Iskhanov and T Sviridonova (n86) 56.

[89] Ibid.

specify the surrogate's entitlement,[90] it would be unfair to leave her with no compensation whatsoever, especially if she observed the requirements.

The cases of accidental child deaths are less straightforward. Surrogacy arrangements, as well as traditional pregnancies almost always involve third-party interventions, either by private or public hospitals, especially if a pregnancy and birth have been complicated. Post-birth child care sometimes requires almost instant decision-making by the nurses, clinical physicians and in some cases genetic parents.[91] In such instances, there is always scope for human error or a tragedy due to the pure lack of medical attention or negligence. Some circumstances might go beyond an honest mistake on behalf of a practitioner, with a child being intentionally killed. Whilst it may be true that the errors are something to learn from and push the medical advancements to evolve,[92] the grim reality should not be ignored. The cases of *de facto* medical negligence in Russian hospitals are reported frequently,[93] with the numbers of claims consistently increasing since 1990s.[94] Yet, in 2017-2018 less than 10 legal claims brought against doctors on grounds of medical negligence during or post-labour were successful,[95] and, for those who were, no details of legal proceedings were disclosed. Thus, in 2017 an on-call doctor could not make a decision on an urgent C-section thereby leading to the child's death. Same year another obstetrician was sentenced for the failure to resuscitate the newborn.[96] In both instances the medical professionals were found to be in breach of their professional duties of care, yet still falling short of medical negligence.

If the death was caused by a third-party intervention, this would disturb the contractual nature of the arrangement as no contract would exist between the doctor, the intended parents and a surrogate. Yet, despite the apparent frequency of the instances of medical negligence, there is also no separate provision covering medical negligence in Russian legislation. Medical negligence is covered by a broad-brushed art. 293 of the Criminal Code "On negligence." This provision defines negligence as

[90] It is highly unlikely that the contract would not stipulate the surrogate's entitlement in such circumstances.
[91] Karen Kavanaugh, Teresa Savage, Sarah Kilpatrick, Rob Kimura and Patricia Heshberger, 'Life Support Decisions for Extremely Premature Infants: Report of a Pilot Study' (2005) 20 *Journal of Pediatric Nursing* 347, 347.
[92] 'The Mistakes and Responsibilities of Medical Workers for Professional Violations in Contemporary Conditions' in Evgeni Barinov, Pavel Romodanovskii, Natalia Mikheeva, Elena Cherkalina, A Tatarintsev (eds) *Medical Law: Legal Literacy of a Doctor, a Textbook for Higher Education Institutions* 8.
[93] E.g. 'A mistake costing life' (8 Aug 2018) Life at <https://life.ru/p/1141671> accessed 14 Jan 2021. The dates of publication show that medical negligence cases are reported at least once every two-three days.
[94] Barinov and others above (n92) 4.
[95] Above n93.
accessed 5 Oct 2020. In reality, these numbers are very deflated and medical errors/ negligence occurs much more often, yet this is difficult to prove the subject of fault.
[96] Ibid.

"non-performance or performance of the duties not up to the required standard by a qualified person due to the unethical practice or careless attitude towards his duty leading to a large- scale financial damage of more than 1,500,000 roubles.[97] The punishment increases if [the above] caused grievous bodily harm to or death" to a surrogate child.[98] Part 2 further provides that "in cases of infliction of grievous bodily harm or death the doctor would be punished by a community service of up to five years with a disqualification from obtaining certain positions or practicing for up to three years; or imprisonment for up to five years with disqualification from obtaining certain positions or practicing for up to three years."[99] The onus of proof would be on the prosecution to prove that the surrogate child died as a result of the medical staff's negligence. The limitation period for a claim in negligence is three years.[100] In practice the procedure could be even more complicated than prescribed by the patchy legislation. First of all, it is not clear who has standing to bring a case against the hospital in case of death of a surrogate child. In the absence of clear guidelines, this seems to be determined by the child's registration. If a child died shortly after the surrogate provided consent for the intended parents to be registered as the child's parents, the process seems to be exactly the same as for the parents who had a child via a traditional pregnancy. They would be able to bring a claim against the negligent doctor by firstly formally complaining to the Chief Medical Officer of the hospital.[101] If the liability cannot be determined at this stage, the intended parents may further complain to the court by providing proof that the death of the child was caused by negligence of the particular medical personnel. The matter is more complicated if the child has died prior to the transfer of legal parenthood to the intended parents, then the surrogate mother would be deemed to be the legal mother thereby having the standing to sue.

The Criminal Code provides for a broad spectrum of criminal actions that could be applicable to death of a surrogate child at the hospital, depending on the actions taken by the doctors. The most seemingly straightforward one seems to be murder under art. 105, committed by a medical professional.[102] Art. 105 applies in cases of "murder of a juvenile in a vulnerable position." Para 2(v) states that "the murder of a juvenile, being, knowingly for a perpetrator, in a vulnerable position…" should be "punishable by imprisonment from eight to twenty years… or life imprisonment." Although

[97] Approximately £15,000.
[98] Article 293 of the Criminal Code.
[99] Part 2 art. 293 of the Criminal Code from 13.07.2015 N 265-FL.
[100] Art.293 above (n98).
[101] There is no prescribed process of formal complaint for medical negligence, however, the practitioners seem to be unanimous that the starting point would be to complain to the Chief Medical Officer of the hospital where the death occurred. See e.g. 'How to prove medical negligence?' (17 Jun 2018) at <https://pravo.team/uk-i- koap/prevyshenie-polnomochij/vrachebnay-halatnost.html >. Also Maksim Ivanov, 'Where and How to Complain about a Doctor?' Pravoved at https://pravoved.ru/journal/kak-i-kuda-mozhno-pozhalovatsya-na- vracha/.
[102] Discussed below.

these occurrences are hard to imagine nowadays, some state that there are still hospitals which not also 'give life but also take it.'[103] Thus, in 2018 a case of a doctor from Kaliningrad came into spotlight. The lead doctor was accused of ordering the colleague from the ICU department to inject a lethal dose of a drug to a prematurely born child. In attempts to keep the perinatal centre's statistics 'clean' she concealed the intentional killing by reporting it as intrauterine death.[104] Initially, the prosecution successfully contended that the death has been pre-planned by the doctor, driven by ambitions and higher position within the clinic.[105] However, the jury reached a 'not guilty' verdict with the court ruling that there is no evidence suggesting that there was intentional murder rather than the child passed away because of prematurity.[106] If the identity of a doctor whose actions led to the child's death is identifiable, a case may be brought directly against him/ her before the court.[107]

A more complex scenario, however, is when it is not clear whether it was the act of a third party that caused a child's death i.e. where the death could be attributable either to medical negligence or some other factors. If a surrogacy agency has a separate contract with a private perinatal clinic, a clinic may be liable for medical negligence in breach of contract. This may not be the case if the surrogate gives birth in a state hospital, where the cases of medical negligence are more numerous. For example, in 2019 a newborn died of a streptococcus infection, shortly after birth. The bacteria, deadly for neonates, led to meningitis and subsequently, a coma. The devastated parents argued that the death of a child could have been avoided but for negligence of the hospital's staff. The doctors, on the other hand contended that the mother transmitted the bacteria to the child during labour.[108] Another child died from collibacillus, which was transmitted, as medical staff insist, intrauterine. The mother, in turn, claimed that it has been caused by the conditions within the hospital. Another no less complicated matter arises where the death is caused either by acts or omissions of the hospital staff but ultimately happened as a result of what is called 'external factors,' such as lack of resources provided by the government so as to ensure high sanitary standards. For example, in 2017 11 newborns were lost to

[103] Lia Komissarova, 'A Death for the Statistics and Position: the Doctors are accused of Death of a Newborn' 1 Jul 2019) Life at <https://life.ru/p/1226268> accessed 2 Oct 2020.
[104]Ibid.
[105] The Lead doctor has already been prosecuted before under art. 286(3)(c): "overstepping professional duties."
[106] This is clearly inconsistent with the provisions of the Order of the Ministry of Health № 409n from the 1 June 2010 which provides for specific requirements for doctors while assisting neonates. Alsou Menibayeva, 'Why the Kaliningrad case of Doctors-Murderers ended with a Not Guilty Verdict' (11 Dec 2020) News.ru at <https://news.ru/investigations/pochemu-kaliningradskoe-delo-akusherov-ubijc-zavershilos-opravdaniem/> accessed 11 Dec 2020.
[107] There is no clear legal procedure for this which makes the process complicated.
[108] Elizaveta Koroleva, 'Put on a Conveyor Belt: How Newborns Suffer from Doctors' Errors' (8 Aug 2019) Gazeta.ru at <https://www.gazeta.ru/social/2019/08/07/12562945.shtml> accessed 5 Oct 2020.

sepsis caused by unacceptable standards of care in the hospital.[109] Rusty pipes, cracks in tiles and walls did not allow the cleaners to sanitise the premises thereby making it a fertile ground for infection. The conditions in the surgery as well as the perinatal rooms also violated the prescribed norms. In such a case, despite the recurring tragedies, it would be hard to blame the doctors alone. As the hospital admitted, they receive no financial assistance from the state whatsoever which means that higher sanitary standards cannot be practically maintained.

The main issue, however, is who would be entitled to bring a claim against the hospital or a medical professional: whether this should be the genetic parents or a surrogate mother. Art. 140 of the Criminal Procedure Rules[110] provides that logging a crime incident report is one of the ways for a criminal investigation to be instigated. The Investigation Committee[111] will examine all available evidence and, if appropriate, will transfer the case to the court. Art. 5 clarifies that in cases of death of the patient, other parties may apply for a criminal investigation, such as 'connected persons… apart from close relatives, connected by a long-term close relationship';[112] close relatives: a spouse, parents, children, adoptive parents, adoptive children, blood brothers and sisters, grandfather, grandmother and grandchildren;[113] and the state prosecutor supporting the accusation on behalf of the state.[114] The clarifying provision narrows down the number of parties that can apply for the investigation to close relatives or the state. As the law has not envisaged surrogacy when it was drafted, it is not clear whether the intended parents would be eligible to apply. The provision does not specify whether parenthood would be defined by law or genetics in the present instance. Therefore, if the child died before the transfer of parenthood from the surrogate to the intended parents it may well be the case that they would not fall within the scope of 'parents' for the purposes of this article. Yet, in these circumstances the surrogate mother might get implicated as she would be seen as the child's mother, unless she provided her consent to surrender the child to the intended parents. Similarly, if she did provide her consent but the child died before the parents' legal parenthood was recorded, it the surrogate mother would still have standing. In case of death of both the surrogate and the child, the state would have to interfere and apply for investigation. If, however, the child died after legal parenthood has been transferred to the intended parents, the position in terms of standing would be unambiguous. The

[109] Anna Kozkina, 'We died of sepsis: How the Mothers of Newborns Seek for Punishment of the Hospital Staff' (27 Jul 2017) Mediazona at <https://zona.media/article/2017/07/27/newborn> accessed 2 Oct 2020.
[110] From 29 May 2002 N 58-FL and from 05 Jun 2007 N 87-FL.
[111] The state body that investigates the crimes and refers the cases to the court if appropriate. See 'The Investigative Committee of the Russian Federation' <https://sledcom.ru/> accessed 5 Oct 2020.
[112] Article 5 para 3 of the Criminal Procedure Rules.
[113] Ibid article 5 para 4.
[114] Ibid article 5 para 5 of the Criminal Procedure Rules.

intended parents would clearly fall within the respective Criminal Procedure Rules provision allowing them to log an investigation. This puts the parties in a complicated position and the eligibility of the applicant would depend on when *exactly* the application is made.

A further administrative quagmire may transpire during post-death registration. In traditional births, the situation appears to be straightforward: if the child died within a week after labour, the parents would be automatically issued both the birth and death certificate. If the child died during labour, however, the birth certificates are not issued at all. Instead, the hospital would provide a 'medical record card' of the death of a child,[115] usually accompanied by the forensic evidence report. These, however, are provided upon the 'request by one of the *parents.*'[116] In traditional births the document will be requested by the *genetic* parents, who will also be the *legal* parents of the deceased child. It is not clear, however, who may be entitled to request either the medical record card or the certificate in cases of surrogacy. At first glance, it seems that similarly to traditional birth, in cases of surrogacy, it would be the mother who would be entitled to request the death certificate on the basis of parturition. Similarly to the situation discussed above the eligibility would depend on whether the surrogate has relinquished the child at the time of the child's death.

However, it would be wrong to assume that neonatal deaths may only be caused by diseases or lack of medical care. Sometimes children become victims of those who gave birth to them, with their own mothers committing infanticide. Infanticide, defined as "the act of deliberately causing the death of a very young child (under 1 year old),"[117] was labelled as a 'privilege crime'[118] for its component elements[119] and fairly lenient punishment. Having become widespread in the 19th century[120] it still

[115] Art. 20 of the Federal Statute № 143-FL "On the Acts of Civil Statuses" from 15 Nov 1997. The plethora of literature, however, suggests that not all hospitals follow the precise guidelines.
[116] In terms of personal details the medical record would only record the name and surname of a child, date of birth, date and time of death as well as the place of death. An example may be seen at 'Help me Bury a Child' at <https://pomoshdengami.ru/help/pomogite-pohoronit-rebenka> accessed 5 Oct 2020.
[117] 'Infanticide' the definition from Humanium at <https://www.humanium.org/en/infanticide/> accessed 9 Oct 2020. The case raises the issue of fairness in criminal justice system, which is beyond the scope of the thesis.
[118] Г. Батыршина, «Проблемы Распознанвания Суррогатной Матери как Субъекта Убийства Суррогатного Ребенка» (2008) 9 Аллея Науки 2, 2. G. Batyrshina, «Problemy Raspoznanvanija Surrogatnoj Materi kak Sub"ekta Ubijstva Surrogatnogo Rebenka» (2008) 9 *Alleja Nauki* 2, 2. G Batrshina, 'The Problem of Recognition of a Surrogate Mother as a Subject in Murder of a Surrogate Child' (2018) 9 Alley of Science 2, 2.
[119] Placing undue emphasis on the psychological state of the mother which deems it 'less dangerous' for the society. See Владислав Витер, Алексей Вавилов, Карина Бабушкина и Светлана Хасанванова, Судебно-медицинская экспертиза зародышей и новорожденных (Ижевск 2016) 5. Vladislav Viter, Aleksej Vavilov, Karina Babushkina i Svetlana Hasanvanova, Sudebno-medicinskaja jekspertiza zarodyshej i novorozhdennyh (Izhevsk 2016) 5. Vladislav Viter, Aleksei Vavilov, Karina Babushkina and Svetlana Khasanyanova, *Forensic Expertise of Corps of Foetuses and Newborns*, (Izhevsk 2016) 5.
[120] Michelle Oberman, 'Mothers Who Kill: Coming to Terms with Modern American Infanticide' (1996) 34 *American Criminal Law Review* 1, 1-110.

continues to be concerning worldwide.[121] As Porter and Gavin observed, in some countries the rate may go as high as 7 deaths per 100,000 not including the cases that go undetected.[122] While some women have full awareness of their actions[123] others murder their own children due to postpartum depression or acute psychotic filicide, lacking any specific motive.[124] Unfortunately, neonatal infanticide has always been a part of Russian history.[125] Infanticide remains fairly common nowadays: the news on mothers murdering their newborn children tend to appear almost every week.[126] Thus, the Investigation Committee claims that infanticide has become by 50% more common compared to some four years ago,[127] making it the most common crime committed by women.[128] The data provided by the Russian Head Centre of Information and Analytics (the Ministry of Internal Affairs) indicates a fluctuating yet consistent rate of infant murders: around 200 newborns are killed yearly.[129]

Similarly to a *traditional* pregnancy, the surrogate pregnancy might also have an adverse and unpredictable psychological effect on the mother. 'Maternal blues', 'postpartum psychosis' as well as depressions are said to happen quite often, accompanied with some frightening thoughts of suicide or hurting the newborn.[130] Despite the steps taken by the clinics as well as the intended parents to create comfortable conditions for the surrogate,[131] it is suggested that this may not always alleviate the above

[121] Alexandra Bacewicz and Susan Hatters Friedman, 'Infanticide and the Law' in Todd K Shackelford (ed) The SAGE Handbook of Domestic Violence (SAGE Publishing 2021) 413.
[122] Theresa Porter and Helen Gavin, 'Infanticide and neonaticide: a review of 40 years of research literature on incidence and causes' (2010) 11 *Trauma Violence Abuse* 99, 99-110.
[123] E Kurguzkina, 'The Reasons for Infanticide' in А. Долгова, (ред.) Криминальная ситуация на рубеже веков в России (Крим. Асс. 1999) 43. A. Dolgova, (red.) Kriminal'naja situacija na rubezhe vekov v Rossii (Krim. Ass. 1999) 43A Dolgova (ed.) Criminal Situation in Russia on the Borders of Centuries' (Crim Assoc 1999) 43.
[124] Friedman and Resnick in Shackelford above (n121) 415.
[125] See generally М Гернет, Детоубийство (тип. имп. Моск. ун-та 1911). *M Gernet, Detoubijstvo* (tip. imp. Mosk. un-ta 1911). M Gernet 'Infanticide' (Tip. Of Moscow University1911).
[126] Владимир Безгин, «Детоубийство и Криминальные Аборты в России: Прошлое и Ответственность» (2013) 4 Правовые Исследования 196, 196. Vladimir Bezgin, «Detoubijstvo i Kriminal'nye Aborty v Rossii: Proshloe i Otvetstvennost'» (2013) 4 *Pravovye Issledovanija* 196, 196. Vladimir Bezgin, 'Infanticide and Criminal Abortions in rural Russia: the past and responsibility' (2013) 4 Legal Explorations 196, 196.
[127] 'The Number of Infanticides rose by 50% compared to Four Years ago (19 Dec 2019) Ria Novosti at <https://ria.ru/20191219/1562606583.html> accessed 1 Jan 2020.
[128] A Diveeva in Виктория Кириленко и Екатерина Хомутова, «Отграничение Убийства Матерью Новорожденного Ребенка (Ст. 106 Ук Рф) От Смежных Составов Преступлений» (2020) Молодежь И Xxi Век – 2020 53, 53. Viktorija Kirilenko i Ekaterina Homutova, «Otgranichenie Ubijstva Mater'ju Novorozhdennogo Rebenka (St. 106 Uk Rf) Ot Smezhnyh Sostavov Prestuplenij» (2020) Molodezh' I Xxi Vek – 2020 53, 53. Viktoriya Kirilenko and Ekaterina Khomutova, 'The Limitation of Murder of a Newborn by a Mother (art.106 of the Criminal Code of the RF) from related crimes' (2020) *Youth and XX Century* 53, 53.
[129] The data is correct as of 2019. The data is available at the Russian Head Centre of Information and Analytics (the Ministry of Internal Affairs) https://xn--b1aew.xn--p1ai/mvd/structure1/Centri/Glavnij_informacionno_analiticheskij_cen. .
[130] Joyce Hopkins, Marsha Marcus, and Susan B. Campbell, 'Postpartum Depression: A Critical Review' (1984) 95 *Psychological Bulletin* 498, 501.
[131] Е. Вакалюк, «Субъкт Преступления в статье 106 Уголовного Кодекса Российской Федерации» (2012) *Вестник Челябинского государственного Универстита* 64, 64. E. Vakaljuk, «Sub"kt Prestuplenija v stat'e 106 Ugolovnogo Kodeksa Rossijskoj Federacii» (2012) *Vestnik Cheljabinskogo gosudarstvennogo Universtita* 64, 64. Vakaliuk, 'A Subject

symptoms. On the contrary, it is claimed that these feelings may become even more exacerbated, especially for those surrogates who realise that their moral obligation is to relinquish the child.[132] Nevertheless, the law has failed to carve out a specific provision that would clearly state the liability of a surrogate committing infanticide. So far, neonatal infanticide is generally covered by chapter 16 of the Criminal Code of the Russian Federation. The chapter broadly addresses the 'crimes against a person.'[133] It can be questioned, however, whether art. 105 could be more relevant here. As detailed above, the provision applies to a crime committed towards a juvenile in a vulnerable position.

Indeed, at first glance, the most relevant provision appears to be art. 106 of the Code. It provides that 'a murder of a newborn child by his *mother* during or immediately after the birth is equated to a murder in a psychologically traumatising situation or in a condition of a psychological disorder not excluding mental capacity punishable from two to four years in prison or community service up to five years or imprisonment for the same duration.'[134] The provision applies to a competent woman above the age of 16, who performed an act or omission of any kind that led to a death of a newborn. By virtue of art. 53 of the Federal Statute "On the Basics of Protection of the Citizens of the Russian Federation" art. 106 also applies to 'infanticide *during* labour.' The article defines birth as a "moment of separation of the newborn from the mother's body during the process of labour."[135] The main area of focus of the legislation, however, is that the birth must be live at the time of infanticide is committed. Part 3 of the Supplement to the Order № 1 of the Ministry of Health and Social Development of the Russian Federation defines live birth as "the moment of separation of the newborn from the mother's body by means of labour at 22 weeks with the [newborn's] weight being more than 500 grams... If the newborn's weight is unknown at the time of the birth, the height… above 25 cm with other signs of life, such as breath, heartbeat, umbilical cord pulse..."[136]

While the wording of the provision seems to be straightforward, it cannot be satisfactorily applied to a scenario where the act of infanticide has been committed by a surrogate mother. The first problem lies within the terminology, more specifically, the legal treatment of the term 'mother.' As there is no statutory definition of the concept of a 'mother' provided in the Criminal Code, the academic

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of a Crime provided for in art.106 of the Criminal Code of the Russian Federation (2012) 1 *The Messenger of Chelyabinsk State University* 64, 64.

[132] Vasanti Jadva, Clare Murray, Emma Lycett, Fiona MacCallum and Susan Golombok, 'Surrogacy: the experiences of surrogate mothers' (2003) 18 Human Reproduction 2196, 2196.

[133] The Criminal Code of the Russian Federation from 1996 № 63 F3.

[134] Art.16 of the Criminal Code.

[135] The Federal Statute №323-FL from 21 Nov 2011.

[136] The Supplement to the Order № 1 of the Ministry of Health and Social Development of the Russian Federation from 27 Dec 2011 № 1687n.

body seems to agree that in order to fall within art. 106 it should mean *de facto and de jure* mother cumulatively.[137] Although the term 'legal mother' appears to be self-explanatory, there is no unanimity as to what a 'factual mother' would mean. Thus, art. 106 seems to be easily applied in cases where a mother has carried a child in a traditional pregnancy,[138] as the woman carrying the genes and the one who gave birth would be the same person. This raises the question as to the legal provision that should be applicable to infanticide conducted by the surrogate mother. In cases of surrogacy the law differentiates between the gestational (and therefore, the legal) mother – the one that carried the child (i.e. the surrogate) and the genetic one – who provided her eggs for conception.[139] This makes the application of art. 106 somewhat problematic. If it is accepted that the notion of 'mother' is based only on the physiological aspect, that is, gestation and carrying the pregnancy, then a surrogate would be deemed to be the mother for the purposes of art. 106 irrespective of the ways the child was conceived. It can be argued, however, that mere physiology would not be enough for a woman to be defined as a factual mother.[140] The advocates of this view insist that only a woman that conceived naturally would fall within the concept of a mother.[141]

However, none of the above propositions can convincingly explain the assignment of legal motherhood to the surrogate mother. By placing *too much* emphasis on physiological connection the propositions overlook the multi-dimensional nature of motherhood. Whilst the importance of procreation may not be denied, motherhood also heavily focuses on the fulfilment of parental 'duty to safeguard and promote the [child's] welfare'.[142] Thus, Barton and Douglas offer a more nuanced test for legal parentage based on 'the [increased] extent to which legal recognition is given to a person's intention or desire to be regarded as a parent, and to fulfil the functions of a parent'.[143] Eekelaar suggests that such a duty includes a duty to promote human flourishing applicable to anyone within society as it is universal and exists *independently* of any social structure. The subject of the precise

[137] See e.g. Л. Мурзина, «Квалификация Убийства Новорожденного Совершенного его Матерью» (2012) 28 Известия Белинского МПГУ 134, 134. L. Murzina, «Kvalifikacija Ubijstva Novorozhdennogo Sovershennogo ego Mater'ju» (2012) 28 Izvestija Belinskogo MPGU 134, 134. L Murzina, 'The Qualification of a Murder of a Newborn committed by his Mother' (2012) 28 *Izvestiya Belinskiy MPGU* 134, 134.

[138] E.g. Case № 1-129/2017 (2017). There are no known instances of infanticide committed by a surrogate as of 2020

[139] As written above, the law draws a distinction between traditional and gestational surrogacies. Traditional surrogacy is illegal by virtue of art. 55(10) of the Federal Statute №323-FL.

[140] Т. Горина, «Проблемы Квалификации Убийства Суррогатной Матерью» (2019) 35, *Аллея Науки – Научный Журнал* 2, 2. T. Gorina, «Problemy Kvalifikacii Ubijstva Surrogatnoj Mater'ju» (2019) 35, *Alleja Nauki – Nauchnyj Zhurnal* 2, 2. T Gorina, 'The Problems of Qualification of a Murder by the Surrogate Mother of Newborn' (2019) 35 *Alley of Science Journal* 2.

[141] Ibid.

[142] Chris Barton and Gillian Douglas, *Law and Parenthood* (Butterworths 1995) 28. The authors, however, refer to parenthood in general.

[143] Barton and Douglas ibid 51. They considered the Human Fertilisation and Embryology Act 1990.

allocation of this duty, however, is decided by society itself. The fixation of the duty is determined by those who *assume* the role of fulfilling the duty.[144] Some suggest that this rationale reduces the role of a surrogate to nothing more than an 'incubator.' She is seen merely as a voiceless gestational carrier, a host for the surrogate child.[145] However, this does not mean that the surrogate does not perform any 'motherly' functions. She still carries and gives birth to the child and has to undergo rigorous medical checks. She is as susceptible to physical risks and psychological trauma as the mother, who conceived in the traditional way. Yet, the surrogate's *duty* to the child she carries is limited.[146] She is bound by a contractual duty to comply with the prescribed medical recommendations so as to ensure that the child is in good health and to carry pregnancy to the full term. She does not owe a duty to care for him, to ensure his future flourishing or welfare as neither has she *assumed* nor *intended* to assume this duty in a first place. Brilliantova agreed that art. 106 cannot be applied in the instant scenario - while the surrogate may be deemed to be the *de jure* mother, she cannot satisfy the social criteria for a *de facto* (in other words, future) 'mother.'[147] Therefore, in order to qualify for art. 106 the surrogate must have carried the child for 'herself' with the intention to keep him.[148] From this perspective, the surrogate is seen merely as the gestational carrier. She only carries the child, without *any intention* to fulfil the motherly role after she gives birth. Her status of 'mother' is assigned by law, rather than the role she will be playing in the child's life. She lacks the genetic link with the child she carries, neither does she intend to become a part of the surrogate child's life. Her involvement in the latter ends straightaway after birth unless some form of a contact is agreed upon by both parties.[149] Conversely, this duty was assumed by the genetic mother. Her *expression of the intention* to play the key role in the child's upbringing was also recorded in the contract. Therefore, the legislation should relieve the surrogate from the status of legal mother.

The application of art. 106 to a case of infanticide committed by a surrogate mother is also problematic from the administrative perspective as the legislator has not included the situations of surrogacy thereby leading to ambiguity. A woman acquires the status of a legal mother only *after* her

[144] John Eekelaar, 'Are Parents Morally Obliged to Care for their Children?' (1991) 11 *Oxford Journal for Legal Studies* 340, 341.
[145] Herbert T Krimmel, 'The Case against Surrogate Parenting' (1983) 13 *The Hastings Center Report* 35, 35.
[146] Some parallels may be made with the role of the sperm donor who has no duty to contribute to the child's upbringing. See also Barton and Douglas above (n143) 28.
[147] А. Бриллиантова (ред.) Комментарий к Уголовному Кодексу Российской Федерации (Проспект 2010) 309-310. A. Brilliantova (red.) *Kommentarij k Ugolovnomu Kodeksu Rossijskoj Federacii* (Prospekt 2010) 309-310. A Brilliantova (ed.) A Commentary to the Criminal Code of the Russian Federation (Prospekt 2010) 309-310.
[148] Gorina above (n140) 2-3.
[149] There are no known instances either in Russian media or case-law where a surrogate mother expressed a wish to keep contact with the child.

details are entered on a birth certificate.[150] Until then, therefore, she would be stranded in legal limbo, only to be seen as 'a woman who gave birth.' This is not a legal status, but a mere acknowledgment of the fact that the child was born to a certain individual. Therefore, infanticide committed by a surrogate during or after birth but *prior* to the birth registration would be deemed to be committed by the 'postpartum woman,'[151] rather than the legal mother as legal motherhood would not be acquired yet. In this scenario the surrogate's actions cannot fall within the scope of art. 106 as she would not satisfy the administrative requirement for legal motherhood. Thus, it would appear more logical for infanticide to be covered by art. 105 of the Criminal Code. This provision does not specify the subject of a crime and therefore does not require infanticide to be committed by a *mother* specifically. In the eyes of this provision the surrogate would be as a stranger to the child. The generalised nature of this provision could also catch the situation when the surrogate kills the child *after* providing consent for his relinquishment but before the child is handed over to the genetic parents. Once the surrogate provides consent for the genetic mother to be registered as the legal mother, infanticide would be deemed to be committed by a 'stranger.' Similarly to the above, this would potentially call for art. 105 application. Yet, the situation would be different if the surrogate committed infanticide after *refusing* to provide consent for the registration of the intended parents thereby being registered on the birth certificate herself. By law, as soon as the surrogate is registered on the birth certificate, she becomes the legal mother. Therefore, the relevant applicable provision would be art. 106.

The second issue is rooted in the actual differentiation between the levels of responsibility provided by arts. 105 and 106 respectively. The breach of the respective provisions has different consequences. The punishment envisaged under art. 106 is imprisonment from two months to five years, compared to the one provided under art. 105 which is from six to fifteen years. While the *method* of punishment is seemingly identical, the difference in the maximum penalty is around ten years and the difference between the minimum one is even bigger – about thirty-six times.[152] Thus, if the surrogate killed the child she carried, would most certainly fall within the scope of the former provision. This means that her punishment would be less severe compared to if an identical crime was committed by anyone else, including the genetic mother. Moreover, in certain circumstances, a surrogate might be able to avoid liability altogether: part 1 of art. 15 of the Criminal Code classifies infanticide as misdemeanour.[153] If

[150] Art 48 of the Family Code.
[151] There is no equivalent in English. The 'woman in labour,' 'postpartum woman' or 'woman who just gave birth' have the same meaning.
[152] Sergei Protsenko, 'Protection of Newborn's Life in Russian Criminal Law' (1 Jun 2016) Zakon.ru at <https://zakon.ru/blog/2016/6/1/ohrana_zhizni_novorozhdennogo_rebenka_v_rossijskom_ugolovnom_zakonodatelstve> accessed 3 Oct 2020.
[153] Art. 15 of the Criminal Code.

the surrogate notifies the police of a crime she has committed or in any way confesses of that crime she might be relieved of the liability, especially if she is a first time offender.[154] The data indicates that the latter outcome is most likely: in the Far East Federal district,[155] for example, more than a half of those committing infanticide were given a probation period, with only 46% receiving the punishment from two to three years.[156] While it is hard to imagine a situation where a surrogate would want to intentionally kill the child she is supposed to hand over, the situations where she might do so simply because of the fairly lenient punishment cannot be ruled out completely. This violates the Federal Statute "On the Basic Guarantees of the Rights of the Child" which provide that a child has rights and freedoms from the very moment of birth as well as the right to life as provided by art.20(1) of the Russian Constitution.

It is clear that the current approach is unsatisfactory, prompting more questions than providing clarification on the legal position of the surrogate who committed infanticide. The first problem lies within the application of art. 106 to such instances in general. Despite the generally clear wording of the provision, with precision outlining 'a mother' as a subject of the crime, it does not provide the definition of 'mother' for these purposes. The case-law, actively trying to fill the gaps, only seems to suggest that in order to fall within art. 106 a woman must be seen as a mother in both: fact and law. This is hardly workable in cases of surrogacy. While a surrogate does perform certain maternal functions, such as undergoing a pregnancy and giving birth, the factual role she will play in the child's life afterwards would be beyond minimal. Secondly, even if it is accepted that the surrogate's functions are significant so as to deem her the mother in fact, the requirement of legal motherhood is no less easy to satisfy. It seems that in some cases the surrogate's acquisition of legal motherhood will be barred by the administrative procedure requiring the woman to be registered on the certificate in order to become the legal mother. Therefore, it seems that the most probable scenario for art. 106 to be applicable is if the surrogate *refuses* to provide consent for the intended parents to be registered on the birth certificate and commits infanticide after the acquisition of the status of the legal mother. Art. 105, however, proves no less problematic. Similarly to art. 106, at first glance it appears that para 2(v) is quite well-drafted. Its subject is fairly broad in its scope, making it more likely for the surrogate mother to be caught by it. Yet it also suffers from some gaps and lack of detail. Although all minors would be deemed

[154] Part 1 art. 75 of the Criminal Code.
[155] Easternmost part of Asia, with Vladivostok being the administrative centre.
[156] И. Кабанова, *Детоубийство: криминологический анализ. Акутальные Проблемы Теории и Практики* (Хабаровск 2007) 135. I. Kabanova, *Detoubijstvo: kriminologicheskij analiz. Akutal'nye Problemy Teorii i Praktik*i (Habarovsk 2007) 135. I Kabanova, Infanticide: a Criminological Analysis. Actual Problems of Theory and Practice in Combatting Crime in Asian and Pacific Region (Khabarovsk 2007) 135.

'vulnerable,' it is not clear whether the newborn may fall within the definition of a 'juvenile.' The law also does not clarify whether only the acts (e.g. a surrogate suffocating the child) would fall within the scope of art. 105 or it would apply to omissions (e.g. not feeding him thereby resulting in death) as well.

Based on the above, there is a need to dedicate a separate provision in the Criminal Code to infanticide committed by a surrogate mother. Vakaliuk argues that art. 106 should remain as the applicable provision. However, it needs to be re-formulated so as to avoid the problematic definition of a 'mother.' Thus, she suggests the word 'mother' to be replaced by a 'woman.' The amended provision in art. 106 therefore, would read: "the killing of a child by *a woman* who gave birth to him during or immediately after labour… during the conditions of psychologically detrimental situation…"[157] The amendment also needs to be more act-specific: therefore a surrogate's position would be better described as "woman at labour" or "postpartum woman."[158]

5.3 Involuntary loss of pregnancy

Surrogate motherhood has been widely practiced in Russia for more than twenty years[159] and has been praised for its relatively high success in birth rates. The data suggests that almost half of the IVF procedures result in a successful pregnancy with around 77% of pregnancies leading to live births.[160] Compared to the IVF procedure which is a little less complex,[161] surrogacy is the result of a highly complicated and scrupulous staged process which a surrogate mother has to undergo while preparing her body for the future pregnancy – from hormonal stimulation prior to the implantation to the special treatment during the pregnancy.[162] The clinics seek to ensure that the surrogate is provided with the conditions most favourable for the growth of embryos.[163] In order to minimise the risks of an embryo

[157] E. Vakaliuk (n131) 64-65.
[158] Translation my own. These terms literally mean a "birthing woman". See А. Красиков, *Правовая Защита Человеческих Свобод в Уголовном Праве* (Саратов 1996) 46. A. Krasikov, *Pravovaja Zashhita Chelovecheskih Svobod v Ugolovnom Prave (*Saratov 1996) 46Krasikov, *Legal Protection of Human Freedoms in Criminal Law* (Saratov 1996) 46.
[159] 'The Experience of Realisation of Surrogate Motherhood Programme' (2001) *The Journal 'The Problems of Reproduction'* Issue 3 at <http://www.rusmedserv.com/problreprod/2001g/3/article_878.html> accessed 27 Nov 2020
[160] Vladislav Korsak, 'The President of the Association of Human Reproduction: the Chances of Pregnancy significantly decline after 35' (18 May 2019) Interfax at <https://www.interfax.ru/russia/661068> accessed 1 Dec 2020.
[161] See generally 'The Risks of surrogate Motherhood' *Genesis* at < https://mcgenesis.ru/zdorovie-i-lechenie/riski-surrogatnogo-materinstva >. IVF is also one of the stages of surrogacy.
[162] Indeed, IVF is one of the stages of surrogacy. Surrogacy, however, is more complex as it requires both the intended mother's and surrogate's cycles to be synchronised. '10 Assumptions on Surrogate Motherhood: the Truths and the Myths' (16 Jun 2017) at <https://medaboutme.ru/articles/10_ubezhdeniy_o_surrogatnom_materinstve_pravda_i_mify/> accessed 1 Dec 2020.
[163] 'The Procedure of Surrogate Motherhood' at <https://mama-i-ya.ru/proczess-surrogatnogo-materinstvaf.html> accessed 3 Dec 2020.

rejection the future surrogate mothers receive progesterone and human chorionic gonadotropin[164] and remain under the surveillance of medical professionals and agency coordinators for the duration of the programme. This altogether seeks to "establish the foetus as the main character in the reproductive story."[165] Nevertheless, the careful observance of the prescribed rules does not always prevent 'unforeseeable' termination of pregnancies[166] from occurring. Some claim that these may be provoked by the lack of genetic link between the surrogate mother and the child as well as the medical technology failures.[167] Pregnancy loss is the most common complication[168] and may happen at early as well as later stages of an initially successful embryo implantation, following something that is referred to as 'natural correction.'[169] This is defined by the 'biological selection' whereby the surrogate's body simply rejects the embryo for no apparent reason.[170]

Involuntary pregnancy loss may be distinguished between a miscarriage, stillbirth and abortion.[171] While all of them result in the death of the embryo or a foetus, the terms differ in terms of 'intentionality… attributes of the pregnancy…'[172] as well as the 'gestational age of a foetus.'[173] Thus, miscarriage is defined as "the loss of a pregnancy during the first 23 weeks."[174] The death of a foetus after the 24-week period, by contrast is referred to as 'stillbirth.'[175] Pregnancy loss inevitably leads to the inability of the surrogate mother to fulfil her contractual obligations that is, to deliver the baby. The unpredictable nature of the terminated pregnancy raises the question whether it would fall within the scope of 'force-majeure', the circumstances that are "beyond the control of the parties."[176] If the force-majeure clause is triggered, it would relieve the party from the penalty payment imposed for non-fulfilment of contractual obligation. This means that the surrogate mother would not be obligated to

[164] 'Surrogate Motherhood – How is this carried out?' at <https://homeurist.com/semya/materinstvo/surrogatnoe-materinstvo-kak-eto-proisxodit.html>.
[165] Zsuzsa Berend, 'Surrogate Losses: Understandings of Pregnancies and Assisted Reproduction among Surrogate Mothers' (2010) 24 *Medical Anthropology Quarterly* 240, 249.
[166] The terms 'termination of pregnancy' and 'miscarriage' will be used interchangeably.
[167] Susie Kilshaw and Katie Borg (eds.) Navigating Miscarriage: Social, Medical and Conceptual Perspectives (Bergahn Books 2020) 37.
[168] Sayani Mitra, 'Miscarriage and its Resulting Losses during Commercial Surrogacy in India' in Kilshaw and Borg ibid 185
[169] Olga Yakovleva, 'Miscarriage: The Reasons of Involuntary Termination of Pregnancy' (19 Oct 2019) at <https://unclinic.ru/vykidysh-prichiny-samoproizvolnogo-preryvanija-beremennosti/> accessed 1 Dec 2020.
[170] Ibid.
[171] Abortion is mainly associated with the intentional termination of pregnancy and is considered below. 'Spontaneous abortions' however, are used interchangeably with the term 'miscarriage' – see Kilshaw (n167) 11.
[172] Susie Kilshaw, 'Introduction: Ambiguities and Navigation' in Susie Kilshaw and Katie Borg (n167) 10.
[173] Ibid.
[174] Miscarriage: Overview' (1 Jun 2018) at <https://www.nhs.uk/conditions/miscarriage/>. See also *R v HS and Dhinghra* (1991) CC Birmingham.
[175] 'Stillbirth: Overview' (8 Feb 2018) at https://www.nhs.uk/conditions/stillbirth/.
[176] 'Force majeure' Glossary, Practical Law UK at https://uk.practicallaw.thomsonreuters.com/3-107-5776?transitionType=Default&contextData=(sc.Default)&firstPage=true .

refund the intended parents for failure to deliver the baby. The unique nature of surrogacy arrangement, however, implies that the contractual obligation can be fulfilled but to some extent – pregnancy carried out up to a certain term before its loss happened. Involuntary termination raises the question what compensation, if at all, the surrogate mother would be entitled to in case of a miscarriage that has not been prompted by her own actions. If she is, the next question would be whether the amount of compensation should increase in accordance with the gestational age of the foetus.

The Russian legislation remains somewhat ambiguous as to the legal positions of the parties to surrogacy arrangement when the latter can no longer be fulfilled due to *unforeseen* circumstances. The inability to perform due to unforeseen circumstances is generally governed by civil law. The Civil Code outlines for the conditions for 'circumstances of unavoidable force' and its consequences. Article 401 provides for "the bases for the violation of responsibility" by defining 'force majeure' as a 'compelling force, extraordinary, unforeseeable and/ or unavoidable circumstances.'[177] The judicially-created test for 'unavoidable circumstances' is the objective one –first of all, one has to look at whether another party would have failed in fulfilment of their obligations in similar circumstances. Secondly, whether the circumstances leading to the failure are 'absolute' – that is, that by no means the circumstantial 'barriers' can be overcome.[178] The test appears to be fairly strict: the party would also bear the burden of proving the existence and the precise duration of the exceptional force; the causal link between the exceptional force and inability to perform under a contract; the absence of their own implication into the 'creation' of exceptional force; and reasonable steps taken to prevent the circumstances of exceptional force.[179] The Order of the Plenum of the Supreme Court further clarified the requirements: exceptional circumstances mean that "the occurrence is not "usual" and is "unavoidable."[180] Lastly, the party is also required to 'take all appropriate steps' to fulfil their obligations.[181]

It is questionable whether the involuntary termination of pregnancy could satisfy the strict requirements of the 'circumstances of unavoidable force' under art. 401, taking into account the unclear scope of their application. The circumstances are broadly defined as being brought about by the

[177] Article 401(3) the Civil Code. The term force-majeure is seen as an 'anglicanism' and is mainly referred to in business sphere.
[178] E.g. The Ruling №A32-556/2018 of the Arbitrazh Court, North-Caucasian District; see also Vasiliy Yarovenko, 'Exceptional Force (force majeure): Actual Questions, Judicial Practice and the Selection of the Contractual Clauses' (27 Jul 2020) at <https://zakon.ru/blog/2020/07/27/nepreodolimaya_sila_fors-mazhor_aktualnye_voprosy_sudebnaya_praktika_podborka_primernyh_uslovij_dogo> accessed 5 Dec 2020.
[179] The Supreme Court ruling on the Issue of the Spread of Coronavirus (Covid-19) Disease № 1 from 21 Apr 2020. See also Yarovenko (above n178).
[180] The Order of the Plenum of the Supreme Court, para 6 from 24 Mar 2016 N 7 (ed. from 07.02.2017).
[181] Article 401(1) para 2 the Civil Code.

external force and are unforeseen.[182] Judicial guidelines only exist in the area of commercial law and even those are inconsistent[183] making the conditions hard to apply in the context of surrogacy. For example, it is confirmed that 'natural disasters, war actions and certain major protests' fall within the scope of the provision as these are unavoidable and unforeseen.[184] The applicant(s) must have no control of the circumstances so as to take any preventative measures. On the one hand, it might be argued that pregnancy loss is also an *unforeseen* event. Whilst there could be certain biological predispositions, such as certain viruses or genetic problems, these cannot be always predicted especially if the surrogate has never had a miscarriage before.[185] Indeed, when implanted with an embryo, she expects and intends that the arrangement will end as planned. The possibility of pregnancy loss is emotionally hard to accept; women may experience a wide range of emotions, such as numbness, emptiness, shock[186] and denial.[187] One of the surrogate mothers admitted that even while already experiencing the miscarriage symptoms, she was still "confident that everything is OK."[188] However, *rejecting the idea* that miscarriage might happen does not necessarily imply the *non-foreseeability* of such event. First of all, the surrogacy clinics explain the risk factors, including unsuccessful implantation, early embryo rejection and miscarriage before the arrangement is entered into. They seek to clarify that despite the necessary precautions that the surrogate mothers take, miscarriages still frequently occur. Thus, it is estimated that generally 20% of all pregnancies result in miscarriages.[189] Although there is no conclusive data as to miscarriages or stillbirths in surrogacy arrangements, it is claimed that these are more frequent, almost three times above the rate in traditional pregnancies.[190] Some miscarriages occur following an illness developed over time and while being

[182] Olga Lapaeva, 'Force Majeure' in Theory and Practice' (17 Apr 2007) at <https://www.klerk.ru/law/articles/73595/ > accessed 17 Jan 2020.
[183] Some suggest that the provision is only workable in failed commercial arrangements e.g. bankruptcy. Lapaeva, above. See the Order from 23 Oct 2001 № КГ-А41/5895-01. The vagueness of the conditions was challenged in the Explanation of the Supreme Court of the Russian Federation from 19 Feb 2003 № 79-О. The applicant claimed that it violated the Constitution.
[184] Lapaeva, above (n182). See the Order from 23 Oct 2001 № КГ-А41/5895-01. The vagueness of the conditions was challenged in the Explanation of the Supreme Court of the Russian Federation from 19 Feb 2003 № 79-О. The applicant claimed that it violated the Constitution.
[185] There is a correlation between primary miscarriage and inability to carry a child full-term. See 'Miscarriage and Surrogacy: What you need to know' (9 Jul 2019) at <https://madeintheusasurrogacy.com/miscarriage-and- surrogacy/> accessed 7 Dec 2020.
[186] David M Haas and Patrick S Ramsey, 'Progestogen for Preventing Miscarriage' (2013) *Cochrane Database of Systematic Review* 1, 5.
[187] Chunxiang Qin, Wei-Ti Chen, Yunlong Deng, Yao Li, Chunmei Mi, Linli Sun, Siyuan Tang, 'Cognition, Emotion, and Behaviour in Women undergoing Pregnancy Termination for Foetal Anomaly: A Grounded Theory Analysis' (2019) 68 Midwifery 84, 87. The study explored the sudden termination of pregnancies due to foetal abnormalities and was not involving surrogacy arrangements.
[188] Lucy Clark, 'After three recurrent miscarriages, I was allowed to see a specialist consultant' (June 2016) at https://www.tommys.org/baby-loss-support/stories/miscarriage/after-three-recurrent-miscarriages-i-was-allowed-see-specialist-consultant.
[189] 'The Symptoms of a Miscarriage at an Early Stage and What to do after' (Oct 2018) at <http://zdravotvet.ru/simptomy-i-prichiny-vykidysha-na-rannem-sroke-chto-delat-posle/ > accessed 7 Dec 2020
[190] The higher rate may be attributable to multiple pregnancies – see Berend above (n165) at 258.

involuntary, by no means they are *spontaneous* or *unforeseen* at the time the contract is concluded.[191] Although healthcare professionals suggest that foetal abnormalities caused by a malfunctioning immune system may be just some of the factors,[192] it is not always possible to pinpoint the exact reason for the pregnancy loss. Secondly, the ultrasound tests performed during the routine check-ups, are capable of predicting miscarriages to a certain extent.[193] The ultrasound usually reveals some of the biological changes prompted by a potential miscarriage, such as internal muscle contractions.[194] Therefore, it appears that the commercial test might be met - miscarriage is not an unpredictable occurrence. It is definitely an unwanted outcome, but not completely unforeseeable.

The vague wording of art. 401 as well as the natural complexity of surrogacy arrangements makes it fairly difficult to satisfy the elements of the objective test. The difficulty becomes apparent with the application of the first limb looking at the potential outcome had another surrogate been in the same position. While it is argued elsewhere that miscarriages are fairly common in general, this does not necessarily mean that another surrogate mother would have also lost the pregnancy. Miscarriages may be attributed to various factors, including a biological incompatibility between the surrogate and the foetus,[195] sometimes completely unapparent even after medical checks. Although there are no known instances of the same surrogate mother frequently miscarrying, the clinics claim that spontaneous embryo rejections do, at times, occur. For example, in 2012 Olesia Kalashnikova had a miscarriage which the doctors concluded not to be her fault. The intended parents, however, decided that they would not need a prematurely born baby, who would most likely have health issues in the future.[196] Thus, after three miscarriages a surrogate mother is usually replaced with another candidate. Despite the lack of definitive data on whether the change would definitely lead to a successful pregnancy, the clinics suggest that this usually helps. Nevertheless, it is hard to make a definitive conclusion as to whether this element of the test would be satisfied.

The second limb is no less complex: it looks at whether the circumstances could have been avoided. When miscarriage has been prompted by the surrogate mother intentionally, it is fairly clear

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[191] E Isakova, 'Paramedical Aspects of Surrogate Motherhood' (2001) Russian Medical Server at <http://www.rusmedserv.com/problreprod/2001g/5/article_908.html > accessed 22 Dec 2020.
[192] Above (n189).
[193] S Choong, L Rombauts, A Ugoni and S Meagher, 'Ultrasound prediction of risk of spontaneous miscarriage in live embryos from assisted conceptions' (2003) 22 Ultrasound in Obstetrics and Gynaecology 571, 571-577.
[194] 'Ultrasound during the Pregnancy' at <https://www.avaclinic.ru/blog/uzi-pri-beremennosti/> accessed 19 Jan 2020.
[195] Viktoriya Gnipova, 'When can you get pregnant after a miscarriage and how to save it?' (10 Jun 2020) AltraVita at https://altravita-ivf.ru/stati/beremennost-posle-vyikidyisha.html.
[196] 'The parents rejected a prematurely born baby' (7 Nov 2012) *NTV* at <https://www.ntv.ru/novosti/364060/> accessed 9 Nov 2012.

that *but for* her actions it could have been avoided. Sometimes, however, miscarriage can also be prompted by the specific actions but unintentionally. Despite the conflicting medical evidence,[197] the studies suggest that certain activities such as weight lifting (e.g. lifting shopping bags), infectious diseases[198] or even standing may cause a miscarriage.[199] While there is no specifically prescribed guideline as what activities would render a miscarriage to be a surrogate's fault, the *Korikova* case, discussed in greater detail below, seems to suggest that weight lifting, getting a flu or even an accident fall would deem the pregnancy to be terminated at surrogate's fault.[200] Whilst there seem to be no exact guidelines as to how a surrogate's negligence would be proved, it is most likely that the commissioning parents would need to obtain medical evidence that would specify the most probable cause of the pregnancy loss.

Article 401(3) of the Civil Code is said to be of 'permissive' nature. This means that the parties are allowed to include certain conditions that would be deemed as 'force majeure' despite not satisfying the Code's strict requirements.[201] They may redefine the scope of liability in accordance with their preferences as long as the conditions included are not illegal. Thus, the 'force majeure' liability in a surrogacy arrangement is generally prescribed by the contract itself. It either provides for involuntary miscarriage as a part of the force-majeure or contains a standalone clause outlining the liability for the 'death of an embryo: lack of surrogate's fault.' It also specifies the compensation rate in accordance with the relevant time-frame during which the miscarriage has occurred.[202] The precise sum payable is agreed by the parties but it would be proportionately reduced depending on the gestational age of the foetus.[203] Fortunately, the instances where one could see the operation of such a clause in practice have

[197] Jens Peter E Bonde, Kristian Tore Jørgensen, Matteo Bonzini and Keith T Palmer, 'Risk of miscarriage and occupational activity: a systematic review and meta-analysis regarding shift work, working hours, lifting, standing and physical workload' (2013) 39 *Scandinavian Journal of Work and Environmental Health* 2, 2.

[198] Л. Виговская, А. Шуляев и И. Закиров, «Медико-статистический Анализ Влияние Негативных Факторов Пренатального периода на преждевременное рождение» (2011) 9 Фундаментальные Изучения 223, 223. L. Vigovskaja, A. Shuljaev i I. Zakirov, «Mediko-statisticheskij Analiz Vlijanie Negativnyh Faktorov Prenatal'nogo perioda na prezhdevremennoe rozhdenie» (2011) 9 Fundamental'nye Izuchenija 223, 223. L Vigovskaia, A Shulaev, I Zakirov, 'Medico-Statistical Analysis of The Impact Of Adverse Factors Of the Perinatal Period on the Birth of Premature Infants' (2011) 9 Fundamental Studies 223, 223.

[199] Bonde, Jorgensen and others (n197) 2.

[200] Анна Пурге, « Правовые последствия несоблюдения условий договора суррогатного материнства в Российской Федерации и странах СНГ» (2017) Национальная правовая система Республики Таджикистан и стран СНГ: анализ тенденций и перспектива развития. V Международная научно-практическая конференция 269, 272. Anna Purge, « Pravovye posledstvija nesobljudenija uslovij dogovora surrogatnogo materinstva v Rossijskoj Federacii i stranah SNG» (2017) Nacional'naja pravovaja sistema Respubliki Tadzhikistan i stran SNG: analiz tendencij i perspektiva razvitija. V Mezhdunarodnaja nauchno-prakticheskaja konferencija 269, 272. Anna Purge, 'Legal Consequences of Non-Compliance With The Terms Of The Contract Of Surrogate Motherhood in Russia and CIS Countries' (2017) V *International Scientific-Practical Conference 269, 272.*

[201] Yarovenko, above (n178).

[202] Case No. 2-5282/2014 M-5250/2014 (2014).

[203] Anna Purge, above (n200) 271-272.

been fairly rare with only one receiving publicity in academic literature.[204] In case *No. 2-5282/2014 M-5250/2014 (2014)* O. Korikova, the surrogate mother, claimed remuneration and compensation for moral distress as provided by the surrogacy contract. She argued that she has had a miscarriage on the 16th week leading to the natural termination of pregnancy. Clause 3.10 of the contract provided that in case of termination of pregnancy not being the surrogate's fault beyond week 14 the relevant payable sum would be 100,000 RUR (approximately £1000). The intended parents, however, paid only half of the sum – 50,000 RUR (approximately £500). The surrogate's request to pay the other half was refused. The Kirov district of Omsk City court ruled against the surrogate mother. The medical expertise concluded that miscarriage happened on the 13,5 week which was reduced the entitlement of the surrogate to 50,000 RUR. The court noted that the period starts running from the actual embryo implantation, not from the date when the contract has been signed. Thus, the conditions were observed by the intended parents. While this case mainly considers the precision with which the courts interpret the provision on the time-frame, at the same time it also provides a rough indication of the approach taken towards the allocation of liability in cases of involuntary termination.

Although the surrogacy contract seems to be governed by the freedom to contract, there are certain issues which remain obscure. First of all, the extent of the court's jurisdiction is not entirely clear – for example, so far there has been no clarity as to the court's powers to alter the terms of a contract if there is unfairness to the surrogate. Thus, the question is whether an agency or the commissioning parents would be able to leave the surrogate with no compensation in cases where she suffered a miscarriage. It is also not clear whether the court has powers to strike out a term of an agreement by deeming it unreasonable. Arts. 166(1) and 168(1) of the Civil Code make challenging an agreement almost impossible – not only must the claimant prove that the terms of the agreement are unreasonable but also that they violate the defendant's rights and lead to consequential loss. In commercial cases, claims based on unreasonableness of a term very rarely succeed.[205] Secondly, it is not entirely clear who bears the burden of proving a surrogate's negligence although it may be presumed that it would be the intended parents - it would be the commissioning parents that would need to prove her negligence by requesting medical evidence from the hospital that would conclude on the probability of a miscarriage being a surrogate's fault.

[204] Елизавета Прокофьева и Наталия Везус, «Правовые Проблемы в Контракте Суррогатного Материнства» (2018) Всероссийская Научная Конференция «Дни Науки» 127, 127-132. Elizaveta Prokof'eva i Natalija Vezus, «Pravovye Problemy v Kontrakte Surrogatnogo Materinstva» (2018*) Vserossijskaja Nauchnaja Konferencija «Dni Nauki»* 127, 127-132. Elizaveta Prokofyeva and Nataliya Bezus, 'The Legal Issues of Surrogacy Contract' (2018) All-Russian Scientific Conference "Days of Science" 127, 127-132.

[205] See e.g. Case № A40-55541/2013 (2014). See also 'Is it Easy to Challenge an Agreement?' at < https://www.law.ru/article/21039-qqe-16-m9-26-09-2016-legko-li-osporit-dogovor >.

5.4 Posthumous reproduction: death of the intended parents before the transfer of parenthood and issues related to inheritance

Parental death may be attributable to a variety of circumstances: from the long-term illnesses to natural causes leading to a sudden death and leaving the offspring parentless. In Russia social and natural cataclysms are said to be contributing factors to child orphanage.[206] Some claim that locality may play a role[207] as well as the nature of the parents' job. Although the rates in orphaned children are said to have decreased in the past decade,[208] it is the biological orphanage that remains a serious concern for the state.[209] The death of parents is generally seen as a 'profound crisis' depriving the children of future emotional stability[210] and disrupting 'biological regulatory system.'[211] A loss of a parent is the most significant one in life of a child[212] as it irreversibly severs his bond with the parents who were supposed to create the comfortable familial microclimate for him.[213] This is especially true for very young orphaned children as they are often "forced to live in a survival mode."[214] In cases of surrogacy, however, parental death may have less emotional impact on a newborn child as he would not have had an opportunity to create such a bond with them and consequently grief. Nevertheless, it might give rise to profound social and legal issues, such as the reduction in or potential lack of legal protection for the

[206] N Samarina, 'Orphanage as a Social Problem' (no year) 3173 at <http://elib.osu.ru/bitstream/123456789/2091/1/3171-3177.pdf> accessed 2 Mar 2020.

[207] Jackie Ellis, Chris Dowrick and Mari Lloyd-Williams, 'The Long-Term Impact of Early Parental Death: Lessons from a Narrative Study' (2013) 106 Journal of the Royal Society of Medicine 57, 58.

[208]The Number of Orphans Has Reached a Record Low Level' (5 Sep 2018) Izevstiya at <https://iz.ru/785391/2018-09-05/kolichestvo-sirot-v-rossii-snizilos-do-rekordno-nizkogo-urovnia> accessed 3 Mar 2020.

[209] Biological orphanage implies the loss of both parents by virtue of their death before the age of 18. Social orphanage, by contrast, involves children left without parental support or whose parents cannot be located. The latter is beyond the scope of the thesis. Никита Искрин, «Социальное сиротство в России: актуальность комплексного подхода к проблеме» (2014) Интернет Журнал: Науковедение 1, 3. Nikita Iskrin, «Social'noe sirotstvo v Rossii: aktual'nost' kompleksnogo podhoda k probleme» (2014) Internet Zhurnal: Naukovedenie 1, 3. Nikita Iskrin, 'Social Orphanage in Russia: the Relevance of Holistic Approach to the Problem' (2014) *4 Internet Journal: Naukovedenie* 1, 3.

[210] George C Temblay and Allen C Israel, 'Children's Adjustment to Parental Death' (1998) 5 *Clinical Psychology Science and Practice* 424, 424.

[211] Linda J. Luecken and Danielle C. Roubinov, 'Pathways to Lifespan Health Following Childhood Parental Death' (2012) 6 Social and Personality Psychology Compass 243, 243.

[212] А. Ларин и И. Коноплева, «Соверемнные Проблемы Детей-Сирот» (2015) 4 Современная зарубежная психология 5, 5. A. Larin i I. Konopleva, «Soveremnnye Problemy Detej-Sirot» (2015) 4 Sovremennaja zarubezhnaja psihologija 5, 5. A Larin and I Konopleva, 'The Contemporary Problems of Orphaned Children' (2015) 4 *Journal of Modern Foreign Psychology* 5, 5.

[213] Дильфуза Рахманова, «Роль Родителей В Семье Привоспитании Ребенка» (2019) Архив научных исследований 1, 2. Dil'fuza Rahmanova, «Rol' Roditelej V Sem'e Privospitanii Rebenka» (2019) Arhiv nauchnyh issledovanijDilfuza Rakhmanova, 'The Role of Parents in the Family in the Child's Upbringing' (2019) Arhiv nauchnyh issledovanij 1, 2. Dilfuza Rakhmanova, 'The Role of Parents in the Family in the Child's Upbringing' (2019) *The Archive of Scientific Explorations* 1, 2.

[214] Boris Gidnis, 'Post-Orphanage Behavior In Internationally Adopted Children' (2012) Center for Cognitive-Developmental Assessment and Remediation at <http://www.bgcenter.com/BGPublications/OrphanageBehavior.htm> accessed 5 Mar 2020.

child.[215] As Purvis observes, sometimes even the welfare considerations do not save the children from exclusion from legal and social protection that is usually provided to children born out of traditional pregnancies.[216] Thus, even the most straightforward surrogacy arrangement becomes complicated if the intended parents die unexpectedly.[217] This raises the questions of the child's upbringing, his inheritance status as well as the issue of payment to the surrogate mother, especially if she agreed to a lump payment transfer upon birth.

The existing Russian legislation does not regulate the consequences of parental death occurring before the transfer of legal parenthood. It is understood that the issue is covered by the default rules on parenthood deeming the biological parents as being strangers to the child before their registration. Thus, in theory, if one biological parent dies the child shall still be handed over to the second parent in accordance with the contract and the parent will be entered on the birth certificate.[218] So far, there is no judicial decision in Russian case-law that would clarify the parties' positions. However, the recent UK case of *Re X*[219] might shed some light onto the judicial stance taken in other states. The case arose in the situation that was supposed to be an unproblematic surrogacy arrangement. The facts, albeit being tragic, are relatively straightforward. The intended parents entered into a surrogacy arrangement with a family friend and a baby girl was conceived. However, halfway through the surrogate's pregnancy the baby's father, whose genetic material was used, unexpectedly died from a heart problem leaving the question of the child's paternity open. The complications arose from the UK's legal treatment of surrogacy. Similarly to Russia, the UK places emphasis on the presumption of maternity whereby the woman that gave birth would be deemed to be the legal mother. The intended parents, in turn, would have to apply for a parental order so as to be entered onto the birth certificate. Because of the father's death, however, the intended mother became ineligible for a joint application. As she is not the child's biological mother, she also could not apply on her own. The only remaining option for the mother was to apply for adoption. The court was faced with the question whether it would be possible

[215] The state does have the legal framework for the protection of orphans as provided by art. 1 of the Federal Law №159 FL from 21 Nov 1996 (ed. 17 Feb 2021) on "Additional Guarantees of Social Support of Orphaned Children and Children Left without Parental Support." In practice, the state's support is hard to obtain and leaves the majority of children in deplorable conditions.
[216] Dara E. Purvis, 'Intended Parents and the Problem of Perspective' (2012) 24 *The Yale Journal of Law and Feminism* 211, 211.
[217] NGA Law at <https://www.ngalaw.co.uk/blog/2020/06/05/what-happens-when-a-parent-dies-mid-surrogacy- journey> accessed 5 Mar 2020.
[218] See e.g. Анастасия Бутовец, « Проблемы Наследственной Правоспособности Ребёнка» (2020) *Актуальные Проблемы Гражданского И Предпринимательского Права: История И Современность* 43, 46. Anastasija Butovec, « Problemy Nasledstvennoj Pravosposobnosti Rebjonka» (2020*) Aktual'nye Problemy Grazhdanskogo I Predprinimatel'skogo Prava: Istorija I Sovremennost'* 43, 46. Anastasiia Butovec, 'Problems with Hereditary Legal Capacity of a Child' (2020) *Actual Problems of Civil and Business Law: History and Contemporary Time* 43, 46.
[219] [2020] EWFC 39.

to read s.54 of the Human Fertilisation and Embryology Act 2008 so as to imply that the application was being made on behalf of a deceased person. At paras 96-99 Theis J ruled that both the intended mother and deceased biological father should be recorded on the child's birth certificate. She referred to the Human Rights Act 1998 which requires the law to be interpreted compatibly with the rights provided for by the European Convention on Human Rights. The court observed that this outcome was needed to reach a morally just result and although such situation was not originally envisaged by Parliament it did not go against its intentions. The decision was welcomed as a progressive way to ensure that the welfare of the child is secured. It was also confirmed that the present approach to surrogacy is outdated and focuses too much on the precise timing of determination of legal parenthood: "while legal parenthood is determined at conception for all other children born through assisted reproduction (including egg and sperm donation), in surrogacy cases parenthood has to be reassigned after the child is born."[220]

Therefore, if both parents die before the surrogate mother provided consent for them to be registered as the legal parents, the latter might be registered as the only parent of the child unless she is married. In the latter case, her husband will be registered as the legal father of the child. This follows the general position on legal parenthood as provided by the Family Code.[221] The surrogate mother would be allowed to introduce the child into her family and provide for his upbringing. It is possible, however, that the surrogate would not want to keep the child. In this situation, the child will be treated as 'given up for adoption' triggering the general law on provision of state care. Thus, under the Federal Statute № 44 FL "On the State Bank of Details of Children Left without Parental Care" the child will be deemed as "left without parental care" and will be placed on the all-Russia register for those in need of state care.[222] In accordance with the instructional Recommendations "On the Questions of Adoption of those Below the Age of Adolescence" № 55/4016[223] as affirmed by the USSR State Committee on Education and the USSR Healthcare Ministry the child would be registered as an orphan.

The complications created by the death of the intended parents also give rise to the question of the child's status for the purposes of inheritance. The intended parents would not be able to apply for the child registration which means that legally the child would not be deemed to be their successor. Some

[220] NGA Law above (n217).
[221] Arts. 51 paras 1, 4 of the Family Code 1995.
[222] From 16 Apr 2001.
[223] From 31 Jan 1991.

suggest that the child should be registered as the intended parent's child by virtue of a court order.[224] This would require a surrogate mother to surrender her maternity rights and apply for a court order so as to register the child as being the child of the deceased' parents. With the court applications procedures being lengthy and cumbersome, it is highly questionable whether the surrogate would want to make any personal sacrifices in order to re-register the child.[225] Practically, however, it is highly unlikely that the surrogate mother would proceed with an application as it would pose unnecessary complication of going through cumbersome administrative procedures. Hence it seems reasonable to insert a provision into the Civil Code that would allow the child to be registered as the child of the deceased parents as evidenced from the surrogacy contract as opposed to the surrogate's automatic legal motherhood. This would give rise to the child's inheritance rights under art. 1142 and allow the Child Protection Services to represent the child in the disputes related to his inheritance.[226] Thus, the child's inheritance rights would arise by operation of law thereby making him a 'successor of first order.' The child's rights would be protected by art. 1167 of the Civil Code under which the court would alert the Child Protection Services about the child's inheritance.[227]

5.5 The decision of a surrogate mother to keep the child

Historically, Russian legislation on procreation has been following the principles of '*mater semper certa est*' (the mother is always certain) and '*mater est quam gestatio demonstrat*' (the mother is defined by pregnancy).[228] According to the presumption the origins of the child are defined by gestation. This means that the woman who gave birth to the child would therefore be deemed the legal mother. The 20th century Red Revolution while introducing some changes in the general understanding of familial

[224] Анастасия Пестрикова, «Наследственные Права исходящие из использования суррогатного материнства» (2007) 10 *Законы России* 132, 134. Anastasija Pestrikova, «Nasledstvennye Prava ishodjashhie iz ispol'zovanija surrogatnogo materinstva» (2007) 10 Zakony Rossii 132, 134. Anastasia Petrikova, 'Inheritance Legal Rights Occurring from the Use of Surrogate Motherhood' (2007) 10 Laws of Russia 132, 134.

[225] Юлия Лескова, «К Вопросу Об Ориентирах Совершенствования Действующего Законодательства Рф В Сфере Правового Статуса Суррогатных Детей» (2015) Семейное Право И Законодательство: Политические И Социальные Ориентиры Совершенствования 149, 150. Julija Leskova, «K Voprosu Ob Orientirah Sovershenstvovanija Dejstvujushhego Zakonodatel'stva Rf V Sfere Pravovogo Statusa Surrogatnyh Detej» (2015) Semejnoe Pravo I Zakonodatel'stvo: Politicheskie I Social'nye Orientiry Sovershenstvovanija 149, 150. Yulia Leskova, 'On the Question of Improving the Existing Legislation of the Russian Federation covering the Sphere of a Legal Status of Surrogate Children' (2015) *Semeinoe Pravo I Zakonodatel'stvo: Political and Social Contours* 149, 150.

[226] А. Кравчук, «Проблемы Реализации Наследственных Прав Детьми Рожденными Суррогатной Матерью» (2011) Государственное и Муниципальное Управление в XXI веке: Теория, Методология и Практика 1. A. Kravchuk, «Problemy Realizacii Nasledstvennyh Prav Det'mi Rozhdennymi Surrogatnoj Mater'ju» (2011) Gosudarstvennoe i Municipal'noe Upravlenie v XXI veke: Teorija, Metodologija i Praktika 1,. A Kravchiuk, 'The Problems with Realisation of Inheritance Rights of Children born by a Surrogate Mother' (2011) State and Municipal Management in the XXI Century: Theory, Methodology and Practice 1.

[227] A. Pestrikova, "On Inheritance Rights of Surrogate Children" at https://ale-gribov.livejournal.com/23965.html.

[228] К. Кириченко, «Эволюция доктринальных подходов к институту родства в отечественном семейном права» (2007) 3 Вестник НГУ 18, 19. K. Kirichenko, «Jevoljucija doktrinal'nyh podhodov k institutu rodstva v otechestvennom semejnom prava» (2007) 3 *Vestnik NGU* 18, 19. K. Kirichenko, 'The Evolution of Approaches towards the Institute of Relationship in Family Law' (2007) 3 Messenger NGU 18, 19.

relationships,[229] left the position of mothers almost untouched. The relevance of the Roman principle in assisted reproduction might seem to be a logical extension of the traditional legal position on the role of motherhood. In cases involving surrogacy the Family Code 1995 retains the superior status of gestational origin by treating the surrogate mother as a legal mother of the surrogacy-born child despite the lack of the genetic link.[230] Article 51 of the Family Code was 'inspired' by article 14 CAHBI Recommendations in 1989.[231] The principle provides that "the woman who gave birth to the child is considered in law as the mother."[232] While following the recommendation as a default, the Code however, makes an important reservation. It implicitly allows the biological parents to be registered as legal parents but *only if the surrogate mother provides consent*. This qualification is further stated in art.16 of the Federal Statute 143- F3 which provides that "the registration of a child… the spouses that consented to the implantation of an embryo to a woman for a purpose of its gestation… at the time of the provision of the document confirming the birth of the child, a document recording consent of a woman that gave birth to the child that biological parents to be the legal parents must also be provided…" There is no specific timeframe during which the surrogate must consent. Art.16, however, which provides that the birth certificate 'must be issued within a month from birth.' Therefore, it seems to follow that consent should also be given within a month.[233] In essence, this implies that a surrogate has a month to 'decide' whether she wants to keep the child and if so, she has full legal protection.

The conflict between the wishes of the surrogate mother and the intended parents was best illustrated in *Ch.P*.[234] The facts were fairly straightforward: the parties entered into an agreement in 2010. The intended parents agreed that a surrogate mother gestates a child for a couple. Shortly after birth, however, the surrogate applied for herself and her husband, with his consent, to be registered as the legal parents. The intended parents also applied to be registered as legal parents, but their application was denied as the surrogate mother did not consent. The parents were also refused the right to appeal. Subsequently, they applied to the court claiming the violation of multiple constitutional rights, such as equality, motherhood, state protection etc. The court did not find an incompatibility with the Constitution and ruled in favour of the surrogate mother. The decision, however, was not unanimous. One of the dissenting judges criticised the court for rigidly following the Family Code

[229] The VTSYK Decree from Dec 1918 allowed 'couples to apply to be registered as the legal parents' (adopt)
[230] Kirichenko (n228) 24.
[231] Olga Khazova, 'Surrogacy in Russia' in Claire Fenton-Glynn, Jens M Scherpe and Terry Kaan (eds.) *Eastern and Western Perspectives on Surrogacy* (Intersentia 2019) 286.
[232] Report on Human Artificial Procreation, Principles set out in the report of the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences (CAHBI) 1989 at <https://rm.coe.int/09000016803113e4> accessed 6 Sep 2020.
[233] Art16(6) Federal Statute 143-F3.
[234] *Ch.P and Ch.Y* (2012) CC Ruling (15.05.2012) No. 880-O.

thereby failing to consider the feelings of the intended parents. This omission is crucial as it is the latter whose gametes were used. He further observed that "the exclusive prerogative the surrogate has in making a decision on commissioning genetic parents" interfered with the interests not only of the parents, but also of the child born as a result of IVF.[235]

This unsatisfactory position was partially rectified by the 2017 Supreme Court Decree, which declared that while the provisions of the Family Code are still valid law, the surrogate mother's right to the child is no longer 'absolute'. Section 31 of the Decree provides that "the absence of consent does not ultimately imply the refusal of the intended parents to be registered as the legal parents and for the child to be handed over to the intended parents, when an agreement with a surrogate mother has been entered into."[236] The Court will look at all relevant facts of the case, such as the existence of a formal agreement between the parties, the reasons for surrogate mother to withhold consent, the genetic relationship between the intended parents and the child, the latter's best interests as well as the objectives of art.3 of the Convention on the Rights of Child.[237] The Decree has been rationalised on the basis that the reliance on the provisions of the Family Code alone led to a highly detrimental outcome for the intended parents. The ability of the surrogate mother to refuse consent might have acted as a deterrent for them and discourage from choosing surrogacy as a reproductive method. The fact that there are no legal consequences for the surrogate mother if she chooses to refuse consent transformed some arrangement into a blame- game. Anna Zheravina, the director of one of the surrogacy clinics in Moscow, admitted that the law begged for an urgent reform: "I just have to say as it is, no matter how rude this sounds… our legislation in this area is incredibly stupid. The Family Code entitles the surrogate mother to keep the child."[238]

The practitioners welcomed the Decree by agreeing that the legislator should not automatically side with the surrogate mother: "the blind "satisfaction" of the surrogate's interests would lead to the violation of the intended parents' reproductive and other rights…"[239] Technically, by default the surrogate mother is 'allowed' to manipulate with the genetic material of the intended parents and has considerable room for blackmail. The numerous instances where a surrogate refused to provide consent or disappeared with a child until her demand for a higher payment is satisfied are widely highlighted

[235] Sergei Knyazev summarised by Olga Khazova in Claire Fenton-Glynn (n231) 287.
[236] Supreme Court Order from 27.04.2017 at https://ceur.ru/library/articles/sudebnaja_jekspertiza/item311561/.
[237] Section 31.
[238] Anna Zheravina in 'Take One Child for 750' (19 Dec 2016) at <http://stringer- news.com/publication.mhtml?Part=50&PubID=41394> accessed 5th Sep 2020.
[239] Svetlana Burkanova in 'The Questions on Surrogate Motherhood are for the Supreme Court to Decide' (27 Apr 2017) *MariMedia* at <https://www.marimedia.ru/news/russia/item/61295/> accessed 16 Sep 2020.

by the media.[240] The change, by contrast, seems to send a clear message to both parties. It tells the intended parents that their rights can be restored and signals the ill-intentioned surrogate mothers that the legal loopholes are closely monitored for a potential abuse. One of the first instances decided in accordance with the Decree was the infamous *Frolov* and *Suzdalev* litigation.[241] The story, which started in 2015, is a classic example of the surrogate mother refusing to 'hand over' the children after the birth. The Frolovs (the intended parents) and Marina Suzdaleva (the surrogate mother) entered into a surrogacy contract, according to the terms of which she would be remunerated 750,000 RUR for twin pregnancy plus additional 150,000 RUR compensation for pregnancy-related expenses.[242] Having accepted the terms and signed the contract Suzdaleva changed her mind shortly prior to birth. She claimed further 750,000 RUR for the second child in breach of the initial agreement. The intended parents insisted on observing the terms of the contract. In response, Suzdaleva quit the surrogacy programme and decided to 'raise the children as her own.'[243] Initially it was assumed that the surrogate was merely suffering from birth-related traumas or developed maternal instinct, it later transpired that she abused her dominant position in order to blackmail the intended parents for higher remuneration. After the latter's refusal to increase the payment, she decided to keep the twins, thereby becoming eligible for state benefits. Suzdaleva swiftly divorced her husband and registered herself as a single mother, which entitled her to a council flat and additional child support.[244] Having considered all circumstances of the case, St. Petersburg District Court concluded that the surrogate's actions amounted to nothing less than blackmail. The court implemented the Decree and ruled in favour of the intended parents. The decision was subsequently affirmed by the Court of Appeal. Igor Abalov, Suzdaleva's lawyer, argued that the precedent has 'dangerously surpassed the Russian [codified] law" and the application to the European Court of Human Rights will be required.

Although the decision was celebrated as a first step in the right direction, unfortunately it is only a 'half-measure' that might not offer an adequate protection to the intended parents. The establishment of a clear precedent does not necessarily mean that the decision will be continuously

[240] See e.g. 'A Surrogate Mother from near Moscow refuses to return the surrogate child' KP at < https://www.kp.ru/daily/27138/4229636/ >.
[241] Case №33-16343/2017 (2017).
[242] Approximately £12,000 in total as of 2015.
[243] Mikhail Terekhov, 'Not a Mother Gave Birth. The Courts started to Take the Children Away from Surrogate Mothers' (27 Aug 2017) *Rossiyskaya Gazeta* at <https://rg.ru/2017/08/21/sudy-nachali-zabirat-detej-u- surrogatnyh-materej.html> accessed 25 Mar 2018.
[244] Suzdaleva already had a child of her own. A single mother with three children becomes eligible for a wider range of benefits and state subsidies: from reduced communal bills to additional monthly payments. The amounts would vary within the regions. See 'The subsidies for single mothers' (08 Sep 2020) at <https://bankiros.ru/wiki/term/posobie-materi-odinocke> accessed 1 Oct 2020.

followed.[245] One of the failings stems from the generally unclear if not weak position of precedents in Russian legal system. Precedents, as Anglo-Saxon incarnations are seen as alien and violative of the principle of the separation of powers.[246] Judges, in turn, are confined to interpreting the existing norms, rather than attempting to establish new ones by imposing their interpretation on the lower courts. Nersesyants denies precedent having any practical significance: "law-making powers cannot belong to judicial body… this goes against its very nature… judicial activity is the creation of the law-making body…."[247] On the one hand, it was recently suggested that the global convergence between the precedential and the civil law systems is slowly getting reflected in Russian jurisprudence.[248] The judiciary plays greater role in filling the legal gaps efficiently. Fomushina notes that the current legal reality is extensively shaped by case-law and judicial practice as a whole.[249] Pryahina and Rozanova add that denying precedent as a source of law means "not being able to see the real changes happening in the sphere of jurisprudence."[250] Yet, despite the growing academic 'favouritism'[251] and increased attention to worldwide integration of legal systems,[252] the real status of precedent remains only theoretical.[253] Its slow acceptance does not automatically imply that precedent would play any *normative* role any time soon.[254] Thus, although the cases decided by the courts of higher instances are fairly authoritative, they are still treated as inferior to the codified provisions on the Family Code. The

[245] 'The Courts Started Taking Children from Surrogate Mothers' (22 Aug 2017) at <https://deti.mail.ru/news/sudy-nachali-zabirat-detey-u-surrogatnyh/ > accessed 27 Sep 2020.

[246] Article 10 of the Constitution. See Generally Варвара Брянцева и Дмитрий Карев, «О Перспективах Судебного Прецедента В Российской Правовой Системе» (2019) *Синергия Наук* 1-5. Varvara Brjanceva i Dmitrij Karev, «O Perspektivah Sudebnogo Precedenta V Rossijskoj Pravovoj Sisteme» (2019) *Sinergija Nauk* 1-5. Varvara Bryantseva and Dmitry Karev, 'On Prospects of the Judicial Precedent in the Russian Legal System' (2019) *Synergy of Sciences* 1-5.

[247] Владик Нерсесянц, *Проблемы общей теории права и государства* (Норма: НИЦ ИНФРА-М 2015) 28. Vladik Nersesjanc, *Problemy obshhej teorii prava i gosudarstva* (Norma: NIC INFRA-M 2015) 28. Vladik Nersesyants, *General Law and the State* (Norma: Nits INFRA-M 2015) 28. НИЦ ИНФРА-М 2015) 28.

[248] Е. Фомушина, «Значение судебного прецедента в России» (2009) 5 Вестник ВолГУ 81, 81-82. E. Fomushina, «Znachenie sudebnogo precedenta v Rossii» (2009) 5 *Vestnik VolGU* 81, 81-82. E. Fomushina, 'Significance of Judicial Precedent in Russia' (2009) 5 Vestnik VolGU 81, 81-82.

[249] Ibid 84.

[250] T Pryahina and E Rozanova in А. Гречушкина, «Место судебного прецедента в правовой системе России» (2020) *Перспективы Науки и Развития в Совеременном Мире* 42, 42. A. Grechushkina, «Mesto sudebnogo precedenta v pravovoj sisteme Rossii» (2020) *Perspektivy Nauki i Razvitija v Soveremennom Mire* 42, 42. A Grechushkina, 'The Place of Precedent in Russian Legal System' (2020) *Perspectives of Sciences and Development in a Contemporary World* 42, 42.

[251] G Gadzhiev, amongst others – Г. Гаджиев, *Феномен Судебного Прецедента в России. Судебная Практика как Источник Права* (Юрист 2000) 51. G. Gadzhiev, *Fenomen Sudebnogo Precedenta v Rossii. Sudebnaja Praktika kak Istochnik Prava (*Jurist 2000) 51. G Gadzhiev, *Phenomenon of Judicial Precedent in Russia. Judicial Practice as a Source of Law* (Jurist 2000) 51. See also Bryantseva and Karev (n246) 822.

[252] Алексей Анненков и Руслан Гасанов, «Судебный Прецедент в Российской Федерации: Возможные Перспективы» (2018) *Вестник Образовательного Консортиума* 39, 39. Aleksej Annenkov i Ruslan Gasanov, «Sudebnyj Precedent v Rossijskoj Federacii: Vozmozhnye Perspektivy» (2018) *Vestnik Obrazovatel'nogo Konsortiuma* 39, 39. Alexei Annenkov and Ruslan Gasanov, 'Judicial precedent in the Russian Federation: Possible Prospects' (2018) *Vestnik Obrazovatel'nogo Konsortsiuma* 39, 39.

[253] Grechushkina (n250) 42.

[254] С. Поляков, "Судебный прецедент в России: форма права или произвола?» (2015) 3 Теоретические Проблемы Отраслей 28, 28. S. Poljakov, "Sudebnyj precedent v Rossii: forma prava ili proizvola?» (2015) 3 *Teoreticheskie Problemy Otraslej* 28, 28. S Polyakov, 'Judicial Precedent in Russia: a Form of Law or Arbitrariness?' (2015) C *Teoreticheskie Problemy Otraslei Prava* 28, 28.

legislator is reluctant to implement any formal changes on the role of precedent. This means that the subsequent identical cases might be decided simply on the basis of the Code and without any reference to *Frolov* case at all. Despite the little steps taken towards some positive modification in regulation of consent, manipulative surrogate mothers might 'get away' with the abuse of the Family Code provisions with the judges (involuntarily) having to take their side.

The Supreme Court intentionally refrained from giving the intended parents absolute priority.[255] The wording of the Decree does not prevent a surrogate mother from withholding consent. Nor does it seem to prioritise the intended parents in the dispute between the latter and the surrogate mother.[256] This might suggest that even under the Decree the default position would be the same as under the Family Code: as a general rule, the surrogate has a right to refuse consent with the possibility that in *some* instances she would not have a final say. The reference to 'various factors' is also fairly vague – it is not clear how much weight is given to any of them. This makes the outcome seem to be dependent on mere luck. Thus, some criticise the Decree for indirectly focusing on surrogate's consent, rather than the genetic parents' right to become registered as legal parents. Others argue that it is not clear why consent would be needed in a first place, taking into account that she has no genetic link to the child. Svitnev, for example, argues that this position creates 'a reckless patchwork which in turn prompts conflicting situations,'[257] rather than solves them. Technically, this may be avoided since a surrogate mother has provided her consent when she entered into the agreement before pregnancy. Obtaining consent post-birth appears to be nothing more than a formality – the surrogate mother only *confirms* that she does not have the right to the child. The refusal to provide such confirmation, in turn, might amount to abuse of the legal position.[258] Therefore, the legislator needs to take more drastic measures than provide the explanations.[259]

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[255] Елена Резник, «От проекта к воплощению: отказ от исключительного права суррогатной матери» (2018) *Юридические Науки* 37, 37. Elena Reznik, «Ot proekta k voploshheniju: otkaz ot iskljuchitel'nogo prava surrogatnoj materi» (2018) *Juridicheskie Nauki* 37, 37. Elena Reznik, 'From the Project to Incorporation: a Step- back from the Absolute Right of a Surrogate Mother' (2018) *Juridical Studies* 37, 37.

[256] Vladislav Kulikov, 'The parents are chosen by the court' (23 May 2017) Rossiyskaya Gazeta at https://rg.ru/2017/05/23/vs-rf-raziasnil-pravila-rassmotreniia-sporov-pri-surrogatnom-materinstve.html accessed 5 Oct 2020.

[257] Konstantin Svitnev in 'SC of the RF: a Surrogate Child may be returned by the court' (27 Apr 2017) Surrogacy at <https://surrogacy.ru/news/news_27_04_2017/> accessed 17 Sep 2020.

[258] Ibid.

[259] В. Ашуха и Е. Невзгодина, «Пункт 4 ст. 51 семейного кодекса Российской Федерации - гарантия защиты материнских прав, повод для злоупотребления правом, анахронизм?» (2017) *3 Вестник Омского Университета. Серия* «Право» 111, 114. V. Ashuha i E. Nevzgodina, «Punkt 4 st. 51 semejnogo kodeksa Rossijskoj Federacii - garantija zashhity materinskih prav, povod dlja zloupotreblenija pravom, anahronizm?» (2017) 3 *Vestnik Omskogo Universiteta. Serija «Pravo»* 111, 114. V Ashukha and E Nevzgodina, 'Clause 4 of the art.51 of the Family Code of the Russian Federation – the Guarantee of the Protection of the Maternal Rights, a Reason for the Abuse of Rights, or Anachronism? (2017) 3 *Messenger of Omsk University* 111, 114.

Apart from the wording of the Decree undermining the shaky position of the intended parents, it is the general effect of the Decrees that could be overestimated. They are not binding in their effect – they are merely a recommendation or an interpretative aid to the courts of lower instances. Although following the recommendation would amount to good practice, in general the lower courts are free either to ignore the recommendation or to distinguish the case at stake and render the Decree inapplicable. One of the later instances where the Constitutional Court applied the 2017 Decree was the 2018 *S.T and S.D* Ruling. The Court partially sided with the intended parents and declined the claim of the surrogate mother that the former's registration as legal parents violated the Family Code and surrogate's constitutional rights.[260] Similarly to the *Frolov* case, the court looked at the relevant circumstances of the case and found malicious intentions in the surrogate's actions. The Court noted that the surrogate has abused her position by violating the agreement and acting to the detriment of the surrogate child and her own children.[261] While this might seem to a gradual shift towards affording more protection to the intended parents, it is not clear whether the Court would have reached the same conclusion had it not found any anomalies in the surrogate's behaviour or if there were other circumstances on which surrogate's refusal to consent could have been questioned. At the time of writing there is no conclusive data as to the exact number of collisions that occurred post-2017 as well as the successful outcomes where the intended parents got their rights restored so as to conclude whether this would be a consistent approach. This means that unfortunately *Frolov* as well as *S.T* outcomes could be an exception rather than indicative of a trend for a uniform approach to resolving a conflict between a surrogate and the intended parents.

Direct prioritization of the surrogate's wishes over the wishes of the intended parents distorts the balance between the parties' powers.[262] While the surrogate mother has the right to be registered as a legal mother *independently* of the intended parents' wishes, the intended parents' right is dependent upon the surrogate's consent.[263] This places the genes on an inferior position in comparison to gestation and birth, which allows the wishes of a surrogate mother to prevail over the genetic connection between

[260] The search within the database returned to only one result. It might be the case that there is a lag in the recording system. The Constitutional Court of the Russian Federation Ruling dated 27 Sep 2018 N 2318-O.
[261] Ruling dated 27 Sep 2018 N 2318-O at <https://legalacts.ru/sud/opredelenie-konstitutsionnogo-suda-rf-ot- 27092018-n-2318-o/> accessed on 18 Oct 2020.
[262] The Judge of the Supreme Court V. Momotov in Reznik above (n261) 37.
[263] Дмитрий Решетов, «Право ребенка на семейное воспитание: Суррогатная Мать или Генетические родители? Моральные и правовые аспекты (2017) *Российское Право Онлайн* 74. Dmitrij Reshetov, «Pravo rebenka na semejnoe vospitanie: Surrogatnaja Mat' ili Geneticheskie roditeli? Moral'nye i pravovye aspekty (2017) *Rossijskoe Pravo Onlajn* 74, 74. Dmitry Reshetov, 'The Right of a Child to a Familial Upbringing: the Surrogate Mother or Genetic Parents? Moral and Legal Aspects' (2017) 2 *Russian Law Online* 74, 74.

the child and his parents.[264] Antokolskaia defends this lack of balance and claims, "the process of gestation and birth is emotionally more significant than the genetics."[265] She sees the current position as the "achievement" of the Family Code, as it accounts for the importance of the maternal instinct and psychological traumas that a surrogate mother might suffer from the detachment. Indeed, on the one hand, such position might seem understandable. The law recognises the surrogate mother's sensitive position and her potential attachment to the baby. Even the 'usual' pregnancies may make mothers' emotional state very fragile, with their behaviour turning fairly extreme. The 'unusual' circumstances of the case might take even worse emotional toll. Psychologically, the surrogates are said to 'connect' to the child as if he was her own.[266] In this scenario the trauma may be comparable to the one suffered from the loss of one's own child.

However, it is highly questionable whether the emotional state of the surrogate should trump the vulnerability of the intended parents. Some suggest that the prevalence of the former might be justified by the length of the 'bonding' process between the surrogate mother and the baby.[267] These nine months of providing nutrition to the baby lay the foundation for the intimate relationship between them. The intended parents, by contrast, have not had an opportunity to connect to the child on the same level. This means that they would not be traumatised by the 'disconnection' if the surrogate refuses to relinquish the child as there was no connection between them in a first place. One of the surrogate mothers dismissed concerns about the emotional wellbeing of the intended parents: "they have not lost the children. They simply lost their dream about them."[268] Sergei Knyazev, one of the Supreme Court judges, partially agreed that carrying a child inevitably leads to a blood relationship. Yet, he stressed that it is necessary to take into account of the way the child 'brought about.' The embryo was created through IVF and is a combination of the DNA of the genetic parents. This makes the alleged "absolute" priority of the surrogate mother far from being undisputable. The surrogate,

[264] А. Барышникова и М. Радченко, « Правовое регулирование суррогатного материнства» (2017) Южно-Уральский государственный университет 1, 54. A. Baryshnikova i M. Radchenko, « Pravovoe regulirovanie surrogatnogo materinstva» (2017) Juzhno-Ural'skij gosudarstvennyj universitet 1, 54. A Baryshnikova, 'The Legal Regulation of Surrogate Motherhood' (2017) Qualification Submission at South- Ural State University 1, 54.

[265] Antokolskaia in A Kokorin, 'On obtaining surrogate mother's consent for the registration of the spouses providing their genetic material' (5 Sep 2016) CenterBereg at <https://center-bereg.ru/f1022.html> accessed 12 Sep 2020.

[266] А. Конкина, «Проблемы Суррогатного Материнства: Вопрос передачи ребенка родителям или «покупателям» (2016) 2 *Актуальные Вопросы Науки и Образования* 258, 258. A. Konkina, «Problemy Surrogatnogo Materinstva: Vopros peredachi rebenka roditeljam ili «pokupateljam» (2016) 2 *Aktual'nye Voprosy Nauki i Obrazovanija* 258, 258. A Konkina, 'The Problems of Surrogate Motherhood: on the Issue of Passing over of the Newborn to the Intended Parents or 'Customers' (2016) 2 *Actual Questions of Science and Education* 258, 258.

[267] Kirichenko (n228) 41.

[268] Olga Salnikova, '"They did not pay extra." The Surrogate Mother Refused to Hand over the Children to the intended Parents" (20 Dec 2016) *Argumenty I Fakty* at <https://spb.aif.ru/society/people/zhivot_naprokat_surrogatnaya_mat_ne_otdala_detey_biologicheskim_roditelyam> accessed on 17th Oct 2020.

therefore, simply realises the third parties' reproductive rights.[269] Justifying the legal imperfections by emotional traumas caused by gestation amounts to nothing less than a violation of the constitutional right of the intended parents to the "realisation of motherhood."[270] The law does not account for the fact that the intended parents, already devastated by infertility and long wait for the child will find themselves in a very tragic situation.

Nevertheless, by focusing on the *post-partum* emotional state of the surrogate, the legislator also used to overlook the fact that her consent or the lack of it might have more far-reaching implications on other parties. Surrogacy is a multi-partied arrangement, where the interests of the surrogate's husband (if she is married) need to be taken into consideration. The position of the surrogate's husband used to be particularly peculiar as the protection of his rights was not initially envisaged by the legislator. In fact, there is no specific legislation explicitly covering the position of a surrogate's husband at all. It followed that used to be covered by the default position on legal fatherhood which mirrors the Latin principle of '*pater est quem nuptiæ demonstrant.*' Thus, fatherhood is determined in accordance with the presumption laid in article 48(2) of the Family Code which provides that if a child 'is born within the wedlock, the husband of a woman who gives birth automatically becomes the child's father.'[271] This meant that as long as the surrogate mother is formally married and enters herself as the child's mother on the register her husband will automatically become the child's legal father. There is a potential danger that the surrogate's husband would not accept the child thereby making the atmosphere within the family more intense. The strict application of the presumption proved problematic if the surrogate made the entry on the register without her husband's knowledge when the parties were estranged.[272] This implies responsibilities towards the child whom he has no connection to, including financial provision until the child reaches the age of maturity.[273]

5.6 Withdrawal of the intended parents

Surrogate motherhood assists those unable to have children to realise their dream of becoming parents,[274] by offering a unique way of having a genetically related child. The intended parents' path to

[269] Kristina Kotsoeva, 'The Problem of Obtaining the Consent by the Intended Parents from the Surrogate Mother in order to Obtain Parental Rights for the Baby and Ways of Solving it' (2017) *European Research* 275, 275.
[270] Part 1 of art.38 of the Constitution of the Russian Federation.
[271] Article 48 para 2 the Family Code 1995.
[272] Diana Kirova and Nataliya Ablyatipova, 'The Establishment of Paternity for a Child Born through Surrogacy Procedure' (2020) 10 *Colloquium Journal* 9, 9.
[273] The Federal Statute "On Healthcare of the Citizens of the Russian Federation" sought to rectify this issue. This is discussed above in 5.4.
[274] 'Surrogate Motherhood and the Fears of the Parents: The fears and how to overcome them' (29 May 2019) ReproHelp at < https://reprohelp.ru/agency/articles/201/ > accessed 30 Jul 2019.

parenthood is usually a rocky one, forcing them to undergo various fertility treatments for many years. The 'reproductive failure' is a distressing experience, making the parents realise that 'this milestone will never be hit.'[275] For some, infertility is caused by diseases, or 'occupational hazards' as well as the environment.[276] The intended parents' recourse to surrogacy is usually the last resort, when no other option is available. Thus, the typical portrait of the intended parents appears to be a couple that takes parenthood very seriously, successful in their profession, mid-aged and living in comfortable conditions. In other words, having all the necessary prerequisites for a family yet missing one piece of a puzzle – the child. They enter into the arrangements having the knowledge and appreciation of what it involves. The potential risks and challenges are further explained to them by the clinics thereby clarifying what their expectations of surrogacy should be. Therefore, it would be hard to imagine under what circumstances the intended parents would withdraw from the arrangement that would bring them their long-awaited addition to the family. However, although unimaginable, this is exactly what happened in the notorious *Baby Manji* case.[277] The case itself was concerned with cross-border surrogacy: Manji's parents, Ikufumi and Yuki Yamada engaged in a surrogacy arrangement in India, a popular surrogacy destination until 2016. During the surrogate's pregnancy the unforeseen happened – the Yamadas divorced and refused to accept the child. The surrogate also had no intention of raising her. Instead of a child with bright future and a loving family, Manji became "the child of no one."[278] Luckily, her grandmother came to the rescue and after a lengthy administrative procedure managed to take the girl to Japan. Nevertheless, the question of the surrogate's rights as well as the parents' obligations should they change their mind and withdraw from the programme before the child is born remains unanswered.

Russian surrogacy legislation does not address the situations where the intended parents withdraw from the arrangement prior to the child's birth. Some scholars seem to suggest that in this instance surrogacy could be equated to 'biomedical research' which is conducted for the purposes of treatment of a specific illness, i.e. infertility. An example may be seen in art.55 of the Law № 87-LRT of the Republic of Tatarstan "On the Regulation of Separate Issues in the Sphere of the Protection of Health of Citizens of the Republic of Tatarstan,"[279] which states that a treatment may be provided with the consent of those who are in need of the treatment. This might be applicable to the intended parents since it is them who are unable to have a child in a traditional way. The surrogate, however, falls outside

[275] Robert J Edelmann, 'Psychological Assessment in Surrogate Motherhood Relationships' in Rachel Cook, Shelley Day Slater and Felicity Kaganas (eds.) *Surrogate Motherhood: International Perspectives* (Oxford, Portland Oregon 2003) 143.
[276] Ibid.
[277] The case is explained above in the context of statelessness.
[278] Jennifer A. Parks, 'Care Ethics and the Global Practice of Commercial Surrogacy' (2010) 24 *Bioethics* 333, 333.
[279] From 22 Dec 2012.

the scope of the legislation since she does not require the treatment. The consensual nature of the treatment also implies the right to withdraw from it at any time.[280] Since this specific legislation only applies in the Republic of Tatarstan and does not explicitly refer to surrogacy, it does not even partially address the issues faced by the parties to the arrangements if the intended parents do pull out of the arrangement.

The instances of child rejection are not numerous: it is suggested that the rejection of surrogate children occurs 'thousand times less often' than of those who were born in a traditional way,[281] with only the media giving these cases some publicity. Thus, the case-law offers only a very limited clarification as to the parties' rights and obligations. So far, there are only three unfortunate instances where the intended parents decided to exit the arrangement during the surrogate's pregnancy thereby jeopardising the surrogate mother's and the child's interests. None of the cases provide a definitive answer as to who would become the child's legal parents: whether the intended parents would be 'forced' to take the child or whether the surrogate mother would be 'obliged' to raise the child. Neither does the law specify whether the surrogate would be entitled to claim the material losses to be paid. The *prima facie* conclusion seems to indicate that in accordance with art. 51 of the Family Code there is no obligation on the intended parents to register themselves as the legal parents. The provision only states that they may be registered as the legal parents with the consent of the surrogate, which seems to imply that may get away with refusing to take the child. Furthermore, following art. 49 of the Code the surrogate would automatically become the legal mother, which means that nothing could stop her from surrendering the child for adoption if she does not want to raise him. All that would be required here is a proof that she gave birth to the child, a document that would be easily obtainable from the medical institution where she gave birth. The parents also seem to be under no obligation to 'accept' the child, which means that the surrogate may not be entitled to claim arrears under art. 393 of the Civil Code, which obliges the debtor to compensate the creditor for improper performance.[282]

Thus, one of the most legally straightforward scenarios would be where a surrogate mother

[280] For a general discussion see Исрофил Бабаджанов, «Суррогатное Материнство: Некоторые Вопросы Правового Регулирования» (2012) 10 *Мир Политики и Социологии* 107, 107. Isrofil Babadzhanov, «Surrogatnoe Materinstvo: Nekotorye Voprosy Pravovogo Regulirovanija» (2012) 10 *Mir Politiki i Sociologii* 107, 107. Isrofil Babadzhanov, 'Surrogate Motherhood: Some Issues of Legal Regulation' (2012) 10 *The World of Politics and Sociology* 107, 107.

[281] Sergei Lebedev, 'Surrogate Motherhood' (6 Apr 2011) at <https://vechnayamolodost.ru/articles/bioetika/surrmat2e/> accessed 21 Jun 2017.

[282] See generally А. Семенов и Е. Семенова – Шусс, «Вопросы Правового Регулирования Суррогатного Материнства» (2015) 14 *Вестник Академии Знаний* 43, 43. A. Semenov i E. Semenova – Shuss, «Voprosy Pravovogo Regulirovanija Surrogatnogo Materinstva» (2015) 14 *Vestnik Akademii Znanij* 43, 43. A. Semenov and E. Semenova-Shuss, 'The Issues of Legal Regulation of Surrogate Motherhood' (2015) 14 *The Herald of the Academy of Knowledge* 43.

decided to keep the child and raise him as her own. This is what happened to Galina, a surrogate mother who was abandoned by the intended parents when she was pregnant with their twin daughters.[283] When the surrogate was at the hospital the intended father firstly cut off all the communication with Galina and later notified the doctors that they have no intention to take the children anymore, justifying their decision by "the relationship that has fallen apart and resulted in a divorce." After the conversation with the medics, he left without enquiring about the surrogate's health or the girls' condition. Next day the doctors were ordered to transfer the newborns to the ward for 'unwanted' babies. However, the surrogate mother and her husband decided to take the children and raise them alongside the ones of their own. Luckily for the children and the surrogate, there were no legal hurdles whatsoever. By law, the intended parents were deemed to be strangers to the girls, which means they did not even have to complete a 'rejection' form that would confirm that they officially give them up for adoption. The surrogate, in turn, did not have to endure the cumbersome adoption procedure as legally she was still the mother of the girls, and her husband automatically became the child's father. The automatic parenthood has also released the intended parents from their parental responsibilities, such as payment of alimonies and other child support. Yet, it is not clear whether the intended parents had to compensate the surrogate for breach of contract. If she received the money for the pregnancy, then it would be hard to argue that she has suffered a loss.

However, complexities may arise when the intended parents withdraw from the arrangement yet re-appear afterwards trying to claim their rights to the child. The first prominent example where the 'intended parents [initially] simply disappeared' dates back to 2010.[284] Zinaida Rakova, was one of the two surrogate mothers who, through a third party, agreed to carry a child for an infertile couple. However, after both embryos were successfully implanted, the third-party intermediary misled the intended parents as to the progress of the pregnancy which led to a complete breakdown in communication between them and the surrogate. At the time of miscommunication Rakova was already five months pregnant and could not undergo an abortion, which she would have wanted to anyway, as she got attached to the child. Having given birth to a healthy baby boy, Rakova registered herself as the legal mother and decided that she does not want the compensatory payment from the intended parents. Six months after the birth, the biological parents decided to appear in Rakov's life

[283] Olga Strelkova, 'The Surrogate Mother gave birth to two twins but the intended parents refused to take them. Their fate was decided next day' (18 Dec 2020) SYL at https://www.syl.ru/post/home-and-family/167664 accessed 22 Dec 2020.
[284] Yana Podzuyban, 'New Problems of Surrogate Mothers: A planned child is not needed for anyone' (18 Nov 2010) 1Tv.ru at <https://www.1tv.ru/news/2010-11-18/133336-novye_problemy_surrogatnyh_materey_inogda_zaplanirovannyy_rebenok_stanovitsya_nikomu_ne_nuzhnym> accessed 5 Jun 2017.

claiming the rights to the boy.[285] After an unsuccessful attempt to annul the surrogate's registration as the legal mother they applied for a court order. Following a lengthy battle, the matter reached the Constitutional Court in 2012. The intended parents argued that the surrogate 'took' their child, and they knew nothing about his birth and tried to rely on the genetic relationship between themselves and the child as the basis for their claim. The unconvinced Court refused the intended parents' application after finding no violation of their constitutional rights.[286] The majority explained that the lack of surrogate's consent was key to the issue which has not been obtained.[287] Therefore, the child was to be left to be raised by the surrogate mother and her husband.

Despite the controversial factual scenario, the decision to leave the child with the surrogate does not seem to be entirely satisfactory. The Court appears to have rigidly followed the legislation in its pursuit to protect the surrogate mother thereby sacrificing the interests of the biological parents as well as the child. The Court decided that by making birth a definitive element of legal motherhood far more important than the biological parents' genetic connection to the child. Such an anachronistic understanding of motherhood completely overlooks the moral suffering endured by the intended parents. For some reason, the fact that they have undergone years of treatment yet with no prospect of having the child in traditional way is deemed to be less important than the surrogate's feeling of attachment. This has been discussed by the minority in the dissenting opinion. Judge Gadzhiev argued that this position ignores the vulnerability of the intended parents, and it is for this reason an application should have been allowed: for him, the genetic connection between the parents and the child should be prioritised over gestation and birth. The current stance, by contrast, seemed to amount to deprivation of the intended parents of their parental rights, something that happens only in very extreme circumstances, such as child abuse or the parents' addictions.[288] However, the decision has also overlooked the fact that the child's right to live with a family would also be violated. Even those children whose parents were deprived of their parental rights may still maintain some relationship with them; in the majority of circumstances these parents also have their parental rights restored. In the present instance, by contrast, such decision means an ultimate and irreversible alienation of the child

[285] Yekaterina Kachur, 'The Court in Ylianovsk ruled on the famous case on surrogate motherhood' (19 Apr 2011) *1Tv.ru* at <https://www.1tv.ru/news/2011-04-19/128003-sud_v_ulyanovske_vynes_prigovor_po_gromkomu_delu_o_surrogatnom_materinstve> accessed 17 Jun 2017.

[286] The Decree № 880-O from 15 May 2012.

[287] There is evidence that there has been a conflict between the surrogate, the third party and the intended parentsthat has been prompted by the third-party intermediary who 'tried to establish her authority'. She has not notified the parents of the birth of the child and allegedly told the surrogate that they changed their mind on the arrangement. See Konstantin Svitnev, 'The Constitutional Court refused the application of the intended parents of the surrogate child' (Aug 2012) Newsland at <https://newsland.com/community/289/content/konstitutsionnyi-sud-rf-otkazal-geneticheskim-roditeliam-surrogatnogo-rebenka/1474576> accessed 30 Jun 2017.

[288] Art. 69 of the Family Code 1995.

from his genetic parents. Svitnev notes that this is not just the limit to maintain contact with the genetic parents, but also wider circle of relatives, that is, the grandparents, uncles and aunts, who would only be able to see the child from the TV screens, something that has been unfortunately pre-determined by the method of his conception.[289] Judge Kniazev, also voting against the refusal, argued that such an approach, focusing on the surrogate's prerogative to deprive the biological parents of their parenthood status amounts to nothing less than "distorting the balance between the constitutional values and diminishing the interests of the genetic parents as well as the child born with the help of the assisted reproductive technology."[290]

A more complicated situation happened in Blagoveschensk, Amur District, where the intended parents and a surrogate mother entered into a surrogacy agreement. Unlike the situation with Rakova, the parents from Blagoveschensk agreed the terms *orally*. They provided their genetic material but shortly before the child's birth they had a 'change of heart' and refused to take the child and pay the surrogate.[291] The surrogate did not want to take the child either, claiming that she "has nothing to do with [him]."[292] As a result, the child was left with no parents in the birth certificate and was placed in a state institution for adoption.[293] Nataliia Tomilova, the Head of the Amur Civil Registry observes: "this is a one-off situation… we really hope this is not going to happen again… the parties should regulate their arrangements in a 'legal' way…"[294] The case clearly raises the question whether the contract not concluded in a written form would offer any protection to the surrogate. Art. 158 of the Civil Code broadly seems to suggest that the parties were not under an obligation to conclude a written contract unless there is a clear legal requirement to do so.[295]

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[289] 'Surrogacy News' https://surrogacy.ru/news/surrogacy_news68/ >.
[290] Ibid.
[291] 'The Clients refused to take the child from the Surrogate mother in Blagoveschensk' (30 May 2017) *Port Amur* at <https://portamur.ru/news/detail/v-blagoveschenske-zakazchiki-otkazalis-zabirat-rebenku-u- surrogatnoy-materi/> accessed 31 May 2017.
[292] Daria Druzhinina, 'Amurians refused to take a child from a surrogate mother' (7 Jun 2017) My-Madonna at http://my-madonna.ru/article/malyisha-ot-kotorogo-otkazalas-surrogatnaya-mat-vsetaki-zabrali-biologicheskie-roditeli accessed 19 Jun 2017.
[293]Евгения Брюхина и Ольга Трясцина, «Суррогатное материнство: «За» и «Против». Проблемные вопросы нормативного регулирования» (2017) 3 *Вестник Пермского государственного гуманитарно-педагогического университета. Серия № 3* 164, 172. Evgenija Brjuhina i Ol'ga Trjascina, «Surrogatnoe materinstvo: «Za» i «Protiv». Problemnye voprosy normativnogo regulirovanija» (2017) 3 *Vestnik Permskogo gosudarstvennogo gumanitarno-pedagogicheskogo universiteta. Serija* # 3 164, 172. Гуманитарные и общественные науки Evgeniia Bryukhina and Olga Tryastsyna, 'Surrogate Motherhood: For and Against Normative Regulation' (2017) 3 *Humanities and Social Sciences* 164, 172.
[294] 'The intended parents refused to accept the child from a surrogate mother in Blagoveschensk' (30 May 2017) Blagoveschensk.ru at < https://www.blagoveshensk.ru/news/dvazhdydva/183051/ > accessed 31 May 2017.
[295] Art. 158 of the Civil Code from 30 Nov 1994.

Another controversial case arose in Moscow, where a surrogate mother carried a grandson for a successful Russian barrister, Ermolai Kostuykov, who was about to lose his son to a terminal illness. The dying man's family insisted on his biological material being preserved in order to have his child. The barrister subsequently entered into multiple surrogacy arrangements and proclaimed that he will take all the children, irrespective of their sex, albeit clearly preferring a grandson to a granddaughter: "I will offer 1,5 million for a grandson and 850,000 for a granddaughter."[296] Initially excited about the addition to the family, the grandfather disappeared as soon as the ultrasound showed a baby girl, not a boy as he wanted. "He simply vanished," explains Nina Dmitrushkova, one of the surrogate mothers involved in the arrangement.[297] She never received the payment from the intended parents but could not place the child for adoption. She had to 'introduce' the child into her own family. She applied to the court, arguing a breach of contract by the intended grandfather. The Court agreed and awarded 2,5 million roubles in damages, a sum substantial enough for a purchase of a flat for herself and her family. The grandfather changed his legal name and still has not paid. Dmitrushkova decided to apply for alimonies or child support in order to provide for the daughter. Yet, the court ruled that in the absence of the DNA test the genetic relationship could not be proved. Even if the grandfather took it, however, there would be no 'fatherhood' relationship between the baby girl and the grandfather that would have required him to pay the alimonies.

The Court's approach to the payment of the compensation has also been hard to rationalise. The case of Anna Dunaeva illustrates the lack of predictability in judicial award of the compensation. Dunaeva has entered into a surrogacy arrangement with the Rybakovs, the family desperate to have the children of their own. Unfortunately, the child was born with the structural heart defect. The intended parents rejected the child and claimed that "they do not need a sick baby."[298] They also refused to pay the compensation for the pregnancy. Dunaeva applied to the court and claimed that the compensation should be payable in full. The Court rejected her claim, relying on the 'recommendations of the Council of Europe' which provide that only sisters, close relatives or friends should act as surrogate mothers with the compensation not going beyond 'any reasonable expenses.' There is no information

[296] Ю. Грухин и Е. Зайцева, «Суррогатное материнство в России» (2017) *Модернизация Общественных Наук В Эпоху Глобальных Перемен: Экономические, Социальные, Философские, Политические, Правовые, Общенаучные Аспекты* 95, 96. Ju. Gruhin i E. Zajceva, «Surrogatnoe materinstvo v Rossii» (2017) Y. Grukhin and E. Zaytseva, 'Surrogate Motherhood in Russia' (2017) *Modernizacija Obshhestvennyh Nauk V Jepohu Global'nyh Peremen: Jekonomicheskie, Social'nye, Filosofskie, Politicheskie, Pravovye, Obshhenauchnye Aspekty* 95, 96. Y. Grukhin and E. Zaytseva, 'Surrogate Motherhood in Russia' (2017) *Conference: Modernisation of Social Sciences at the time of Global Changes: Economic, Social, Philosophical, Political and Legal and Common Knowledge Aspects* 95, 96.

[297] Yulia Danil'chenko, 'We wanted a boy: the parents refused to take the child from the surrogate mother because of the sex' (5 Dec 2019) *Komsomol'skaya Pravda* at < https://www.volgograd.kp.ru/daily/27064/4132711/ > accessed 20 Dec 2019.

[298] Based on the monograph of Konstantin Svitnev, 'History: Judicial Processes in Russia' (no date) Surrogacy at <https://surrogacy.ru/surrogacy/surrogacy_history/> accessed 5 Jul 2018.

as to the child's whereabouts since then.[299]

From the complicated situations depicted above it transpires how the legal patchwork leads to the lack of clarity as to the parties' positions as well as the lack of the child's protection. The law does not explain whether the intended parents could insist on abortion if they decide to withdraw from the arrangement at an early stage of pregnancy; whether there could be a way to make the intended parents to take the child and whether the surrogate mother would be entitled to claim alimonies from them if she decides to raise the child by herself. Svitnev tries to explain some of the issues in his commentary on the Rakova case. He observes that under the existing abortion legislation, abortion is voluntary and would be completely for the surrogate to decide on. Thus, it appears that even during the first weeks of pregnancy the intended parents could not 'force' the surrogate to abort the child: since the surrogate is deemed to be the child's legal mother until he is registered "she determines the child's fate. If she wishes, she may keep him, she may blackmail them, and she may also terminate the pregnancy."[300] He continues, that the contract which constitutes the legal crux of the arrangement, also would not be of much use here – it cannot oblige the intended parents to accept the child; all it can do is to regulate the financial side of the arrangement, that is to require the intended parents to pay the compensation to the surrogate.[301]

The current legal position is unsatisfactory. The lack of clarity as to the child's position caused by the absence of codified legislative response may lead to a situation where the child would be left in the hands of the surrogate. Indeed, as real-life scenarios show, in some cases the surrogates do get attached thereby deciding to raise the surrogate children and treat them as their own. However, in some circumstances, the surrogate may also 'reject' the child either because of lack of willingness to make any emotional investment into the child that is not genetically related to her or mere financial constraints. Since the intended parents would not want to be registered as the legal parents and the surrogate would also surrender her legal motherhood the child would end up as having no parents at all – "too much of a burden for a poor soul."[302] This position would violate the child's constitutional

[299] Юлия Павлова, Антонина Попова и Мария Михина, «Актуальные Проблемы Регулирования Суррогатного Материнства На Современном Этапе» (2020) 2 *Медицинское Право: Теория И Практика* 123, 126. Julija Pavlova, Antonina Popova i Marija Mihina, «Aktual'nye Problemy Regulirovanija Surrogatnogo Materinstva Na Sovremennom Jetape» (2020) 2 *Medicinskoe Pravo: Teorija I Praktika* 123, 126. Julia Pavlova, Antonina Popova and Maria Mikhina, 'Actual Problems of Regulation of Surrogacy at the Present Stage' (2020) 2 *Medical Law: Theory and Practice* 123, 126.

[300] Yana Podzuyban, 'New Problems of Surrogate Mothers: A planned child is not needed for anyone' (18 Nov 2010) 1Tv.ru at https://www.1tv.ru/news/2010-11-18/133336-novye_problemy_surrogatnyh_materey_inogda_zaplanirovannyy_rebenok_stanovitsya_niko mu_ne_nuzhnym

[301] Konstantin Svitnev above (n291).

[302] Babadzhanov (n280).

rights, namely, the right to live and be raised in a family as provided by art. 54, the right to communicate with his parents as under art. 55 and the right to receive child support from his parents as per art. 60.[303] It is suggested that it would be fairer to introduce a specific amendment in the Family Code that would provide that the intended parents would be able to surrender their obligations towards the child only if the surrogate mother agrees to raise the child herself. The release from parental responsibility would not lead to an automatic termination of the obligation to contribute to the child support. The intended parents would also be liable for the payment of compensation to the surrogate mother since she has carried the child to the full-term pregnancy.

5.7 Voluntary termination of pregnancy by the surrogate mother

As seen elsewhere above, motherhood has always been integral to procreation in Russian family law. Historically, the legal attention has been focused on the protection of family and the units within the family, such as strengthening the roles of fathers, mothers and children. The Soviet state promoted motherhood through various initiatives and welfare benefits, praising mothers for the number of children she gave birth to. Despite some influential claims from the Marxist theoreticians that "motherhood is a barrier to women's emancipation,"[304] it is the negative propaganda of "motherhood," used to build communism, which ultimately defeated the idea of emancipation.[305] After the shaky 20-year-period of Soviet ban on abortion,[306] motherhood has ultimately been established as *voluntary* – the issue of reproduction has since been left for the woman to decide on. The state's intervention in reproductive rights has been passive, taking place through the encouragement, rather than an obligation to reproduce either in general or dictating the number of children a family should have. This included the Order of Mother Heroine discussed in 3.3. Throughout the years this approach has been realised by the 'social' state[307] and was codified in the Russian 1993 Constitution. Thus, article 7 provides that the

[303] The Russian Constitution 1993.

[304] Alexandra Kollontai in 1921 referred to this as a "maternity crux" meaning that motherhood is a burden – quoted in Юлия Градскова, «Культура, Гигиена и Гендер: Совеитезация Материнства в России в 1920х – 1930х в Павел Романов и Елена Ярская-Смирнова (ред) Советская Социальная Политика в 1920х-1930х: Идеология и Повседневность (Вариант 2007) 242-243. Julija Gradskova, «Kul'tura, Gigiena i Gender: Soveitezacija Materinstva v Rossii v 1920h – 1930h v Pavel Romanov i Elena Jarskaja-Smirnova (red) Sovetskaja Social'naja Politika v 1920h-1930h: Ideologija i Povsednevnost' (Variant 2007) 242-243. Yulia Gradskova, 'Culture, Hygiene and Gender: sovietisation of motherhood in Russia in 1920s-1930s' in Pavel Romanov and Elena Yarskaia-Smirnova (eds.) *Soviet Social Politics in 1920s-1930s: Ideology and Daily Life* (Variant 2007) 242-243.

[305] Nataliya Chernyaeva in ibid 243.

[306] The Soviet Union was fairly progressive in its decision to 'make motherhood voluntary'. See for comparison other former communist states e.g. Romania (1966-1990), Hungary (allowed, but the list of reasons justifying abortion has been limited since 1973) Poland (legalised in 1952 but following a Constitutional Court ruling in October 2020 almost all abortions are deemed illegal – 'Poland abortion: Top court bans almost all terminations' (23 Oct 2020) *BBC News* at <https://www.bbc.co.uk/news/world-europe-54642108> accessed 24 Oct 2020.

[307] Г. Романовский, *Правовая Защита Материнства и Репродуктивного Здоровья: Монография* (Проспект) глава 2. G. *Romanovskij, Pravovaja Zashhita Materinstva i Reproduktivnogo Zdorov'ja: Monografija* (Prospekt) glava 2. G Romanovsky, *Legal Protection of Motherhood and Reproductive Health. A Monograph* (Prospekt) chapter 2.

state supports family, fatherhood, motherhood and childhood. This was further enshrined in the 'determination' of the Constitutional court from the 19th of January 2010 №151-O-O which proclaimed that "… motherhood… in its traditional sense, inherited from the ancestors represents the values which ensures the unbreakable connection between the generations… preserve the multinational Russian Federation…"[308] This sub-chapter will discuss the legal consequences of voluntary termination of pregnancy by a surrogate by comparing them to the ones in traditional pregnancy.

The voluntary basis for motherhood is prescribed in article 56(1) of the Federal Law "On the Basics of Healthcare of the Citizens of the Russian Federation" № 323-F-3 provides that "each woman shall make a decision on motherhood *independently.* Artificial termination of pregnancy may only be performed upon voluntary consent." Then the provision clarifies the conditions under which a pregnancy may be terminated. For pregnancies up to the first term (12 weeks) a mere request suffices for an abortion. Article 56(3)(1) states that "pregnancy may be terminated no earlier than 48 hours after a woman notified the clinic of her wishes to terminate on the (a) fourth-seventh week of pregnancy; (b) eleventh-twelfth week of pregnancy." Article 56(1)(2) further states that pregnancy may be terminated not earlier than seven days after notification if a woman is within eight to ten-week pregnancy time. Following the Government's Decree from 06 February 2012 № 98 if the 'social criteria' are satisfied pregnancy may be terminated at any time.[309] The termination would be performed by the state hospital free of charge.[310] Overall, it seems that in the absence of unusual circumstances, a woman may terminate the pregnancy if she wishes as long as relevant time-frame is not violated.

In order to address the legal consequences, there is a need to differentiate between three possible scenarios where voluntary termination may occur:

i) Voluntary termination with the consent of the intended parents;

ii) Voluntary termination by the surrogate with medical reasons but without consent of intended parents;

iii) Voluntary termination by the surrogate without medical reason and without the

[308] The determination also referred to fatherhood and childhood being crucial. Translation my own.

[309] In accordance with art.56(4) a pregnancy may be terminated at any time for 'social reasons.' These criteria are contained in Minzdravsotsrazvitie Order №736 from 03 December 2007. One of them is 'pregnancy resulted from a crime.'

[310] Виктория Сакевич, Борис Денисов, Мишель Ривкин-Фиш, «Непоследовательная политика в области контроля рождаемостии динамика уровня абортов в России» (2016) 14 Журнал исследований социальной политики 461, 464. Viktorija Sakevich, Boris Denisov, Mishel' Rivkin-Fish, «Neposledovatel'naja politika v oblasti kontrolja rozhdaemostii dinamika urovnja abortov v Rossii» (2016) 14 Zhurnal issledovanij social'noj politiki 461, 464. Viktoriya Sakevich, Boris Denisov, Michele Rivkin-Fish, 'Illogical Politics in Birth Control and the Dynamics of Abortion Levels in Russia' (2016) 14 *The Journal of Social Studies* 461, 464.

consent of the intended parents;

In both scenarios the legislation itself is silent on the precise position of a surrogate mother as well as the legal consequences if she changes her mind.[311] The law does not explain whether the surrogate is entitled to voluntarily terminate the pregnancy and if so, under what circumstances.[312] It is also not clear whether the legislator perceives surrogate motherhood any different compared to the 'traditional' one. Following the principle of bodily autonomy, the law also does not require neither her husband's consent nor the one of the commissioning father.

The first scenario would include cases of multiple-embryo pregnancy and a situation when the intended parents pull out of the arrangement due to unforeseen circumstances. The former, also referred to as "selective reduction" appears to be fairly straightforward.[313] In some instances the implantation is a long and complicated procedure, requiring two or more embryos[314] to be implanted in order to increase the chances of a successful pregnancy by half.[315] This is provided by article 24(d) of the Healthcare Order № 107n which limits the number of embryos to 3 if the surrogate provides with informed consent.[316] Multiple pregnancies, however, are usually associated with higher risks for the surrogate, such as involuntary abortions and the embryos – e.g. foetal defects. If a pregnancy is successful, one (or more) embryos are selectively 'reduced'[317] by a gynaecologist in accordance with article 28 of the same Healthcare Order. In the majority of instances, the commissioning couple does not intend to go ahead with the multiple pregnancy from the outset as the families tend to opt for a one-child arrangement. The second and third scenarios appear to be more complex with no specific provision clarifying the positions neither of the surrogate mother nor of the intended parents. If a surrogate decides to terminate the pregnancy is based on medical grounds, she seems to be fully entitled

[311] К. Свитнев, «Репродуктивные Технологии: Правовые Коллизии» (2011) 5 *Правовые Вопросы в Здравоохранении* 57, 57. K. Svitnev, «Reproduktivnye Tehnologii: Pravovye Kollizii» (2011) 5 Pravovye Voprosy v Zdravoohranenii 57, 57. K Svitnev, 'Reproductive Technology: Legal Collisions' (2011) 5 *Legal Issues in Healthcare* 57, 57.

[312] For example, due to an unforeseen psychological trauma as a result of pregnancy/ other circumstances which would render her unable to continue with the surrogate arrangement.

[313] Katie O'Reilly, 'When Parents and Surrogates Disagree on Abortion' (18 Feb 2016) The Atlantic at https://www.theatlantic.com/health/archive/2016/02/surrogacy-contract-melissa-cook/463323/ accessed 3 Nov 2020.

[314] 'Multiple Pregnancies during the IVF' (27 Jan 2020) *Fertimed* at <https://www.fertimed.ru/hotite-znat/mnogoplodnaya-beremennost-pri-eko.php> accessed 4 Nov 2020.

[315] Zarema Barahoeva, 'Selective Reduction of Embryos' (3 June 2020) *AltraVita IVF Clinic* at <https://altravita-ivf.ru/eko/reduktsiya-embrionov.html > accessed 14 Oct 2020.

[316] The Healthcare Order № 107н "On the Order of Application of the Assisted Reproductive Technologies, Side- effects and Limitations on their Application" from 30 Aug 2012.

[317] Whilst there is no data on this, it may only be *assumed* that the second embryo will be destroyed.

to do so, even if the intended parents oppose the decision.[318] Under this scenario, an abortion would be justified by the urgent need to protect the life or health of a surrogate which means that the latter "would take priority over the terms of the contract."[319]

The implications are most likely to be covered by the contract, where the intended parents' actions would amount to a breach. Thus, if the intended parents decide to voluntarily exit the surrogacy programme after the embryo was successfully implanted but within the relevant time frame for the termination, the surrogate mother may undergo a voluntary abortion. The matter seems to be more complicated if the timeframe for the termination has passed. Alborov argues that the parties should not be able to terminate the contract after the twelve weeks as it would be legally impossible to go through abortion.[320] Also the situation would not fall within the 'social criteria' as the surrogate has not become pregnant as a result of a criminal activity which means that the arrangement would have to proceed. There are no known cases of either scenario as of 2020.

It is questionable whether the surrogate mother may be able to undergo an abortion in breach of a surrogacy contract. So far there are no known instances where the surrogate mother decided to voluntarily terminate the pregnancy that reached the court in order to make an accurate assessment as to the exact legal treatment of such a case as well as practical consequences for the surrogate mother.[321] Some suggest that the existing legislation on termination of 'traditional pregnancies,' applies in the context of surrogacy – the surrogate mother would lose the status of a 'surrogate' but not a 'pregnant' woman.[322] This is based on the doctrine of bodily integrity, implying that the wishes of a surrogate not to become a mother anymore might allow her to terminate the pregnancy without accounting for the wishes of the commissioning couple to become parents.[323] Bodily integrity covers "reproductive and sexual rights" including the "…the right… to make their own informed decisions

[318] 'Questions on Surrogate Motherhood' Sweetchild at < https://www.sweetchild.ru/genetic/arhive/voprosy-o-surrogatnom-materinstve >.
[319] Ibid.
[320] Сулико Алборов «Право Суррогатной Матери Прервать Беременность в Отношениях Суррогатного Материнства» (2018) *Проблемы Современного Законодательства России и Зарубежных Стран* 158, 160. Suliko Alborov «Pravo Surrogatnoj Materi Prervat' Beremennost' v Otnoshenijah Surrogatnogo Materinstva» (2018) *Problemy Sovremennogo Zakonodatel'stva Rossii i Zarubezhnyh Stran* 158, 160. Suliko Alborov, 'The Right of a Surrogate Mother to Terminate the Pregnancy in Surrogacy Relationship' (2018) *The Problems of Contemporary Legislation in Russia and Foreign Countries* 158, 160.
[321] Except for some anecdotal 'fictitious' stories from talk-shows, e.g. 'Surrogate Mother aborted an embryo in breach of surrogacy contract' <https://ok.ru/group/52226357788884/video/c2804692> accessed 29 Oct 2020.
[322] Irina Shamraeva, 'The Peculiarities of the Regulation of Surrogate Motherhood' (02 Sep 2019) at <https://www.nbpublish.com/library_read_article.php?id=30520> accessed 2 Dec 2020.
[323] Alborov above (n320) 158.

about reproduction."[324] This principle is universal and does not differentiate between mothers on the basis of the pregnancy method, implying that all women are entitled to self-determination.[325] Others speculate that termination of pregnancy in these circumstances is a matter of a straightforward breach of contract and the surrogate should bear the appropriate consequences.

The birth of the child for the intended parents constitutes the goal of the arrangement, which would not be realised without the surrogate's fulfilment of her obligations. Therefore, the standard contract includes a clause which prohibits voluntary termination of pregnancy.[326] If the surrogate still decides to go through the abortion, she should be liable for non-performance of contractual duties with the penalty prescribed by the contract. These might include damages for non-performance as well as the expenses incurred by the intended parents until the termination.

It is clear that the current legal regime is too relaxed. The conditions and consequences of the voluntary termination need to be clearly stated in the legislation, rather than merely being a clause in the contract. Not only would this recognise the fact that a surrogate enters the arrangement knowingly and voluntarily but also provide for extra legal protection for the commissioning parents. Therefore, the circumstances in which a surrogate should be able to voluntarily terminate pregnancy would be narrowed down to the cases where a) pregnancy causes significant threat to life or health of the surrogate mother; b) if the contract is voluntarily terminated before the twelve-week period expires.

[324] Niamh Reilly (ed.) 'Women's Rights as Human Rights: Local and Global Perspectives. Strategies and Analyses from the ICCL Working Conference on Women's Rights as Human Rights' (Dublin, March 1997) at <http://whr1998.tripod.com/documents/icclbodily.htm> accessed 1 Nov 2020.
[325] Ibid.
[326] A sample may be seen here 'Surrogacy Contract' at <https://homeurist.com/semya/materinstvo/dogovor-surrogatnogo-materinstva- trebovaniya-pravila-sostavleniya-osnovnye-punkty.html> accessed 24 Oct 2020.

6. POTENTIAL LIBERAL INFLUENCES ON RUSSIAN SURROGACY LEGISLATION

Reproduction is widely described as one of the main functions of family,[1] responsible for the 'producing new individuals' thereby allowing society to regenerate.[2] It is argued that reproductive rights "[constantly] move up the legal agenda"[3] prompting legislative responses on both national and international level.[4] Whilst in some states legal developments are closely tied to social demands, in others they may be related to economic concerns or prompted by difficult cases. For example, Thailand banned commercial surrogacy for foreigners after the notorious *Baby Gammy* case.[5] The relatively recent restriction on surrogacy in India followed extensive accusations of the then existing law resulting in mass exploitation of surrogate mothers.[6] In the UK, by contrast, there are calls for reform of surrogacy legislation, a change that arguably reflects social attitudes.[7] While the idea of 'citizens' initiative'[8] is not completely foreign to Russia, as a right it has never been cemented either in the Constitution or other Federal Statutes, save for certain specific areas that do not include assisted reproduction.[9] In fact, the 'citizens' initiative' in Russia does not work at all or is very rudimentary.[10] Art 104 of the Constitution explains that the right of legislative initiative is reserved to

[1] Generally, Татьяна Бендас и Оксана Карымова, «Мотивы деторождения у бездетных пар» (2010) *Вестник Санкт-Петербургского Университета* 191, 191. Tat'jana Bendas i Oksana Karymova, «Motivy detorozhdenija u bezdetnyh par» (2010) *Vestnik Sankt-Peterburgskogo Universiteta* 191, 191. Tatiana Bendas and Oksana Karymova, 'The Motives of Childbirth by Infertile Couples' (2010) The *Herald of St Peterburg University. Sociology* 191, 191.

[2] A. F. Robertson, *Beyond the Family: The Social Organization of Human Reproduction* (University of California Press 1991) 4. Despite this text being written in 1991 it remains relevant.

[3] Екатерина Толкунова и Алена Щербакова, «Регулирование Суррогатного Материнства: Тенденции В Международном И Российском Праве» (2022) 2 *Московский Журнал Международного Права* 17, 21. Ekaterina Tolkunova I Alena Shherbakova, «Regulirovanie Surrogatnogo Materinstva: Tendencii V Mezhdunarodnom I Rossijskom Prave» (2022) 2 Moskovskij Zhurnal Mezhdunarodnogo Prava 17, 21. Ekaterina Tolkunova and Alena Scherbakova, 'Regulation of Surrogate Motherhood: Tendencies in International and Russian Law' (2022) 2 *Moscow Journal of International Law* 17, 21.

[4] Ibid.

[5] 'Thailand bans commercial surrogacy for foreigners' (20 Feb 2015) *BBC* at <https://www.bbc.co.uk/news/world-asia-31546717>.

[6] See generally Amrita Pande, 'Revisiting surrogacy in India: domino effects of the ban' (2021) 30 *Journal of Gender Studies* 395-405.

[7] See generally 'Surrogacy: current project status' https://www.lawcom.gov.uk/project/surrogacy/. The final report which includes the result of public consultation, and the draft Bill were published on 29 March 2023.

[8] There is no single definition of 'citizens' initiative'. Some argue that there are two notions of "citizens' initiative" in Russia – it includes a broader meaning, that is referendums and public consultations as well as a narrow meaning which means creating the legislative initiative - see Павел Баранов, "Гражданская правотворческая инициатива в Российской Федерации: опыт правотворчества на местном и региональном уровнях" (2014) *Философия Права* 67, 68. Pavel Baranov, "Grazhdanskaja pravotvorcheskaja iniciativa v Rossijskoj Federacii: opyt pravotvorchestva na mestnom i regional'nom urovnjah" (2014) *Filosofija Prava* 67, 68. Pavel Baranov, 'Citizens' legal initiative in Russian Federation: The experience of lawmaking on local and regional levels' (2014) *Philosophy of Law* 67, 68.

[9] Ibid 69. There is some reference to 'citizens' initiative' in relation to regional governance – eg the Federal Statute "On Common Principles of Organisation of Local Self-Governance in the Russian Federation" №131-FL from 6 Oct 2005.

[10] Ibid 71.

the representatives of the state.[11] This seems to suggest that the legal approach to surrogacy law is not pre-determined by public initiatives or at least that social attitudes played a very minimal role. Nor have there been any controversial cases that could have prompted the state to push the legal borders of surrogacy. This chapter is going to explore the potential reasons that could have caused the *laissez-fair* approach to surrogacy. First of all, it will examine to which extent, if at all, the development of reproductive rights in Strasbourg jurisprudence was a contributing factor to the liberalisation of Russian surrogacy law. Thus, sub-chapter 6.1 will explore the development of reproductive rights under the ECHR in order to identify whether the right to make use of assisted reproduction techniques has developed, by way of case law, to such an extent as to inspire a permissive approach to surrogacy arrangements in Russia. Sub-chapter 6.2 will look at Russia's compliance with Strasbourg case law, more specifically whether Russia tended to comply with Strasbourg judgments against it and followed principles established in judgments against other States which update Convention obligations *erga omnes partes*. The chapter will also look at the media framing of surrogacy and its relationship with the state so as to identify whether the media could have influenced surrogacy law. Lastly, the chapter will also examine the state's biopolitical agenda as a probable factor that could have influenced the law's liberal direction. As Russia is facing the demographic crisis, the state has introduced various measures that encourage reproduction.

6.1 Freedom to access assisted reproduction treatment as a result of liberal approach to regulating the ART

The importance of reproduction is reflected in its legal recognition in various instruments. For example, art. 16 of the Proclamation of Tehran 1968 provides that the "parents have a basic human right to determine freely and responsibly the number and the spacing of their children."[12] This was followed by the official reference to 'reproductive rights' in UNFPA-organised Programme of Action in Cairo in 1994. The references may be found in a few paragraphs,[13] including 7.3, which notably states that "*reproductive* rights embrace certain human rights that are already recognised in national

[11] This is reserved to the President of the Russian Federation, the members of the Council of the Federation, the members of the State Duma, the government of the Federation, legislative branches of the subjects of the Federation, the Constitutional and High Courts – see 'How the Initiatives become Law' (3 Sep 2019) the State Duma of the Federal Assembly at < http://duma.gov.ru/news/46126/ > accessed 5 Jan 2023.

[12] Art. 16 of the Final Act of the International Conference on Human Rights 1968 A/CONF.32/41 4 at <https://legal.un.org/avl/pdf/ha/fatchr/Final_Act_of_TehranConf.pdf > accessed 22 May 2018.

[13] Paras 4, 7.2, 7.13, 7.34, 7.41, 11.15 and 3. See Programme of Action adopted at the International Conference on Population and Development Cairo, 5–13 September 1994 20th Anniversary Edition at <https://www.unfpa.org/sites/default/files/pub-pdf/programme_of_action_Web%20ENGLISH.pdf> accessed 22 May 2018.

laws, international human rights... These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health."[14] Arguably, however, it is the European Convention on Human Rights and Fundamental Freedoms whose jurisprudence had the most influential contribution to the development of a right to procreate, including, in principle and subject to legitimate State restrictions, by having recourse to assisted reproduction methods. As one of the "greatest projects in human history,"[15] the Convention is said to become the "most effective [safeguard of the] human rights regime in the world."[16] The Russian Federation was one of the latest accessors to the ECHR[17] which recognised the latter's jurisdiction in 1998.[18] By passing the Federal Statute, ratifying the ECHR Russia bound itself to comply with the ECHR standards,[19] including insurance of the appropriate level of protection of reproductive rights. Russia ceased to be a contracting party to the ECHR on the 16th of September 2022 following the conflict in Ukraine.[20] Until its withdrawal there had been no case concerning assisted reproduction or surrogacy brought against Russia. As Russia used to be bound by *res interpretata* principle,[21] in order to ascertain to what extent Russian surrogacy legislation may have been influenced by the development in Strasbourg's case-law, the position of the ECtHR on surrogacy needs to be analysed against the general background of case-law concerning reproduction. This sub-chapter will show the advances that were made by the ECHR in the sphere of assisted reproduction and surrogacy more specifically. It will also conclude that these advances have certain limitations not only provided by art 8(2) but also Strasbourg's own cautious approach to surrogacy. This sub-chapter will conclude that as the ECtHR has not recognised the right to surrogacy, Strasbourg

[14] Ibid para 7.2.
[15] Linos-Alexandre Sicilianos, 'The European Convention on Human Rights at 70: The Dynamic of a Unique International Instrument' (2020) 11 *Iustinianus Primus Law Review* 1, 1.
[16] Helen Keller and Alec Stone-Sweet, 'A Europe of Rights: The Impact of the ECHR on National Legal Systems' in Helen Keller and Alec Sweet-Stone (eds.) A Europe of Rights: The Impact of the ECHR on National Legal Systems (Oxford University Press 2008) 3.
[17] 'The Council of Europe Map and Members' at https://www.coe.int/en/web/tbilisi/the-coe/objectives-and- missions
[18] It recognised the ECHR jurisprudence by passing the Federal Statute № 54-FL "On ratifying the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto." See Anatoly Kovler, 'European Convention on Human Rights in Russia' (2014) 374 L'Europe en Formee 1, 1.
[19] Generally, Ramona Nicoleta Predescu, 'Medically Assisted Reproduction with a Surrogate Mother in the Jurisprudence of the European Court of Human Rights' (2019) *Conferinta Internationala de Drept, Studii Europene si Relatii Internationale* 126, 128.
[20] 'Russia ceases to be a Party to the European Convention on Human Rights on 16 September 2022' (23 Mar 2022) *Council of Europe Newsroom* at < https://www.coe.int/en/web/portal/-/russia-ceases-to-be-a-party-to-the-european-convention-of-human-rights-on-16-september-2022#:~:text=Following%20its%20expulsion%20from%20the,by%20the%20Committee%20of%20Ministers.> At the time when the thesis was initially written up Russia was still a party to the ECHR.
[21] Arts. 1, 19 and 32 ECHR. See also generally Oddný Mjöll Arnardóttir, 'Res Interpretata, Erga Omnes Effect, and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the ECtHR' (2017) 28 *European Journal of International Law* 819-843.

jurisprudence may not serve as an influence on liberalism in Russian surrogacy legislation. Since Russia is not bound by the ECtHR judgments anymore, the cases concerning surrogacy that were decided after Russia ceased to be a contracting party will not be considered below.

Two provisions of the ECHR appear to constitute the legal basis for the right to procreate under the Convention - namely, arts. 12 and 8. Art. 12 reads that "men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right."[22] Art. 8 provides that "everyone has the right to respect for his private, and family life, his home and his correspondence."[23] Whilst art. 12 is treated as being more elastic, there are, however, restrictions on both articles. At first glance, the right to procreate seems to fit well within the scope of art. 12 – it is a logical continuation of the rights to marry and found a family – in fact, procreation, marriage and family do share the same context.[24] The fact that art. 12 constitutes the ground for the right to procreation has been evident from the ECtHR jurisprudence itself. As long ago as in 1977 in *X and Y v. United Kingdom* the Court explicitly stated that "it is implicit in Article 12 that it guarantees *a right to procreate children*."[25] It is clear that the provision placed emphasis on the right to found a family as being equal to right to self-determination[26] as well as highlighting that children are crucial to the existence of a family.

However, the rapid development of assisted reproduction also resulted in the Court's hesitancy to widen the scope of art. 12: the ECtHR has suddenly refrained from the application of art. 12 to procreation cases. First of all, it seems that the meaning of art. 12 is simply too 'narrow' for the modern realities: it is suggested that not only does it apply only to heterosexual couples, but is also confined to a traditional concept of family whereby the children would be genetically related to their parents.[27] Secondly, the wording of the provision is confining: it provides that the right is exercisable in accordance with national legislation, which means that the national restrictions would prevent the provision from being applied in new situations if they "impair the substance of the right." [28] Yet, in relation to art.8, for the development of its jurisprudence on assisted reproduction, the Court relies on a broader scope of the provision. Currently, the interpretation of art.8 indicates the Court's twofold approach: the prohibition of *interference* with family and private life on the one hand and the

[22] Art.12 ECHR.
[23] Art. 8 ECHR.
[24] Marleen Eijkholt, 'The Right to Found a Family as a Stillborn Right to Procreate?' (2010) 18 *Medical Law Review* 127, 133.
[25] *X and Y v. United Kingdom* (app. no. 7229/751977 ECtHR 15 Dec 1977).
[26] Eijkholt above (n24) 133.
[27] Ibid.
[28] Ibid.

imposition of positive obligations on the other. In *Marckx v. Belgium* the Court concluded that "…the object of the Article is "essentially" that of protecting the individual against arbitrary interference by the public authorities… Nevertheless, it does not merely compel the State to *abstain* from such interference: in addition to this primarily negative undertaking, there may be *positive obligations* inherent in an effective "respect for family life."[29]

Indeed, the ECtHR recognises that right to procreation is protected by the Convention. In *Dickson*, for example, one of the parties to the marriage, the husband, was imprisoned for murder.[30] At the husband's earliest release date, his wife would have turned 51, thereby not being of child-bearing age. The couple requested to have access to assisted reproduction technology whilst the husband was still in prison. The Secretary of State refused the request on grounds of public interest and the issue subsequently went to Strasbourg. Not only has the Court decided that the refusal constituted an interference with art. 8 but also extended the right to 'become a parent' to cover the right to use the ART for these purposes.[31] The subsequent case-law seems to indicate that the right to procreate became a separate right in itself.[32] For example in *Evans v. United Kingdom*[33] the applicant, Ms Evans, was diagnosed with ovarian cancer and decided to freeze the embryos to use after she becomes cancer-free. The applicant's partner, despite the initial willingness to undergo the treatment, withdrew his consent upon the relationship breakdown. The applicant argued that the law allowing the withdrawal of consent amounted to violation of art 8. The Grand Chamber ruled against Ms Evans and held that her wishes to become a parent should not be prioritised over her ex-partners' wishes not to become a parent.[34] The Court decided that the right to become (or not become a parent) falls within the scope of art. 8: "private life" … is a broad term encompassing, inter alia, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world… incorporates the right to respect for *both* the decisions *to become and not to become a parent*."[35]

[29] *Marckx v. Belgium* (1979) 2 EHRR 330 at para [31].
[30] *Dickson v. United Kingdom* (app. no. 44362/04 ECtHR 15 Dec 2007).
[31] Ibid [66].
[32] See Guillem Cano Palomares, 'Right to Family Life and Medically Assisted Procreation in the Case Law of the European Court of Human Rights' in Maribel González Pascual and Aida Torres Pérez (eds.) *The Right to Family Life in the European Union* (Routledge 2017).
[33] *Evans v. United Kingdom* (app. no. 6339/05 ECtHR 10 Apr 2007*)* paras [75]-[76].
[34] *Evans* above (n33).
[35] Ibid [71].

In *Costa and Pavan v. Italy*[36] the intended parents were the healthy carriers of cystic fibrosis, a genetic disorder potentially leading to reduced lung function. Concerned that the disease will be passed onto their children, the applicants opted for assisted reproduction technology and screening to eliminate any potential risks. The offending Italian law, however, whilst allowing abortion at a later stage, prevented the couples with genetic disorders from relying on IVF as well as pre-implantation screening.[37] The Court ruled that the prohibitive legislation violates the couple's right to private and family life. The Court observed that the future parents have "a *right to have a child* unaffected by the disease of which they are healthy carriers."[38] The decisions illustrate a gradual transition from a mere recognition of the right to become *a genetic* parent to the right to become a parent through assisted reproduction technology as being protected by the ECHR.

Surrogacy, however, has come under the ECtHR's radar fairly recently. Given the legal fragmentation within the world, cross-border surrogacy has become more popular, thereby leaving more couples and children in a vulnerable position. The Signatory States' attitudes to the arrangement vary from 'permission, tacit tolerance, and regulation' on the one hand, to a complete prohibition on the other.[39] Out of forty-seven States signatory to the ECHR surrogacy is allowed in seven,[40] with commercial surrogacy being legal only in three.[41] The position of the intended parents also varies from state to state. A biologically- related intended father may establish his paternity to a surrogacy-born baby in thirty-one state, inclusive of twelve where surrogacy is illegal. By contrast, in only nineteen states a non- biological mother may establish her maternity, including seven states where surrogacy is not legal.[42] Russia's position on surrogacy has been fairly uncontroversial: not only

[36] (app. no. 5427/10 11 Feb 2013).
[37] See Adriana Di Stefano 'Bio-ethics under Human Rights Scrutiny: Toward a Right to Pre-implantation Genetic Testing under the ECHR?' (20 Sep 2012) *StrasbourgObservers* at https://strasbourgobservers.com/category/cases/costa-and-pavan-v-italy/ .
[38] *Costa and Pavan* above (n36) para [65].
[39] In general, Rapport Preliminaire sur les Problemes Decoulant Des Conventions de Maternite de Substitution a Caractere International (2012) Conference de la Haye de Droit International Prive. See also Mario Gervasi, 'The European Court of Human Rights Shaping Family Life in Cross-Border Surrogacy: The *Paradiso* et *Campanelli* case' in Elena Carpanelli and Nicole Lazzerini (eds.) *Use and Misuse of New Technologies: Contemporary Challenges in International and European Law* (Springer 2019) 152.
[40] The Netherlands, the UK, Albania, Greece, Georgia, Ukraine and Russia. At the time of the writing Russia was still a party to the ECHR.
[41] Russia, Ukraine and Georgia. See Sara Rintamo, 'Regulation of Cross-Border Surrogacy In Light of the European Convention on Human Rights & Domestic and the European Court of Human Rights Case Law' (2016) University of Helsinki at https://helda.helsinki.fi/bitstream/handle/10138/164942/Sara%20Rintamo%20Masters%20Thesis.pdf?sequence=2&isAllowed=y.
[42] *Marckx* above (n29) paras [22]-[24].

is the practice legal but the state also allows the registration of foreign birth certificates.[43] This seems to accord with the Advisory Opinion on the *Mennesson* case (discussed below). The ECtHR appears to opine that "the national legislation of any country should provide an opportunity to recognise the legal relationship with the intended mother, registered on the birth certificate, recognised abroad."[44]

Nevertheless, the advancement of art. 8 jurisprudence in the sphere of surrogacy remains rather limited. Despite the expansion of art. 8 to assisted reproduction technology cases, there is a significant qualification provided in para 2: it provides that interference with art 8 is acceptable only if it is "in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Furthermore, the existing case-law mostly appears to focus on the best interests of the children, rather than the rights of the parents. The cases of *Mennesson and Others v. France* and *Labassee v. France,*[45] *Paradiso & Campanelli v. Italy*[46]as well as the recent *Fjölnisdóttir and Others v. Iceland*[47] illustrate the restrictive nature of art. 8(2) and the general refrain of the Court from either authorising or prohibiting surrogacy.

In *Mennesson* and *Paradiso* the Court seems to have made best interests of the child its main consideration, rather than the rights of the parents.[48] *Menesson* became a 'watershed moment for the regulation of international surrogacy in Europe.'[49] The Mennessons and the Labassees had their children born through a surrogacy arrangement following an oocyte donation in California - where surrogacy and oocyte donations are legal and commercially remunerated. This deemed the children being genetically related to their intended fathers only. Although on the American birth certificates it was stated that the applicants are the legal parents, this was not the case in the transcription of the French records. The French authorities refused to grant legal recognition to a parent-child relationship on the basis of public policy. Surrogacy was said to be irreconcilable with public policy seeking to

[43] Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation, Request no. P16-2018-001 from 10/04/2019 delivered by the European Court of Human Rights 4-5
[44] Advisory Opinion, above. See also Konstantin Svitnev, 'The ECtHR. The First in History Advisory Opinion on the Issues of Surrogate Motherhood" (15 Apr 2019) Rosuyrkonsalting at <https://jurconsult.ru/news/espch- pervoe-v-istorii-konsultativnoe-zaklyuchenie-po-voprosam-surrogatnogo-materinstva/>.
[45] *Mennesson and Others v. France; Labassee v. France* (app. no. 65192/11 & no 65941/11 ECthR 26 Jun 2014)
[46] *Paradiso and Campanelli v. Italy* (app. no. 25358/12 ECtHR 24 Jan 2017).
[47] (app. no. 71552/17 ECtHR 18 Aug 2021).
[48] Mennesson para [80] and Paradiso para [208].
[49] Claire Fenton-Glynn, 'International Surrogacy Before the European Court of Human Rights' (2017) 13 *The Journal of Private Law* 546, 555.

protect public morals.[50] The Court of Cassation observed that it is "contrary to the principle of the unavailability of the status of persons, an essential principle of French law, to give effect with regards to kinship, to a convention on pregnancy for someone else."[51] Subsequently, in 2010 the Court of Appeal decided to annul the entries of the birth certificates.[52] The ECtHR found that it is the children's 'family life' was engaged in the instant case.[53] The Court focused on the rights of the children, more specifically, the right to personal identity, to which biological connection is crucial.[54] It argued that the children's right to inheritance would also be negatively affected if their parentage status is not determined.[55] Thus, the failure to recognise the connection between the applicants and the children constituted an interference with the right to respect family life.[56] Yet, in relation to parents the ECtHR reached a conclusion that whilst there was interference with their rights under art. 8, there was no violation of the parents' right to private life: the administrative and other complications they were encountering were not 'unsurmountable.'[57] *De facto* family life was said to be possible even if the parents' link with the children is not legally recognised.[58] The Court also noted that the interference pursued legitimate aims – that is, the protection of health and rights of others.[59] The Court reiterated the absence of consensus between the signatory states and noted that the states enjoy discretion as to the prohibition of surrogacy.[60] Yet, it also acknowledged that "when applying the public policy exception to the results of a foreign surrogacy, the signatories have to ensure a fair balance of interests with regard to the private and the family life of the parties involved."[61]

[50] Art 16-7 of the Code Civil. See Richard Blauwhoff and Lisette Frohn, 'International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law' in Christophe Paulussen, Tamara Takacs, Vesna Lazić and Ben Van Rompuy, *Fundamental Rights in International and European Law* (Springer 2016) 220.

[51] The Court of Cassation in Gregor Puppinck, 'ECHR: Towards the Liberalisation of Surrogacy Regarding the Mennesson v France and Labassee v France cases (n° 65192/11 & n° 65941/11) (2014) 118 Revue Lamy de Droit Civil 2 at The Resolution of the Plenum of the Supreme Court № 8 from 31 Oct 1995 at https://www.vsrf.ru/documents/own/8342/ .

[52] Ibid.

[53] *Mennesson* para [45] and *Labassee* para [37].

[54] *Mennesson* para [100].

[55] *Mennesson* para [98].

[56] *Mennesson* paras [48-49] and *Labassee* para [49].

[57] Mennesson paras [92-94] and Labassee paras [71-73]. See Liesbet Pluym, '*Mennesson v. France and Labassee v. France*: Surrogate motherhood across borders' (16 Jul 2014) *StrasbourgObservers* at https://strasbourgobservers.com/2014/07/16/mennesson-v-france-and-labassee-v-france-surrogate- motherhood-across-borders/.

[58] Mennesson above (n45).

[59] *Mennesson* para [62] and *Labassee* para [54].

[60] *Mennesson* para [58] and *Labassee* [79].

[61] Mennesson para [84]; see also Christian Kalin, 'Transnational Surrogacy in the Light of the Case-law of the European Court of Human Rights' (2017) 6 Journal of Siberian Federal University: Humanities & Social Sciences 906, 908

The case is significant for a few reasons. On the one hand, it may be argued that at least partial recognition of surrogacy might now be provided to the participating states.[62] The Court seems to *implicitly* agree that surrogacy does not contradict human rights.[63] The fact that France had to 'justify every limitation, and consequently every infringement of rights and freedoms'[64] might indicate that in the future the court might explicitly decide on liberalisation of surrogacy. However, at the same time it shows a missed chance for the Court to clarify the states' obligations in regard to art. 8 thereby 'turning a blind eye on an opportunity to do so much more and delineate the need for international regulation of surrogacy.'[65] Indeed, the Court clarified that there are no legal obligations to either legalise or recognise surrogacy in France or any other signatory state. Neither are the states obliged to recognise the birth certificates for the children born out of surrogacy arrangement, despite the latter being required to protect the child's identity in cross- border surrogacies. Instead, the Court simply provided an opportunity to 'establish a child- parent relationship' so as not to compromise the former's identity.[66] Achmad claims that by basing the decision on practical reality, rather than ethical issues the ECtHR emphasised the need for the laws concerning nationality and birth registration to be re- considered.[67] On the other hand, the Court seems to still 'allow surrogacy to be prohibited but restricts the impact and consequences of its prohibition.'[68] Accepting the argument based on public policy exceptions also carries certain dangers if used broadly. As Michaels observes, "it has the potential to undermine international regulation of parentage and surrogacy arrangements."[69]

Mennesson may be contrasted with the subsequent case of *Paradiso & Campanelli v. Italy*.[70] In *Paradiso*, the applicants were an aged couple which, having unsuccessfully waited for a child adoption,[71] had a child through the surrogacy arrangement with a Russian surrogate mother. Unlike in

[62] Ma´ire Nı´Shu´illeabha´in, 'Surrogacy, System Shopping, and Article 8 of the European Convention on Human Rights' (2019) 33 *International Journal of Law, Policy and The Family* 104, 106.
[63] Puppinck above (n50).
[64]Ibid.
[65] Nila Bala 'The Hidden Costs of the European Court of Human Rights' Surrogacy Decision' (2014) 40 *The Yale Journal of International Law Online* 11, 16.
[66] Cano Palomares above (n32).
[67] Ibid.
[68] ELSA 'Onto Regulating Surrogacy: A Policy Paper by ELSA Malta's Social Policy Organising Committee http://www.elsa.org.mt/wp-content/uploads/2015/11/OfficialPDF-Onto-Regulating-Surrogacy-templated.pdf 12.
[69] Chandler Michaels, 'A Booming Baby Business: International Surrogacy Arrangements And The Need For Regulation' (2022) 54 New York University Journal for International Law & Politics 1, 27.
[70] *Paradiso* above (n47).
[71] 'ECHR Says Removal of Infant from Surrogate Parents Interfered with Right to Respect for Private Life but was Justified under National Law', 24 January 2017 at https://www.hrlc.org.au/human-rights-case-summaries/2017/6/30/echr-says-removal-of-infant-from-surrogate-parents-interfered-with-right-to-respect-for- private-life-but-was-justified-under-national-laws.

Mennesson, in the instant case the child was not genetically related to either of the intended parents: for unknown reason the Russian clinic used anonymous genetic material. The Russian authorities issued a birth certificate which stated that the applicants are the legal parents of the child. Upon their return from Moscow to Italy, the applicants, also requested the corresponding documentation from the Italian authorities. The local authorities, however, refused the child's registration on the basis that the Russian-issued documents contained false information and instigated forgery proceedings.[72] The authorities also deemed the child to be the 'son of the unknown parents' which meant that the intended parents should have undergone the adoption procedure. At the same time the child was also separated from the intended parents and was placed in an orphanage so as to find him a foster family. The intended parents lost trace of the child's whereabouts for two years.[73] The applicants argued a violation of the rights to private and family life as protected by art. 8. In this case, the Grand Chamber concluded that the Italian law prohibiting surrogacy was compatible with the Convention.[74] The Court re-emphasised the absence of biological ties between the parents and children concluding that despite the parents held parentage for them, they were still not legal parents of the child. In *Paradiso* the ECtHR also seems to have focused on the best interests of the child. The Chamber held that a de facto family life within the meaning of Article 8 of the ECHR was created at the time the intended parents decided to become parents. The Court ignored the absence of legal relationship with the child. It concluded that the removal of a child from the family is an extreme action which means that by ordering the removal the state failed to strike a fair balance between public and private interests.[75] It argued that public policy justification was not sufficient enough to justify the approach to birth certificate, affecting the child's identity, as well as the removal of the child from the family simply based on its non-traditional method of birth.[76] Thus, this was a disproportionate response in relation to the child thereby interfering with art.8 ECHR.[77]

The conclusion of the Grand Chamber, however, was different. By the majority of votes, the Court decided that there has been no violation of art 8. The Court rejected that family life was created due to the lack of genetic connection as well as the short duration of the relationship between the

[72] It is not very clear how this transpired: "The Italian Consulate in Moscow informed the Campobasso Minors Court, the Ministry of Foreign Affairs and the Colletorto municipality that the file on the child's birth contained false information." See the Press Release 'Grand Chamber hearing in a case concerning the placement in social- service care of a child born in Russia as a result of a gestational surrogacy arrangement' (9 Dec 2015) ECHR 388 (2015) 1.
[73] Marianna Iliadou, 'Surrogacy and the ECtHR: Reflections on *Paradiso and Campanelli v. Italy'* (2018) 21 *Medical Law Review* 144, 145.
[74] *Paradiso and Campanelli* (n46) [170]-[174].
[75] Ibid GC [86].
[76] Ibid paras [79] to [84].
[77] Ibid.

parents and the child.[78] The Court agreed that the Italian state pursued a legitimate aim, and the interference was necessary in a democratic society:[79] allowing the child to remain with the parents would be "legalising the unlawful situation created by them as a *fait accompli.*"[80] The Court concluded that the interference with private life was proportionate.[81]

Rather interestingly, there appeared to be some tension between the political position of the Court and Russia's own judge – Judge Dedov. In his concurring opinion he was very outspoken in the criticism of surrogacy and insisted that the Court should stop hiding behind the cloak of the margin of appreciation. He observed that "surrogacy presents one of those challenges" and rhetorically asked: "who we are – a civilisation or a biomass? – in terms of the survival of the human race as a whole."[82] In the eyes of Dedov, the ECtHR simply avoid responsibility by reusing to take a firm stance on ethically controversial matters.

The recent case of *Fjölnisdóttir and Others v. Iceland*[83] was another opportunity for the Court to clarify its approach to surrogacy. *Fjölnisdóttir* was concerned with an Icelandic couple, Ms. Fjölnisdóttir and Ms. Agnarsdóttir, who entered into a surrogacy contract with the surrogate mother from California. Neither of the intended parents were genetically related to the child. Upon birth the child was granted US citizenship that allowed him to be travel back to Iceland. The couple applied to the relevant authorities for the birth certificate to be transcribed in Iceland. The authorities, however, refused the transcription arguing that it was the surrogate mother that was the legal mother of the child. The fact that the couple's parenthood was established under Californian law, made no difference which meant that adopting the child was the only option. The couple sought judicial review of the decision and in meantime got divorced. This meant that they could not adopt the child jointly. The authorities granted Fjölnisdóttir custody of the child with Agnarsdóttir allowed to have contact. They also granted the child Icelandic nationality. The couple still decided to pursue legal parenthood and after an unsuccessful claim before the Supreme Court, the case went to Strasbourg. The ECtHR decided that since the couple cared for the child since birth there was an interference with art. 8. However, in the Court's view this interference was justified: not only did it pursue a legitimate aim of protection of surrogates from exploitation but also was proportionate. By granting custody to one

[78] Ibid [157].
[79] Ibid para [167].
[80] Ibid para [209].
[81] Ibid para [215].
[82] Concurring opinion of Judge Dedov in ibid.
[83] (2021) (Application no. 71552/17).

parent and allowing contact to another the state took reasonable steps to 'compensate' for the inability to grant legal parenthood.[84]

The above decisions might be criticised for being a retrogressive step in the ECtHR surrogacy jurisprudence. Both *Paradiso* and *Fjölnisdóttir* illustrate the problems created by the legal patchwork within the signatory states' approaches – potential statelessness and parentlessness of a child. In both cases the Court focused on the absence of biological link between the parents and the children as the basis for refusing legal parenthood. It appears that by adhering to the requirement of genetic ties the Court was potentially seeking to reduce the chances for a child being harmed. As Metz notes, the need for genetic link seems to be justified by "the prospect of harm to the child; a slippery slope towards systemic eugenics; a principle of respect to human nature and a principle of developing one's humanness."[85] However, these rationales do not seem to be convincing. First of all, such prioritisation of the biological ties significantly narrows the concept of *de facto* family. A surrogacy arrangement might not always involve full genetic connection to the intended parents but may also have partial relation (related to one parent) or no genetic relation to them whatsoever. Determining family simply by means of biological connection excludes unconnected by blood yet genuine relationships from the definition of a family thereby also denying them art. 8 protection. The studies carried out in other jurisdictions revealed that the absence of the genetic tie does not increase chances of harm to the child whatsoever.[86] Whilst it could be argued that the intended parents might still circumvent the strict legislation through adoption, sometimes the national rules exclude certain applicants from eligibility. *Fjölnisdóttir* itself is a clear example where the applicants could not adopt the child because Icelandic legislation precludes single parents from adopting a child. Furthermore, the restrictive interpretation of the notion of family life seems to indicate that not all families deserve legal protection. As Iliadou argues, in *Paradiso* the Court placed too much emphasis on the notion of 'illegality' and the fact that the legal uncertainty the couple found itself in was self-inflicted.[87] This, in turn, gives an impression the intended parents have 'stolen' the child from Russia, a state where surrogacy is, in fact, legal.[88] The differentiation between legal and illegal families also does not fit the ECtHR's own non-discriminatory development of the concept of a family.[89] Such an approach could have some further implications for the intended couples. The lack of certainty as to whether parenthood will be granted

[84] Julian W März, 'What makes a parent in surrogacy cases? Reflections on the Fjölnisdóttir et al. v. Iceland decision of the European Court of Human Rights' (2021) Medical Law International 272, 275.
[85] T. Metz, 'Questioning South Africa's 'genetic link' requirement for surrogacy' (2014) 7 South African Journal of Bioethics and Law 39, 39.
[86] Ibid.
[87] Iliadou (n73) 150.
[88] Ibid.
[89] See e.g. *Marckx v. Belgium* (1979) 2 EHRR 330.

might either discourage them from entering into cross-border surrogacy arrangement altogether or leave those, like the *Paradiso* and *Campanelli*, who fell victims of the clinic's error in a vulnerable position.[90] Iliadou further contends that allowing the claims of the genetically-related parents but not non-related ones who were subject to either genuine error or negligence is, at its best, arbitrary.[91]

Overall, it appears that the Strasbourg's advancements in the sphere of procreation cannot explain the liberal approach in Russia. Whilst it may be argued that the unfavourable outcomes in both *Paradiso* and *Fjölnisdóttir* do not mean that the Court is seeking to limit access to surrogacy 'through the back door' and instead Strasbourg seems to adopt a fairly consistent approach. As Puppinck notes, the Court is "progressively legitimising surrogacy by a rapid succession of decisions each carrying further the liberalisation of this practice..."[92] *Paradiso* and *Fjölnisdóttir* neither contradict nor constitute an exception to this approach. In fact, they confirm what has been established by *Mennesson* and *Labassee*. It is becoming clearer that in order to avail the ECHR protection there must be genetic connection with at least one parent. Thus, in its Advisory Opinion P16- 2018-001 the Grand Chamber reinforced *Mennesson* and *Labassee* by confirming that the child's "right to respect for private life within the meaning of Article 8 of the Convention requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother."[93] This Opinion noted that if the legal parenthood of the husband, the intended father, is recognised under the national law, the states must also ensure that the wife, the genetic intended mother, should also be put on the birth certificate.[94] Furthermore, it appears that the scope of the Opinion is not simply confined to the case at stake. The Court explained that if the genetically-related parent is the mother, the case would be even stronger - "the need to provide a possibility of recognition of the legal relationship between the child and the intended mother applies with even greater force in such a case."[95] On the other hand, however, the case seems to be a cornerstone for "children's rights rather than "a continuing trend towards liberalisation of surrogacy."[96] In fact, the ECtHR has not created the right for the intended parents to oblige the national authorities to recognise the relationship with the child even if surrogacy is legal in the state where the child was conceived and born.[97] Although the Court

[90] Iliadou (n73) 151.
[91] Ibid.
[92] Gregor Puppinck, 'The liberalisation of surrogacy through the ECHR' at <https://eclj.org/surrogacy/echr/the-liberalisation-of-surrogacy-by-the-echr>.
[93] Advisory Opinion of the Grand Chamber to the Cour de Cassation (10 Apr 2019) P16-2018-001. See also Marz above (n80) 39.
[94] Advisory opinion ibid 1.
[95] Ibid para 47.
[96] Claire Achmad 'Children's Rights to the Fore in the European Court of Human Rights' First International Surrogacy Judgments' (2014) 6 *European Human Rights Law Review* 638, 646.
[97] Blauwhoff and L. Frohn above (n50) 230.

took the view that a positive obligation to access ART may be imposed,[98] this did not create a right to enter into a surrogacy arrangement.

6.2 Strasbourg influence on the legal landscape in Russia

According to art. 46 (1) the signatory states must "abide by the final judgments of the Court in any case to which they are parties."[99] The relationship between Russia and the European Court of Human Rights itself was relatively not long-standing: following the unsuccessful coup d'état in 1991, which sought to bring about liberal changes, it was not until 1996 when Russia finally became a member of the Council of Europe. This was followed by the ratification of the European Convention some two years later.[100] The accession has not only been a representation of Russia's initial pan-European enthusiasm,[101] but also an opportunity for the ECHR community "… to be exposed to the new influences and traditions…"[102] Having found itself in an uneasy position after the disintegration of the Soviet superpower Russia, as a successor state undertook to put all the due effort to facilitate the promotion of human rights.[103] The development has been met with applause by Russia and Europe yet it was still questioned to what extent, if at all, the promise was to be kept. Whilst Moscow accepted that "further efforts to democratize the Soviet Union will *not* meet further resistance from Soviet political culture,"[104] it is clear that the relations between Russia and Strasbourg were far from being a constructive dialogue. This unsteady relationship completely ruptured in 2022 when Russia was expelled from the ECHR jurisdiction and stopped the implementation of the ECtHR rulings.[105] Since the majority of milestones liberalising Russian surrogacy legislation happened during the state's membership in the Council of Europe, this sub-chapter will seek to determine whether the nature of the past relationship between Russia and the ECtHR could have been one of the reasons for the liberal developments. Although Strasbourg declared that the states are afforded the margin of appreciation when deciding on sensitive issues, such as assisted reproduction and surrogacy more

[98] Ibid.
[99] The ECHR.
[100] The ECHR was ratified on the 5th of May 1998.
[101] Vitaliy Baranovsky, 'Russia: a part of Europe or apart from Europe?' (2000) 76 *International Affairs* 443, 443.
[102] Rolv Ryssdal, the President of the European Court of Human Rights (1985-1998) in Bill Bowring, 'Russia's accession to the Council of Europe and Human Rights: compliance or cross-purposes?' (1997) *European Human Rights Law Review* 1, 1
[103] See generally Trude Johnson, Implementing Human Rights Norms: A Case Study of Russia's Partial Compliance to ECHR (Protocol No. 6, 2006) 7.
[104] James Gibson, Raymond Duch and Kent Tedin, 'Democratic Values and the Transformation of the Soviet Union' (1992) 54 *The Journal of Politics* 329, 329. Italics preserved.
[105] William Maclean and Mark Trevelyan (eds) 'Russian parliament votes to break with European Court of Human Rights' (7 Jun 2022) *Reuters* at < https://www.reuters.com/world/europe/russian-parliament-votes-exit-european-court-human-rights-2022-06-07/ >.

specifically, nevertheless, it is clear that a mutually respectful dialogue could have been enriching for the domestic legal system.[106] This sub-chapter will conclude that despite the moments of thaw the relationship between the ECtHR and Russia has been mostly strained, whereby Russia did not fully 'trust' Strasbourg.

The past relationship between Russia and Strasbourg may be described as rather troubled[107] and full of contradictions. Russia formally agreed for the international law to become part of the Russian legal system.[108] Whilst art.46(3) of the Constitution suggests that international law is directly applicable, thereby supporting compliance with both the ECHR and the Court's decisions,[109] the state was resistant to the implementation of the ECtHR judgments. The never-ending territorial conflicts, general lack of adherence to the rule of law as well as the pendulum-like historical developments determined the hostile perception of ECHR as an incarnation of the 'decaying West.'[110]

On the one hand, the idea of protection of human rights has never been completely alien to the Russian state. Even during the Soviet period there was some room for the observance of human rights - the Constitutions from Stalin to Brezhnev have had a few provisions providing for some rudimentary protection.[111] Whilst it may be suggested that the accession to the ECHR has been largely seen as a challenge to the Russian identity,[112] it marked, at least symbolically, a stronger pro- European attitude. Fura and Maruste observed the two stages of the Russian politics: the first one symbolising Russia's enthusiasm about its membership in the Council of Europe, which lasted approximately until mid-2000s.[113] Initially, Russia has strongly accorded with art. 46 of the ECHR and pledged to ensure conformity 'with the obligations of the Russian Federation arising from participation in the

[106] М. Посадкова, «Репродуктивное Право На Применение Суррогатного Материнства: От Буквы Закона До Правового Прецедента» (2022) *Медицина И Право В XXI Веке* 61, 81. M. Posadkova, «Reproduktivnoe Pravo Na Primenenie Surrogatnogo Materinstva: Ot Bukvy Zakona Do Pravovogo Precedenta» (2022) *Medicina I Pravo V XXI Veke* 61, 81. M. Posadkova, 'Reproductive Right for the Use of Surrogate Motherhood: From the Letter of Law to a Legal Precedent' (2022) *Medicine and Law in XXI century* 61, 81.

[107] Rene Provost, 'Teetering on the Edge of Legal Nihilism: Russia and the Evolving European Human Rights Regime' (2015) 37 *Human Rights Quarterly* 289, 289.

[108] Art.15(4) of the Russian Constitution 1993.

[109] Rachel Fleig-Golstein, 'The Russian Constitutional Court versus the European Court of Human Rights: How the Strasbourg Court Should Respond to Russia's Refusal to Execute ECtHR Judgments' (2017) *Journal of Transnational Law* 172, 185.

[110] Also known as 'the rotting West' – a famous Soviet term describing the moral values of the West that were deemed inappropriate by the Soviets. The term is still popular, especially in the context of LGBT protection, democracy and inclusivity.

[111] Social and economic rights were prioritised – see the USSR Constitution 1978 arts. 40-46.

[112] Generally, Marco Baboni and Carmelo Denisi, 'Reframing Human Rights in Russia and China How National Identity and National Interests Shape Relations with, and the Implementation of, International Law' (2020) 45 *International Comparative Social Studies* 61, 62.

[113] Interestingly, some suggested that the Russian amity towards the ECtHR has peaked during the Putin's early years – see William Simons, 'Russia's Constitutional Court and a Decade of Hard Cases: A Postscript' (2003) 28 *Review of Central & East European Law* 655, 655–678.

Convention and Protocols'[114] thereby confirming that Strasbourg jurisdiction is fully recognised. Only a year after the succession the High Arbitrage Court[115] has directed all Russian arbitrage courts to apply the norms as applied by the European Court of Human Rights in the sphere of property rights and justice.[116] With time, the scope of the direction was extended to other spheres of decision-making, promoting further integration of the ECtHR jurisprudence into the Russian legal system. The Russian Constitutional Court also showed certain degree of conformity by referring to Strasbourg cases in its own decisions even before the ratification of the ECHR. In other words, the cases were seen as very persuasive authorities, thereby not only giving effect to the latter's jurisprudence but also filling the gaps where the national legislation was silent.[117] This may be explained by the willingness of Russian judiciary to shift from conservative, rigid Soviet style of decision- making.[118]

On the other hand, despite some initial integration of the ECtHR judgments in the Russian legal order, it subsequently became apparent that the extent of the manifestation of the Strasbourg regime in Russian legal system remains limited. Russia is on the top list of the countries that have most applications filed against as well the highest record of refusals to comply with Strasbourg judgments.[119] Some explain this by the fact that not only the accession itself was not an easy journey but also there was Russia's general lack of readiness to become a member of the club. The military

[114] The Order of the Constitutional Court of the Russian Federation from 25 Jan 2001 N 1-П 'On the Case of Assessment of the Constitutionality of Provision 2 art. 1070 of the Civil Code of the Russian Federation arising out of applications of I. Bogdanov, A. Zernov, S. Kalianov and N. Trukhanov' at https://base.garant.ru/12121969/ translated by S. Marochkin, 'ECtHR and the Russian Constitutional Court: duet or duel?,' in Lauri Mälksoo and Wolfgang Benedek, *Russia and the European Court of Human Rights: the Strasbourg Effect* (CUP 2017) 94.

[115] From 1992 to 2014 the High Arbitrage Court heard procedural commercial cases and cases on other contentious matters. See Е. Васьковский, Учебник Гражданского Процесса (Краснодар 2003) 179. E. Vas'kovskij, *Uchebnik Grazhdanskogo Processa* (Krasnodar 2003) 179. E. Vas'kovskii, *Textbook on Civil Procedure* (Krasnodar 2003) 179.

[116] Айдар Султанов, «Влияние на право России Конвенции о защите прав человека и основных свобод и прецедентов Европейского Суда по правам человека» (2007) *Журнал Российского Права* 85, 85. Ajdar Sultanov, «Vlijanie na pravo Rossii Konvencii o zashhite prav cheloveka i osnovnyh svobod i precedentov Evropejskogo Suda po pravam cheloveka» (2007) *Zhurnal Rossijskogo Prava* 85, 85. Aidar Sultanov, 'The influence of the ECHR and the precedent of the European Court of Human Rights on Russian law' (2007) *Russian and International Law* 85, 85.

[117] S. Marochkin, 'ECtHR and the Russian Constitutional Court: duet or duel?' in Malksoo above (n109) 96.

[118] See, for example, С. Бумаргин, «Проблемы применения решений Европейского суда по правам человека при рассмотрении уголовных дел судами Российской Федерации» (2018) 12 *Всероссийский Криминологический Журнал* 299, 302. S. Bumargin, «Problemy primenenija reshenij Evropejskogo suda po pravam cheloveka pri rassmotrenii ugolovnyh del sudami Rossijskoj Federacii» (2018) 12 *Vserossijskij kriminologicheskij zhurnalb* 299, 302. S. Bumargin, 'The Problem of Application of Decisions of the European Court of Human Rights by Russian Courts when Considering Criminal Cases' (2018) 12 *Russian Journal of Criminology* 299, 302.

[119] Naser Abdel Raheem Al Ali, Elena Tchinaryan, Roman Dzhavakhyan and Natalya Lutovinova, 'Execution of judgments of the European Court of Human Rights' (2019) 8 *International Journal of Innovative Technology and Exploring Engineering* 1616, 1617.

events in the Chechen Republic resulted in suspension of the accession proceedings in 1995.[120] The government's doubtful attitude towards the ECHR reflected the uncertainties and potentially the ideological disagreements rooted in historical and political tremors that the country has been constantly experiencing. On the one hand, Russia remained nostalgic of the Soviet Union, thereby seeing the European Convention and the Council of Europe as a 'conventional western [ideal]'[121] harmful to the Russian emerging identity. The state was not ready for the so-called ideological reorientation.[122] The citizens, waiting for the positive changes to happen but also fearing that the communist regime might re-establish itself were willing to accept the novel more pro-European regime and become closer to Europe. Yet, whilst the newly born state has partially denied the communist legacy, it still could not shake off the aftermath of the old corrupt system. Corruption has manifested itself in lack of respect of the rule of law and extensive human rights abuse. Whilst some studies revealed that "… the legal order of the Russian Federation… [did] not meet… the standards of the Council of Europe as enshrined in the statute of the Council and the organs of the ECHR"[123] The public general distrust in the judicial system[124] might also add to suspicion of the human rights regime, more specifically, the chances of the latter's protection. The public generally tend to avoid resorting to judicial protection as they do not feel that their interests will be protected.[125]

The extent of the state's intrusion in the enforcement of Strasbourg's judgments as well as the extent of its systemic non-compliance with the latter[126] may be seen in two highly political yet illustrative cases. One of the most prominent ones proving this assertion is the famous *Navalny v. Russia*.[127] In 2020 Navalny was poisoned in a Russian airport. This was followed by a lengthy treatment in Germany. Upon his return to Russia Navalny was arrested and put in custody. Navalny

[120] Maciej Moryc, 'The Role of the Constitutional Court of the Russian Federation in the Enforcement of the European Court of Human Rights (ECHR) Decisions by Russia' (2018) *LXV Annales Universitatis Mariae Curie - Skłodowska Lublin – Polonia* 115, 116.
[121] Theodore P. Gerber, 'Public opinion on human rights in Putin-era Russia: Continuities, changes, and sources of variation' (2017) 16 *Journal of Human Rights* 314, 318.
[122] Generally, Maxim Ferschtman, Reopening of judicial procedures in Russia: the way to implement the future decisions of ECHR supervisory organs? in *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (Brill Nijhoff 1999) 123-135.
[123] Rudolf Bernhardt, Albert Weitzel and Felix Ermacora, 'Report on the Conformity of the Legal Order of the Russian Federation with the Council of Europe Standards' (1994) *Human Rights Law Journal* 249, 249.
[124] For the data from the early 2000s see Alexei Trochev, *Judging Russia: Constitutional Court in Russian Politics 1990-2006* (Cambridge University Press 2009) 250.
[125]Азамат Шандже и Марина Шандже, «Отношение Россиян к Судебной Системе: Факторы Формирования» (2021) *Гуманитарные, социально-экономические и общественные науки* 191, 193. Azamat Shandzhe i Marina Shandzhe, «Otnoshenie Rossijan k Sudebnoj Sisteme: Faktory Formirovanija» (2021) *Gumanitarnye, social'no-jekonomicheskie i obshhestvennye nauki* 191, 193. Azamat Shanzhe and Marina Shandzhe, 'The Attitude towards Russian Judicial System: The History of Formation' (2021) Humanitarian, Socio-Economic and Social Sciences 191, 193.
[126] Abdel Raheem Al Ali, Tchinaryan, Dzhavakhyan and Lutovinova (above n114) 1617.
[127] (app. no. 75186/12 ECtHR 10 Nov 2020).

applied to the ECtHR claiming that remaining in custody put his life in danger. The Court ordered at least temporary release from custody. The Russian government, however, explicitly refused to enforce the ruling, warning the West to stay away from its internal affairs.[128] Konstantin Chuychenko, the Russian Justice Minister, dismissed the Court's decision as 'baseless.' He observed that "[the Court's] demand is baseless and unlawful, because it does not contain any reference to any fact or any norm of the law, which would have allowed the court to take this decision."[129] In the famous *Yukos* case, decided just six years earlier, the Russian Constitutional Court took even more drastic steps – it allowed to "ignore" the ECtHR ruling.[130] In *Yukos* Strasbourg satisfied the largest compensation claim against the Russian state.[131] Russia's arguments were rejected and the state was given half a year to find a solution to 'for distribution of the award of just satisfaction.'[132] Russia, however, missed the deadline for the compensation plan set by the ECtHR. The Russian Constitutional Court claimed that ignoring the deadline was justifiable - Russia 'can step back from its [ECHR] obligations' if the Russian constitutional system is threatened.[133] A few politicians vocalised their attitudes towards the ECtHR after the decision. For example, the Speaker of the Russian Duma observed: "Russia did not transfer to this, or to any other transnational body, the right to revise our Constitution. Still, our motivation was driven by the fact that, in our opinion, individual ECHR decisions can be regarded specifically as, as I have said, entering into contradiction with the fundamental law of the [Russian Federation]."[134]

The famous *Yukos*[135] litigation provided an opportunity for the government to re-define the relations between the two legal systems. The perception of the decision clearly showed that the so-called 'honeymoon period'[136] between Russia and Strasbourg was definitely over. Although the RCC

[128] Andrew Roth, 'ECHR tells Russia to free Alexei Navalny on safety grounds' (17 Sep 2021) The Guardian at < https://www.theguardian.com/world/2021/feb/17/echr-tells-russia-to-free-alexei-navalny-on-safety-grounds>.
[129] 'The Constitutional Court Allowed not to Follow the Decision of the ECtHR on Yukos case' (19 Jan 2017) Meduza.io at < https://meduza.io/news/2017/01/19/konstitutsionnyy-sud-postanovlenie-espch-po-delu-yukosa-narushaet-konstitutsiyu.
[130] Russia dismisses European Court of Human Rights' call to free Navalny' (17 Feb 2021) *Reuters* at https://www.reuters.com/world/russia-dismisses-european-court-human-rights-call-free-navalny-2021-02-17/ .
[131] Neil Buckley, 'Moscow ordered to pay Yukos shareholders €1.9bn' (31 Jul 2014) Financial Times https://www.ft.com/content/5927a632-18a3-11e4-a51a-00144feabdc0
[132] Gabriela Baczynska, 'Top rights court rejects Russia's appeal over Yukos compensation' (16 Dec 2014) Reuters at https://www.reuters.com/article/russia-yukos-idUSL6N0U04J620141216 .
[133] 'Russia puts its law above European court rulings' (14 Jul 2015) BBC News at https://www.bbc.co.uk/news/world-europe-33521553 .
[134] Andriy Osavoliyk and Lyudmyla Kozlovska, 'Russia's ignoring of European Court of Human Rights decisions' (5 Feb 2016) *Open Dialogue* at <https://en.odfoundation.eu/a/7280,russias-ignoring-of-european- court-of-human-rights-decisions/> .
[135] *OAO Neftyanaya Companiya Yukos v. Russia* (app. no. 14902/04 ECtHR 15 Dec 2014).
[136] Ilya Lebedev and Michael Schwarz, At a Crossroads: Russia and the ECHR after Markin (2015) *Verfassungsblog on Matters Constitutional* at <https://verfassungsblog.de/crossroads-russia-echr-aftermath- markin-2/>.

stopped slightly short from declaring the Federal Statute that ratified the ECHR unconstitutional,[137] the current position started to resemble what Mälksoo calls a [first] attempt 'to be in and out at the same time.'[138] The 'clash with the Constitution' became an almost official justification for non-implementation of the ECtHR judgments.[139] Thus, in December 2015 Russia passed an amendment to the Federal Statute № 7-FCL extending the powers of the Russian Constitutional Court. The amendment allowed the Court to ignore the ECtHR's decisions if, in the Court's view, they are 'impossible to implement,'[140] or, in other words, are inconsistent with the Russian Constitution. The lower courts, when deciding on constitutionality of a norm, conflicting with the ECHR 'must petition to the Russian Constitutional Court to determine the ECtHR judgment and the applicable law conformity to the Constitution of the Russian Federation.[141] One of the foremost examples whereby the Russian Constitutional Court has 'exercised the constitutionality review'[142] was *Anchugov and Gladkov v. Russia.*[143] *Anchugov* was concerned with a blanket ban on voting rights of prisoners. The applicants argued that the ban constituted a violation of art. 3 protocol 1 of the ECHR – the right to free elections. The ECHR provision directly contradicted art. 32(3) of the Russian Constitution which explicitly demanded the disenfranchisement of prisoners.[144] Whilst the ECtHR noted that the states enjoy a wide margin of appreciation,[145] Russia "overstepped the margin of appreciation afforded … in this field and have failed to secure the applicants' right to vote guaranteed by Article 3 of Protocol No. 1."[146] The Russian Constitutional Court declared that the *Anchugov* decision is not-executable. Although the Court has diplomatically noted that the ECHR constitutes an integral part of the Russian legal system,[147] it also claimed that "the interaction of the European conventional and the

[137] The Decision of the Russian Constitutional Court "On the ratification of the European Convention on Human Rights and Fundamental Freedoms" from July 14, 2015 http://doc.ksrf.ru/decision/KSRFDecision201896.pdf See also Natalia Chaeva 'The Russian Constitutional Court and its Actual Control over the ECtHR Judgment in Anchugov and Gladkov' at <https://www.ejiltalk.org/the-russian-constitutional-court-and-its-actual-control- over-the-ecthr-judgement-in-anchugov-and-gladko/>.

[138] Lauri Mälksoo, 'Russia's Constitutional Court Defies the European Court of Human Rights: Constitutional Court of the Russian Federation Judgment of 14 July 2015, No 21-П/2015' (2016) 12 *European Constitutional Law Review* 377, 395.

[139] Katlijn Maflet, 'Russia and Europe. Changing the Rules of the Game' (2017) 1 *Sociology. Political Science. International Relations* 498.

[140] Ibid.

[141] The Decision of the Russian Constitutional Court "On the ratification of the European Convention on Human Rights and Fundamental Freedoms" translated by Rachel Fleig-Goldstein, 'The Russian Constitutional Court versus the European Court of Human Rights: How the Strasbourg Court Should Respond to Russia's Refusal to Execute ECtHR Judgments' (2017) *Columbia Journal of Transnational Law* 172, 205.

[142] Maflet (above n134) 498.

[143] *Anchugov & Gladkov v. Russia* (app. nos. 11157/04 and 15162/05 ECtHR 4 Jul 2013).

[144] Art. 32(3) of the Constitution of the Russian Federation.

[145] *Anchugov* above (n143) paras [94]-[95].

[146] Ibid para [110].

[147] The Decision of the Russian Constitutional Court of the Russian Federation from 19.04.2016 №12-P para 1.2 translated by A. Abashidze, M. Ilyashevich and A. Solntsev, "Anchugov & Gladkov v. Russia" (2017) 111 *American Journal of International Law* 461, 463.

Russian constitutional legal orders is impossible in the conditions of subordination."[148] The RCC seems to have achieved several goals – not excluding the possibility of "reinterpreting article 32(3) of the Russian Constitution in light of the ECtHR's judgment"[149] as well as "eliminating the threat to Russian legal sovereignty."[150]

The recent years marked further political alienation of Russia from Europe. The already existing distance has been extended as a result of Russia's external as well as internal relations. Following the annexation of Crimea in 2014 and the Council of Europe sanctions, Russia suspended its delegation to PACE for five consecutive years.[151] The state representatives remained firm in keeping their seats empty and promised to focus on other international organisations that do not encourage the so-called 'sanctions culture.'[152] The next few years marked an even more bumpy terrain for Strasbourg-Russia relations. In 2017 Russia refused to pay the membership subscription fee over the persecution of some of the Russian delegates over Crimea.[153] Sergei Lavrov, the Foreign Minister insisted that the payment would be withheld until the Russian delegates were restored in their rights.[154] Leach and Donald argue that Russia is almost 'creating a precedent' by walking out voluntarily and 'seeking to extinguish the effect of art. 46 ECHR'[155] thereby denying any future human rights protection to its citizens. In 2019 the resolution seeking to restore the delegation in their rights was passed, marking Russia's return in 'full and without any exceptions.'[156] The West met Russia's return with suspicion, labelling it as a 'threat and win.' As Glas commented, "Russia has won. The Assembly has not only lost this fight, but also part of its credibility by permitting Russia to return without attaching any

[148] Ibid.
[149] Ibid 465.
[150] See e.g. А. Николаев и Н. Грудинин, «Постановление Европейского Суда по правам человека по делу «Анчугов и Гладков против Российской Федерации» и его влияние на правовую систему России» (2015) *Вестник Омского университета. Серия «Право»* 69, 78. A. Nikolaev i N. Grudinin, «Postanovlenie Evropejskogo Suda po pravam cheloveka po delu «Anchugov i Gladkov protiv Rossijskoj Federacii» i ego vlijanie na pravovuju sistemu Rossii» (2015) *Vestnik Omskogo universiteta. Serija «Pravo»* 69, 78. A. Nikolaev and N. Grudinin, 'Judgment of the European Court of Human Rights in the case of Anchugov and Gladkov' (2015) 2 *Herald of Omsk University* 69, 78.
[151] Bill Bowring, 'Russia and European Convention (or Court) of Human Rights. The End?' (2020) 33 *Revue Quebecoise de Droit International* 201, 215.
[152] 'Russian Delegation left PACE until the end of 2015' (28 Jan 2015) Lenta.ru at https://lenta.ru/news/2015/01/28/leavepase/.
[153] Tom Batchelor, 'Russia cancels payment to Council of Europe after claiming its delegates are being persecuted over Crimea' (30 Jun 2017) The Independent at https://www.independent.co.uk/news/world/europe/russia- cancels-council-europe-payment-members-persecuted-a7816951.html.
[154] Ibid.
[155] Philip Leach and Alice Donald 'Russia defies Strasbourg: Is Contagion Spreading?' (2015) at <https://www.ejiltalk.org/russia-defies-strasbourg-is-contagion-spreading/> In fact, they suggest that the Decision targets other systems of human rights and international law to which Russia is signatory to.
[156] Bowring above (n151) 216.

'internal sanctions."[157]

The recent internal developments have the potential to further contribute to deeper lack of understanding between Russia and the ECtHR. 2020 symbolised an era for constitutional changes in Russia, that some label as a 'discouragement from applying to the ECtHR altogether.'[158] In May 2020 Vladimir Putin has suggested certain amendments to the Constitution to be introduced. After the all-Russian referendum the Decree officially brought the amendments into life.[159] Art. 79 of the 'amended' Constitution provides that the 'decisions made by international institutions are not enforceable if their legal interpretation is contrary to the [Russian] Constitution."[160] This constitutes a significant expansion of the powers of the Russian Constitutional Court and reduces the authority of the ECtHR for the purposes of compliance with the judgments. The 'amended' Constitution has also granted the Constitutional Court the powers to determine whether there are indeed clashes between the ECtHR judgments and the Constitution itself. Sergei Okhotin observed that the measures were possibly introduced in order to show the Russian citizens that their chances of obtaining relief are not very high thereby completely discouraging them from applying to Strasbourg: "there are certain attempts to persuade the citizens not to bring their case before the ECtHR… the propaganda framing of the headlines, such as "The ECtHR decisions are not complied with," "The Decisions of the ECtHR are not Compulsory for the Russian Federation"… only help to achieve this goal…"[161]

Overall it is clear that Russia and Strasbourg have experienced the decades of the relationship resembling the so-called 'cold peace'[162] whereby Russia simply agrees with the international law norms but refuses to apply them,[1233] or does so to the standards it thinks to be acceptable. While Russia's approach to human rights is not based on complete lawlessness – it is the *attitude* to human rights that differs from the rest of Europe.[163] Although this might be interpreted as Russia '[just] tak[ing] time to translate theoretical freedoms into the actual practice'[164] the reform within the state itself that also stagnated Russia in a Communist regime. On the one hand, the state initially tried to

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[157] Lize Glas, 'Russia left, threatened and won: its return to the Assembly without the Sanctions' (2 Jul 2019) *StrasbourgObservers* at <https://strasbourgobservers.com/2019/07/02/russia-left-threatened-and-has-won-its- return-to-the-assembly-without-sanctions/>.

[158] Sergei Okhotin, 'Will an Updated Constitution deprive the Russian citizens of the international mechanism of protecting rights?' (30 Jun 2020) Advgazeta at https://www.advgazeta.ru/ag-expert/advices/obnovlennaya- konstitutsiya-lishit-grazhdan-rf-mezhdunarodnogo-mekhanizma-zashchity-prav/.

[159] Bowring above (n151) 217.

[160] Yulia Khalikova, 'Russia's cat and mouse game with international courts' (8 Apr 2020) Riddle https://www.ridl.io/en/russia-s-cat-and-mouse-game-with-international-courts/.

[161] Ibid.

[162] Okhotin above (n153).

[163] Jeffrey Kahn, 'The Rule of Law under Pressure: Russia and the European Human Rights System' (2019) 44 *Review of Central and Eastern European Law* 275, 278.

[164] Richard Sakwa, 'Russia and Europe: Whose Society?' (2011) 33 *Journal of European Integration* 197, 197.

adhere to the ECHR standards. However, the period of 'friendship' was not to live long. The general suspicion of Strasbourg as the incarnation of the West that seeks to promote purely Western ideals, has also contributed to the perception of the ECtHR as a way to interfere with the Russian internal affairs. The relationship based on suspicion has become antagonistic after the 2014 fall out with Ukraine over Crimea annexation as well as the legal recognition of the right of the Russian Constitutional Court to ignore Strasbourg's rulings. The Constitutional amendments have been yet another catalyst to already shaken relations between ECtHR and the Russian Constitutional Court. Thus, it can be concluded that the uneasy relationship between Russia and ECHR could not have affected the evolution of surrogacy law in the Russian Federation.

6.3 The view of the media as a means to influence the legislation on surrogacy

Assisted reproductive technology fascinates the media due to its ability to re-define familial relationships as well as disrupting the conventional understanding of motherhood.[165] In some countries, like the US, it was the media that was a powerful tool sparking the parliamentary debate on changes in surrogacy legislation.[166] The widespread nature of surrogacy in Russia means that the practice also has not escaped the spotlight of the media attention often provoking conflicting opinions within the public body as well as those engaged in the industry. Some Russian resources see surrogacy as 'an act of selflessness' while others focus on the potential negative implications of the practice. Some resources equate it to baby-selling: "… ten years ago it portrayed a surrogate mother as a young woman who got pregnant by accident and decided to *sell* the baby…"[167] Whenever appearing on the news, it is still mostly seen as the so-called infant disease of the society, with the effect of shaming all the parties: the surrogate mother – for prioritising money over the child, the intended parents for engaging in a morally controversial arrangement instead of opting for adoption as well as the surrogate children for their questionable origins. The question, however, whether the media could have contributed to the shaping of surrogacy law. Therefore, the aim of this chapter is to uncover the attitude of the media – whether it has supported or opposed the liberal approach to surrogacy. For this purpose, this sub-chapter will look at the approach of talk-shows and newspapers. This chapter will conclude that the media does not have any influence on legislative reforms - it seeks

[165] See generally Susan Markens, 'The global reproductive health market: U.S. media framings and public discourse sabout transnational surrogacy' (2012) 74 Social Science and Medicine 1745, 1746.
[166] For example, the widespread criticism to the custody breakdown in *re Baby M* called for New York legislator's attention.
[167] 'Opinions on Surrogate Motherhood: Social Opinion is Shaped by the Media' (26 Jan 2016) Sweetchild available at <https://www.sweetchild.ru/genetic/arhive/mneniya-o-surrogatnom-materinstve> accessed on 11 January 2019. Sweetchild is one a part of the Multinational Agency of Reproductive Technologies and is a surrogacy clinic with an outstanding reputation.

to catch the attention of the audience and, at times, provides "some food for thought."

Media has always had some interest in assisted reproduction, including surrogacy. On the one hand, it might appear that the general media attitude towards surrogacy is rather negative, seemingly contradicting the latter's portrayal by the law. The analysis of talk-show debates[168] reveals that they are full of 'buzzwords' carrying mostly negative connotations, mainly in comparison between a surrogate and an incubator, a surrogate and a prostitute. The intended parents are always depicted as 'rich, entitled and spoiled,' with their fertility issues mostly overlooked. The child is seen as a product of 'sin' and is nothing more than a victim of the adults' affairs. In all shows, any positive references to surrogacy are kept to a minimum. This message is further 'sent' through the self-explanatory headlines highlighting the real-life problems caused by surrogacy. Amongst others the following headlines were used in some of the episodes: "a surrogate mother *has never received* the payment", "Let them speak: a mother *against* her will"[169] or "a *broken* agreement." The talk-shows incorporate a specific surrogacy case, or a real-life story is presented before the audience - *always* drawn from the negative experiences of at least one the parties involved in a surrogacy arrangement. The main participants are usually the parties implicated in an *unfortunate* surrogate arrangement – occasionally, the intended parents that might have been blackmailed by a surrogate mother.

However, it seems that the debates themselves do not appear either to *degrade* surrogacy in the public eyes, or make it look like a positive development. By exposing the negative side of surrogacy yet making it easy for the public to comprehend, they seek to 'fuel the hype,' rather than have some sort of definitive framing be it negative or positive. They seem to be merely driven by their own 'mindless talk' rhetoric.[170] Such framing does not seek to change public opinion or affect it in any way. The heavy wording of the headlines is merely used to 'prepare' the viewer to the 'negative' content of the episode. For example, the headline from one of the '*Let them Talk'* episodes claim that "[in the episode] we discuss *real* stories on which it is impossible to keep silence,"[171] thereby not only re-emphasising that vital importance of the debate at stake but also trying to make it more relatable to the public. Its catchy titles are aligned with the overall approach of exposing only the cases "where things went wrong." The dramatic atmosphere is created to catch attention, rather than to promote

[168] The following talk-shows were looked at: '*Pust' Govoryat*' ("Let them speak"); '*Muzhskoe/ Zhenskoe*' ("Masculine/ Feminine"); '*Pryamoi Efir*' ("Live Stream").
[169] 'Pust Govoryat – Mat' Ponevole' at https://www.1tv.ru/shows/pust-govoryat/vypuski-i-dramatichnye-momenty/mat-ponevole-pust-govoryat- vypusk-ot-01-12-2010.
[170] Julie Manga, *Talking Trash: The Cultural Politics of Daytime TV Talk Shows* (New York University Press 2003) 4
[171] 'Muzhskoezhesnkoe' at https://www.1tv.ru/shows/muzhskoezhenskoe .

stigmatization of surrogacy. As some of the shows' viewers admit – what they watch is 'weird' and 'bizarre' yet equally 'attention gabbing.'[172] They do not attempt to initiate a constructive dialogue-type conversation on the social acceptance of surrogacy between the members of the audience, and the experts are usually talked over by someone who seeks to provoke an open conflict. Despite the expectation that by being most closely linked to the state officials these channels would deliver the information in a way aligned with the overall state policies,[173] these expectations were not materialized in the case of the talk-shows.

The approach of the newspapers appeared to be fairly similar to talk-shows: having identified surrogacy as a contentious topic sparking public conversation decades ago, they continue to pay significant attention to it. Surrogacy appears to be as popular as other socially controversial issues, such as abortion, euthanasia and IVF.[174] Even in light of the daily amplifying coverage of COVID-19 pandemic, also significantly polarising public opinion,[175] surrogacy remained increasingly prevalent in the media. For example, only in July 2021 one of the leading newspapers made surrogacy subject for the news content 6 times.[176] It may be said that the newspapers' general attitude on the practice is divided: there are resources that focus on negative as well as the ethically questionable aspects of surrogacy. Others, on the contrary, side with the intended parents and claim that surrogacy is justifiable – they see it as the last chance for an infertile couple to become genetic parents.

At the same time, there appears to be some limited correlation between the newspapers reports and the legislative changes. The release of the publications usually coincides either with the important steps within the legislative amendments or medical developments in surrogacy. Initially, the articles appeared in early to mid-2000s with the 'neutral' purpose of simply acknowledging the

[172] Manga above (n170) 158.
[173] The data indicates that 51% of Channel 1 is owned by the state against 49% owned by Roman Abramovich's group. Russia 1, by contrast, is 100% state-controlled. 38,9% of shares state-owned, 9% owned by ITAR-Tass (state-owned informational bureau) 3% telecentre (state-owned) 49% Abramovich's group. It is common knowledge that the millionaire and the President are close (see e.g. "Abramovich is finally paying for his closeness to Putin?" https://www.inopressa.ru/article/22may2018/guardian/abramovich1 where it is assumed that the closeness might be the reason why Abramovich is having issues with the UK visa) The relationship would also mean that the channel is owned by Abramovich on paper only, whereas in reality this seems to amount to being state-owned;
[174] This conclusion has been reached via Yandex data collection toolbar. The news portals release at least one article per day featuring abortions and IVF.
[175] P. Sol Hart, Sedona Chinn, and Stuart Soroka, 'Politicization and Polarization in COVID-19 News Coverage' (2020) 42 *Science Communication* 679, 680.
[176] Yandex. Ru news search at <https://newssearch.yandex.ru/news/search?from=tabbar&text=%D1%81%D1%83%D1%80%D1%80%D0%BE%D0%B3%D0%B0%D1%82%D0%BD%D0%BE%D0%B5%20%D0%BC%D0%B0%D1%82%D0%B5%D1%80%D0%B8%D0%BD%D1%81%D1%82%D0%B2%D0%BE > accessed 29 Jul 2021.

practice's existence rather than seeking to express a particular view. Thus, *Argumenty i Fakty,* one of the most popular newspapers, mainly discussed artificial insemination in light of the US *In re Baby M* decision.[177] The subsequent publications constituted short and impersonal briefs on the Ministry of Health Order that was supposed to be proposed by the end of 2001.[178] Another paper, from 2002, also appears to be a careful piece simply raising awareness that surrogacy exists. Headlined "Who is she, the surrogate mother?"[179] it simply sought to clarify what a surrogate's functions are and to make the surrogacy provisions of the Family Code 1995 clear to the public. The article published a year later may be seen as a gradual shift to more 'high alarm' approach. Not only has it expanded on the legislative requirements of the Family Code but also shared some heartbreaking assumptions that the bond between the surrogate and the child is severed.[180] From 2005 onwards the number of issues where surrogacy was a subject- matter increased from 2 per year to 3-4 in general, peaking in 2012 when 13 articles were published in *Vzglyad*, another major news portal, compared to 20 by *Ria Novosti* and 12 by *A i F*. Not only does this show that the Russian media remains attentive to the developments in assisted reproduction[181] but also that the popularity of surrogacy has been steadily increasing over the years. The articles' content became more elaborative and detailed, offering the reader an opportunity to make an informed opinion on surrogacy as a practice. At the same time, the trajectory of the publications also seems to have shifted from a mere factual report to the so-called 'horror stories.' The newspapers started to portray commercial surrogacy as a 'root of all evil.' The analysis of the archived publications indicates that approximately 70% of the content presented by *Vzglyad*, *A i F* and *Ria Novosti* focus on the negative aspects of commercial surrogacy framing it as an arrangement that almost always ends badly.[182]

It is, however, questionable whether/ to what extent any legislative changes could have been influenced by the media sentiment. For example, one of the most important enhancements to

[177] 'When the State is powerless' (5 Sep 2001) A I F at < https://archive.aif.ru/archive/1668071 >

[178] 'An Order for Surrogate Motherhood is being prepared' (1 Nov 2001) A I F at < https://archive.aif.ru/archive/1693581.

[179] 'An Order on Surrogacy is being prepared' (9 Nov 2001) *A i F* at < https://aif.ru/archive/1693581 > accessed 12 Jan 2018.

[180] Maternal Instinct Demands' (7 Mar 2003) *A i F* at < https://aif.ru/archive/1694142 > accessed 12 Jan 2018.

[181] Anna Kuvychko has analysed the newspaper called *Izvestiya* to reach the conclusion that surrogate motherhood remains a topic for a heated debate for the media. See Анна Кувычко, «Суррогатное Материнство" Как Одна Из Основных Тем Дискурса Материнства В Российских Сми» (2019) 58 Медиа В Современном Мире. 58-Е Петербургские Чтения 185, 185. Anna Kuvychko, «Surrogatnoe Materinstvo" Kak Odna Iz Osnovnyh Tem Diskursa Materinstva V Rossijskih Smi» (2019) 58 *Media V Sovremennom Mire. 58-E Peterburgskie Chtenija* 185, 185. Anna Kuvychko, 'Surrogate Motherhood as one of the Main Topics of Maternity Discourse in Russian Media' (2019) 58 *Media in the Contemporary World* 185, 185.

[182] As Meduza.io, an independent source, has been founded only in 2014 the earlier content could not have been included in the analysis.

surrogacy legislation has been the enactment of the Federal Statute № 323-FL in 2012, which formally legalised surrogacy on a commercial basis. However, it appears that the media has paid little or no attention to either: the debates preceding the new law and the actual impact it had on surrogacy. For example, *Vzglyad* was one of the first papers reporting on the Statute. It released the brief at 5 a.m. on the same day as the new law was supposed to be approved for enactment.[183] The article, however, albeit being generally critical of this legislation itself, refrained from commenting on the potential benefits it might have on surrogacy practice. Unsurprisingly, following the 2012 legislation the frequency of the articles has accelerated: only in 2013 61 articles have been published.[184] Despite reporting the occasional input from the Church and the opposition,[185] focusing on negativities, *Ria*'s general framing remained as positive as it was before. The paper issued numerous articles where the State Duma members argue against the ban on surrogacy,[186] where the experts call for a careful regulation even an open respect for surrogate mothers.[187] Therefore, it seems that it is not the media framing that resulted in the new legislation in 2012. Rather it is the introduction of the new legislation that has, to some extent, impacted the frequency of releases and framing of surrogacy. The articles started to be published more often and the framing by some of the portals became slightly more surrogacy-friendly. The attitude of the media resembles a pendulum gradually shifting in accordance with the legislative amendments. Thus, it is clear that it is the media responses that are aligned with the legislative changes, not vice versa. Instead of acting as a 'tool for informing the legislative debate', the media 'reports' on the proposed legislative modifications *after* the proposals, debated 'behind the scenes,' are released in the public domain.

The "reactive" position of the media is pre-determined by historical and political peculiarities defining the relationship between the Russian state and the media. Freedom of expression in Russia remains very confined. Although a plethora of private media resources has mushroomed after the

[183] 'The SovFed will debate the Law on Healthcare Protection' (9 Nov 2011) *Vzglyad.ru* at <https://vz.ru/news/2011/11/9/537061.html > accessed 14 Jan 2018.
[184] 'Surrogate Motherhood' Search at < https://ria.ru/search/?query=%D1%81%D1%83%D1%80%D1%80%D0%BE%D0%B3%D0%B0%D1%82%D0%BD%D0%BE%D0%B5+%D0%BC%D0%B0%D1%82%D0%B5%D1%80%D0%B8%D0%BD%D1%81%D1%82%D0%B2%D0%BE >.
[185] 'Surrogate Motherhood threatens the world with extinction, opines Mizulina' (10 Nov 2013) *Ria Novosti* at <https://ria.ru/20131110/975842743.html accessed 16 Jan 2018.
[186] See e.g. 'The State Duma has not supported the ban on Surrogate Motherhood' (10 Oct 2013) *Ria Novosti* at <https://sn.ria.ru/20131110/975861374.html>; 'The Speaker Naryshkin is aganst the ban on surrogate motherhood' (11 Nov 2013) *Ria Novosti* at < https://ria.ru/20131111/976017480.html>; 'Surrogate motherhood must be regulated, reckons the United Russia' (11 Nov 2013) *Ria Novosti* at <https://sn.ria.ru/20131111/976057035.html> accessed 16 Jan 2018.
[187] Surrogate Mothers need to be respected, not stigmatised says an expert' (22 Nov 2013) *Ria Novosti* at <https://ria.ru/20131122/979047537.html > accessed 17 Jan 2018.

Soviet Union collapsed, it is highly questionable if they are *completely* independent from the state. Markov notes that private resources tend to be either owned by the private parties thereby serving their interests[188] or have significant links to the government: "around 80% of them are [still] directly controlled by the governmental branches… even if they are not founded by the government."[189] The state would control the material that is selected for publication and censorship as well as decide on the financial support of a specific publishing house. Ultimately, there is no media resource that would be *completely* independent from the government.[190] Despite its purpose of being a control *on* the government and the 'transmitter of opinions,'[191] the practical reality is the opposite: it merely facilitates the expression of the power. The extent of the oppression of free speech fits into the Russian position on freedom of speech when compared to the rest of the world. The data collected by the Freedom House indicates that Russia scored 83 points out of 100 as a country where the press "is not free."[192] It is rightly reported as being regulated by the discretionary governmental powers allowing the government to intervene into the media contents and censorship where it accords with the government's agenda.[193] The gradually tightening governmental control is reflected in the significant downgrade in the points score: from 60 points (partially free) in 2002[194] to 66 (not free) only a year later in 2003.[195]

Overall, it seems that newspapers' publications do not seek to carry any semantic charge beyond attracting a reader's attention. The talk-shows merely focus on the so-called 'horror stories' in order to captivate the readers' attention. Whilst at times the resources seemingly sought to deliver the content in a fairly neutral/ less alarming way, some of the papers use very 'disturbing' headlines and express an ultra-critical opinion of surrogacy. The newspapers also seek to attract the reader by exposing some emotional stories; the coverage of surrogacy became more extensive as the practice industry expanded. Subsequently the media's opinion became more polarised, each side supporting the opposing sides: either praising surrogacy for being the intended parents' blessing or assailing it

[188] Е Марков, «Государственное влияние в российских СМИ» (2012) Среднерусский вестник общественных наук 91, 91. E Markov, « Gosudarstvennoe vlijanie v rossijskih SMI» (2012) *Srednerusskij vestnik obshhestvennyh* nauk 91, 91 E Markov, The State's influence on Mass Media, Politology, *The Actual Aspects, A Mid-Russian Messenger of Social Sciences* 91, 91.
[189] Ibid.
[190] *Meduza* constitutes an independent resource, but due to the governmental suppression it has very limited means of outreach: social media e.g. Instagram and a website.
[191] Dorothea Schönfeld, 'The European Response to Violations of Media Freedom in Russia' in Lauri Mälksoo *Russia and European Human Rights Law, The Rise of Constitutional Argument, Law in Eastern Europe* (Brill Nijhoff 2014) 97.
[192] 0=most free vs. 100= least free. The data is accurate as per 2017; 'Freedom House Report' at https://freedomhouse.org/report/freedom- press/2017/russia.
[193] Ibid.
[194] 'Freedom House Report' at https://freedomhouse.org/report/freedom-press/2002/russia.
[195] 'Freedom House Report' at https://freedomhouse.org/report/freedom-press/2003/russia.

for the commercial element. The media hardly has a meaningful say on the legislative policies. The media's lack of power over the state's actions is a result of a peculiar historical treatment of press and free speech in general. Whilst surrogacy itself is not a politically sensitive matter, it constitutes an area of interest for both the media and the government.

6.4 The state's biopolitical agenda in light of demographic decline and the resurgence of nationalism

The 19th-20th centuries signify the 'era of [rapid] depopulation'[196] in Russia. The trend has also been pessimistically described as a reproductive catastrophe potentially leading to depletion of resources.[197] Various media resources have already alarmingly called for 'saving Russia from depopulation.'[198] It can be argued that the fluctuating downward trend in population, albeit emphasised as being critical, in fact is not a novelty. The demographic problem seems to be of re-occurring nature in Russian contemporary history with the sharp depopulation coming in periodic waves.[199] These usually reflected major historical events and were further exacerbated by political and social realities, such as the two World Wars,[200] the internal civil wars as well as the demographic shock that followed the dissolution of the USSR.[201] This has prompted the government to seek long-term solutions. This sub-chapter will argue that the state's liberal legislative response to surrogacy may have been determined by the historically appalling demographic situation in Russia. This chapter further contends that strengthening the sense of national belonging also lies behind state's desperate efforts to address demographic concerns. This is apparent from the very recent ban on surrogacy for foreigners, a move based on nationalistic tendencies.[202]

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[196] Generally, А. Елохин, М. Болдырева и В. Таболич, «Деморграфическая Ситуация в Мире и в России» (2015) 1 Глобальная ядерная безопасность 10, 10-26. A. Elohin, M. Boldyreva i V. Tabolich, «Demorgraficheskaja Situacija v Mire i v Rossii» (2015) 1 Global'naja jadernaja bezopasnost' 10, 10-26. A. Elokhin, M. Boldyreva and V. Tabolich, 'Demographic Situation in the World and in Russia' (2015) 1 *Global Nuclear Safety* 10, 10-26.

[197] 'Demographic Perspectives in the 21st Century' (4 Mar 2010) at https://drevniy- daos.livejournal.com/220381.html.

[198] Я. Григоренко, «Демографический Кризис в Российской Федерации» (2020) *Стратегии Развития Социальных Общностей, Институтов И Территорий* 270, 271. Ja. Grigorenko, «Demograficheskij Krizis v Rossijskoj Federacii» (2020) Strategii Razvitija Social'nyh Obshhnostej, Institutov I Territorij 270, 271. Y. A. Grigorenko, 'Demographic Crisis in the Russian Federation' (2020) the Strategies of Development of Social Communities, Institutes and Territories: the Materials from VI International Scientific-practical Conference Ekaterinburg 270, 271.

[199] The data is discussed above in 3.1.

[200] Grigorenko above (n196) 271.

[201] Ibid 272.

[202] Claudia Flores, 'Accounting for the Selfish State: Human Rights, Reproductive Equality, and Global Regulation of Gestational Surrogacy' (2023) 23 *Chicago Journal of International Law* 391, 415-416. See Maxim Shemetov, 'Russia moves to bar foreigners from using its surrogate mothers' (24 May 2022) *Reuters* at < https://www.reuters.com/world/europe/russia-moves-bar-foreigners-using-its-surrogate-mothers-2022-05-24/ > accessed 31 Oct 2022.

The Russian liberal response to surrogacy seems to constitute a logical continuation of the overarching goal focusing on 'boosting the birth rate,'[203] started by the Soviets rather than expanding the reproductive liberty itself. Indeed, the legislative framework governing reproduction seems to be extensively determined by the historical legacy – that is, the Soviet realities that for ideological reasons never fully accepted the notions of private life and the lack of self-sustainability being 'sufficient' grounds for refusing to have children. Driven by biopolitical goals with procreation being a definition of traditional family has constantly been on the agenda for the state's policymakers since early Soviet times.[204] The continuous need to 'replenish the population' was purely based on ideological premises – the decline in population would have automatically meant the lack of citizens for 'building socialism.'[205] Whilst initially demographics played a relatively minor role in the state's reproductive policies,[206] it subsequently became an issue for the government's increased concern, at times forcing the latter to employ fairly intrusive measures. The Soviet Union has been paying particular attention to birth rates through various pro-natalist initiatives. The state's response varied in their extremity throughout the times. On the one hand, as a part of 'extreme pronatalist policy'[207] and in attempts to showcase its concern for wellbeing of children and mothers,[208] the state initially criminalised abortions in 1936.[209] The state has justified this legislative step by the 'absence for the basic *need* of abortion:' as the Soviet Union has recovered from the economic crises caused by the preceding political unrest,[210] the need to fill in the demographic gaps remained. Furthermore, a large proportion of the population has withered away in GULAGs and labour camps which also meant withering prospects of the bright 'socialist' future.

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[203] F. Stella and N. Nartova, 'Sexual Citizenship, Nationalism and Biopolitics in Putin's Russia' in F. Stella and Y. Taylor, T. Reynolds, A. Rogers, Sexuality, Citizenship and Belonging: Transnational and Intersectional Perspectives (Routledge 2015) 33.

[204] Generally David M. Adamson, Julie DaVanzo, 'Russia's Demographic 'Crisis' How Real Is It?' (1997) *Rand Report, Centre for Labour and Population Programmes* 1, 2.

[205] Мирослава Полина, «Абортная Культура: От Царской России И СССР До Наших Дней» (2011) 4 Statuspraesens 74, 77. Miroslava Polina, «Abortnaja Kul'tura: Ot Carskoj Rossii I SSSR Do Nashih Dnej» (2011) 4 Statuspraesens 74. Miroslava Polina, 'Abortion Culture: From Tsarist Russia to Nowadays' (2011) 4 *Statuspraesens* 74, 77.

[206] See e.g. Susan Gross Solomon, 'The Demographic Argument in Soviet Debates over the Legalization of Abortion in the 1920's' (1992) 33 *Cahiers du Monde russe et soviétique* 60.

[207] Chris Burton, 'Minzdrav, Soviet Doctors and the Policing of Reproduction in the Late Stalinist Years' (2000) 27 Russian History 197, 197.

[208] Alexandre Avdeev, Alain Blum and Irina Troitskaya, 'The History of Abortion Statistics in Russia and the USSR from 1900 to 1991' (1995) 7 Population: An English Selection 39, 39-66.

[209] By virtue of the Decree 'On Defence of Mother and Child' 1936. Remarkably, the Soviet Union was also the first country in the world to decriminalise abortions in 1920. Michele Rivkin-Fish, 'Conceptualizing Feminist Strategies for Russian Reproductive Politics: Abortion, Surrogate Motherhood and Family Support after Socialism' (2013) 38 *Signs: Journal of Women in Culture and Society* 569, 572-573.

[210] Paula A. Michaels, 'Motherhood, Patriotism, and Ethnicity: Soviet Kazakhstan and the 1936 Abortion Ban' (2001) 27 *Feminist Studies* 307, 308.

The fact that the Russian state is still governed by pragmatism and the post-Soviet ideology is apparent from various other policies governing reproduction that were enacted as a response measure to declining demographics. For example, the Federal Statute № 323-FL, discussed in chapter 4 above, provides for the somewhat restricted access to abortion, something that has been explicitly motivated by birth rate decline. It was stated that the more restrictive abortion policies were introduced in order to allow women to change their minds and potentially reduce the timeframe during which a woman may opt for abortion.[211] The Health Minister, Veronika Skvortsova, dismissed the allegations that the policies are infringing women's reproductive rights and highlighted the positive effect the measures had on declining abortion rates, – "the set measures… had a positive impact on childhood and motherhood… resulting in 59.3 thousand decline in the number of abortions."[212] This comes alongside other pro-natalist trends such as limited access to contraception.[213] Based on the common misunderstanding that contraception is unnatural and borderline dangerous for demographics, the topic of birth control has been a subject for constant disregard.[214] As Sakevich and Denisov observed, the Russian policymakers are still confident that '… the access to birth control [inevitably] implies depopulation.'[215]

'Dwelling' on the past has been employed as a tool in the state's mission of igniting nationalism. Similarly to the tsarist times, once again, the role of women as child-bearers and mothers has been re-emphasised as potentially the only way to save a 'dying out nation.'[216] That is not to say that having identified procreation as key to the nationalist movement the government allowed itself to step back. On the contrary, it launched various initiatives to help the society with creating families. As way of addressing the reproductive crisis, therefore, the nationalist members of the government have boosted the work of family planning organisations. It was during the post-Soviet time when the self-proclaimed 'progressive' advocates for assisted reproduction established the first family planning clinics which later mushroomed even in the most remote regions.[217] The

[211] Stella and Nartova above (n201).
[212] Gritsiuk in Stella and Nartova 33-34.
[213] Ibid 35.
[214] Ibid.
[215] В. Сакевич и Б. Денисов, "Перейдет Ли Россия От Аборта К Планированию Семьи?" (2011) Демоскоп Weekly 465, 466. V. Sakevich i B. Denisov, "Perejdet Li Rossija Ot Aborta K Planirovaniju Sem'i?" (2011) Demoskop Weekly 465, 466. V. Sakevich and B. Denisov, 'Will Russia shift from Abortions to Family Planning?' (2011) Demoscope Weekly 465, 466.
[216] Richard C.M. Mole, 'Constructing Soviet and Post-Soviet Sexualities' in Richard CM Cole (ed.) *Soviet and Post-Soviet Sexualities* (Routledge 2019) 5.
[217] Д. Раскин, «Русский национализм и проблематика культурно-цивилизационной идентичности» (2009) 50 Российские Политические Исследования 36, 36-44. D. Raskin, «Russkij nacionalizm i problematika kul'turno-civilizacionnoj identichnosti» (2009) 50 Rossijskie Politicheskie Issledovanija 36, 36-44. D. Raskin, 'Russian Nationalism and Issues of Cultural and Civilizational Identity' (2009) 50 *Russian Social Science Review* 36, 36-44.

clinics helped the intended parents identify the early signs and the treatment of infertility and sexually transmitted diseases affecting conception and pregnancy.[218] Furthermore, the state has created some rudimentary statutory footing on assisted reproductive technology - the Law 'On Amendments to Some USSR Legislative Acts concerning Women, Family and Childhood' № 1501-I of 22.05.1990. For the first time the law mentioned artificial insemination and provided that "a man who consented to artificial insemination of his wife with a donor genetic material cannot deny his fatherhood."[219]

Since the 'bursted Soviet galaxy'[220] was humiliating enough for the Russian state,[221] it had to take decisive steps in order to re-build the nation that was devastated by the economic and political chaos. Thus, 'the restoration of the Russian national pride'[222] has constituted a part of the action plan with the encouragement of reproduction playing one of the central roles. The fact that the state disagreed with childlessness became apparent in legislative movements that the state promoted from 1995 to late 2000s – that is providing further statutory footing for assisted reproduction. The explicit legalisation of surrogacy in the Family Code 1995 might be seen as a major step towards achieving the goal of increasing the birth rates. Whilst Russia has not disclosed the exact rationale behind designating surrogacy to a specific provision in the Code,[223] it may be assumed that it constituted a part of a wider scheme aiming contribute to the nation-building plan. Khazova commented that the very codification of the right to access assisted reproduction technology implied that the legislator might have recognised "assisted reproduction being an imitation of natural procreation"[224] thereby providing an opportunity to procreate to those who are unable to have children naturally for medical reasons.[225] Following the legalisation of surrogacy in 1995 more than 10 ART clinics were opened with the number increasing by almost 20 times by 2015.[226] In order to respond to a growing demand,

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[218] 'The Family Planning Centres and why we need to visit them' (2 Feb 2020) *YandexZen* at <https://zen.yandex.ru/media/id/5d7fcd59e6cb9b00ad2e0045/centry-planirovaniia-semi--kakie-uslugi-oni- okazyvaiut-i-zachem-ih-nujno-posescat-5e33ea62f79130325aa45a32>.

[219] Art 62.

[220] Ben Fowkes, *The Disintegration of the Soviet Union: A Study in the Rise and Triumph of Nationalism* (Macmillan Press 1997) v.

[221] Mole above (n214) 5.

[222] Eliot Borenstein in ibid 7.

[223] It may be the case that the legislative proposal is not in the public domain.

[224] It may be the case that the legislative proposal is not in the public domain.

[225] The law states that surrogacy and ART are available for medical reasons only. The practical reality, however, seems to be that the grounds could be much more expansive.

[226] Gella Litvintseva, 'Russia – amongst the World Leaders in Surrogate Motherhood' (8 Aug 2018) *Eurasianet* at <https://russian.eurasianet.org/%D1%80%D0%BE%D1%81%D1%81%D0%B8%D1%8F-%E2%80%93-%D1%81%D1%80%D0%B5%D0%B4%D0%B8-%D0%BC%D0%B8%D1%80%D0%BE%D0%B2%D1%8B%D1%85-%D0%BB%D0%B8%D0%B4%D0%B5%D1%80%D0%BE%D0%B2-%D0%BF%D0%BE-%D1%81%D1%83%D1%80%D1%80%D0%BE%D0%B3%D0%B0%D1%82%D0%BD%D0%BE%D0%BC%D1%83-%D0%BC%D0%B0%D1%82%D0%B5%D1%80%D0%B8%D0%BD%D1%81%D1%82%D0%B2%D1%83>

private surrogacy clinics were founded not only in Moscow and St. Petersburg but also in the hardly accessed Siberian areas.[227] It seems that the demand for IVF and surrogacy has not declined even during the Covid-19 outbreak. Accordingly, the governmental support for the assisted reproduction clinics has re-emphasised their importance in light of the pandemic. By Mayor's Order № 68-UM the clinics were allowed to open in early June despite the still raging virus while the vast majority of non-essential businesses were under lockdown.[228] Having lost the clients to isolation, the clinics started receiving financial support from the state to continue their viability.[229]

The 'birth' rhetoric gained momentum during Vladimir Putin's presidency. Similarly to Lenin's ideological orders to "learn, learn, learn!"[230] Putin's explicit message is to "give birth, give birth, give birth!"[231] Thus, in his 2009 speech, which gathered extensive attention, the President has observed: "We must all give birth: That's an order."[232] The President has made no attempts to exclude surrogacy births from his message. Whilst not offering any financing *yet*, the state acknowledges that surrogacy might provide the right answer to demographic concerns by introducing some support measures. To facilitate the arrangement, some agencies have contracts with third-party banks which the intended parents may get a loan from specifically for surrogate motherhood. The rights of all parties as well as the terms of re-payment are to be clearly spelled out.[233] The terms of the loan are 'standard,' with the 9.9% annual interest - the same are usually offered to small businesses.[234] Emelina and Maluyk suggest that the state should further encourage reproduction through surrogacy by way of special federal programmes, targeting certain areas: "there are certain organizations sponsoring assisted reproduction and surrogacy elsewhere in the world… in the absence of the 'start-

[227] 'Clinics of Ural, Siberia and Far East' at <https://www.probirka.org/forum/viewforum.php?f=742> accessed 9 Aug 2020. This does not provide for a definitive list of clinics in the area, but a forum for intended parents that intend to use them.

[228] Tatyana Beskaravainova, 'Minzdrav allowed the Assisted Reproduction Clinics to Resume During the Covid-19' (25 May 2020) at <https://medvestnik.ru/content/news/Minzdrav-razreshil-klinikam-VRT-vozobnovit-rabotu-v-usloviyah-COVID-19.html>.

[229] 'State Measures to Support private Clinics that Suffered during the Coronavirus crisis' (25 May 2020) *Zdravat* <https://www.zdrav.ru/articles/4293661977-20-m05-25-koronavirus-chastnaya-klinika> accessed 8 Aug 2020.

[230] V. Lenin, *Full Volume of Works* (Publishing House of Political Literature 1967) 265.

[231] Arja Rosenholm and Irina Savkina, 'We must all give birth: That's an order' The Russian mass media commenting on V.V. Putin's address' in Arja Rosenholm and Irina Savkina (eds.) *Russian Mass Media and Changing Values* (Routledge 2010) 85.

[232] Ibid 79.

[233] 'Legal Regulation of Surrogate Motherhood – the Main Aspects' (30 Mar 2017) at <https://www.ivf-centre.ru/vse-uslugi/surrogatnoe-materinstvo/pravovoe-regulirovanie-surrogatnogo-materinstva-osnovnye- aspekty.html>

[234] Л. Емелина и Т. Малюк, «Опросы Совершенствования Кредитных Механизмов В Целях Развития Суррогатного Материнства» (2020) Банковское Дело 60, 60-62. L. Emelina i T. Maljuk, «Oprosy Sovershenstvovanija Kreditnyh Mehanizmov V Celjah Razvitija Surrogatnogo Materinstva» (2020) Bankovskoe Delo 60, 60-62. L. Emelina and T. Maluyk, 'The Issues of Perfecting Credit Facilities for the Purposes of Development of Surrogate Motherhood' (2020) *Bankovskoe Delo* 60-62.

up capital'… an option would be to consider a special programme for the demographically deprived regions."[235] Not only would these 'special credit facility arrangements' providing more favourable terms for the loans make surrogacy more accessible but also discourage the intended parents from travelling to countries where these facilities are available.[236]

Although the state's position on financing is unclear, other measures designed to stimulate reproduction to be introduced in the nearest future are already debated. These might operate akin to quotas for the ART, introduced in order to fulfil the goal to increase ART births by 2024.[237] Since 2010 the state pays for IVF, intracytoplasmic sperm injection and embryo reduction as long as a procedure is prescribed by a doctor. The intended parents would be placed on a waiting list and a commission subsequently decides whether the eligibility criteria are met.[238] The goal of widening the access to ART received further codification in 2016: the Order № 669-p prescribed the target of 20,5 IVF births to be achieved by 2020.[239] It may be speculated that in race to improve the demographic situation, those eligible for surrogate motherhood but not being able to afford it would also be placed on the waiting list for the board to decide whether the requirements for a quota are satisfied. If so, the state would subsidise the arrangement making it more accessible to wider groups of society thereby 'preventing the nation's degeneration.'[240] A year ago, Vladimir Serov, the President of the Russian Society of Obstetricians and Gynaecologists already accepted this as a viable option: "we will have quotas in a bit. The life in Russia makes this a necessity: we are facing depopulation and the birth rates are declining. The government will use all avenues that would promote motherhood and births.

[235] Ibid 61.
[236] Ibid.
[237] Ibid.
[238] The Healthcare Order №1047n from 30 December 2009 'On Order and Approval of the State's Assignment for Providing High-Technology-Based Medical Assistance to the Citizens of the Russian Federation by Means of the State's Budget' (effective as of January 2010). Translation my own. 'How to Obtain an ART quota?' (13 Nov 2011) < https://cps.org.ru/articles/kak-poluchit-kvotu-na-vrt/> accessed 11th Aug 2020.
[239] The Order № 669-p from 14 Jun 2016 'On the Approval of the Measures to Address the Demographic Politics in the Russian Federation for 2016-2020 to be Realised by 2025' № 17. Article 2426.Transaltion my own. See also Арина Бакирова, «Актуальные Проблемы Применения Вспомогательных Репродуктивных Технологий (Врт) В Рамках Реализации Демографической Политики РФ» (2018) Образ Будущего: 2030 Сборник тезисов IX Международной молодежной научной конференции 198, 198-199. Arina Bakirova, «Aktual'nye Problemy Primenenija Vspomogatel'nyh Reproduktivnyh Tehnologij (Vrt) V Ramkah Realizacii Demograficheskoj Politiki RF» (2018) Obraz Budushhego: 2030 Sbornik tezisov IX Mezhdunarodnoj molodezhnoj nauchnoj konferencii 198, 198-199. Arina Bakirova, 'The Actual Problems in the Application of the Assisted Reproduction Technology within the Framework for Realisation of Demographical Politics in the Russian Federation' (2018) *The Image of the Future: 2030, The Compilation of Thesis IX of the International Scientific Youth Conference* 198-199.
[240] Елена Ларичева и Наталия Ноздрина, Социальное Поведение Личности: Оценки И Стратегии (Ульяновск Знбра 2016) 237. Elena Laricheva i Natalija Nozdrina, *Social'noe Povedenie Lichnosti: Ocenki I Strategii* (Ul'janovsk Znbra 2016) 237. Elena Laricheva, Nataliya Nozdreva, Paragraph 4.4. in '*Personality's Social Behaviour: Evaluation and Strategies' A Collective Monograph* (Ulyanovsk Zebra 2016) 237.

Potentially, quotas will be introduced."[241]

The nationalist rhetoric is very evident from the introduction of the recent ban for cross-border surrogacy. The Federal Statute №538-FL that came into force in late 2022 restricts the access to surrogacy for those, who do not hold a Russian citizenship. The ban followed the highly publicised '*Doctors Case'* which unfolded during the Covid-19 pandemic. The case itself was concerned with four tragic deaths of surrogate children, which were stranded in Russia due to the lockdown. Their parents, from China and the Philippines, were unable to travel from their countries to pick them up. Unfortunately, the children, temporarily housed in the outskirts of Moscow and St Petersburg died of natural causes. The case triggered an extensive investigation into the surrogacy arrangements involving foreign intended parents and led to unprecedented prosecution of those involved, including the lawyers, the translator as well as the surrogate mother.[242] Although the arrangement was perfectly legal at the time, the Investigation Committee accused all parties, with the exception of the surrogates, of child trafficking that led to death.[243] The Committee also alleged the lack of genetic relationship between the children and their parents implying that the genetic material was 'stolen.' Their colleagues describe the situation as 'unbelievable' and 'heartbreaking': "[it is] shocking to see them behind the bars… wishing them to be back to normal life…"[244] For the Committee, however, all parties involved in the arrangement constituted 'one big criminal gang.'[245] Whilst the legislation appears to be a jerk-knee reaction to the '*Doctors Case'* and unfortunate child casualties that occurred during the pandemic, it seems that the rationale is rooted in the increasing nationalistic tendencies. The legislator itself admitted that nationalism was a major factor on which the restrictions were based. Surrogacy arrangements that involve foreigners, are said to constitute "a threat to national interests."[246] Vasily Piskarev, a lawmaker involved in the legislative procedure, observed that "some 40,000 babies born to surrogate mothers in Russia had left the country to be raised by foreigners" and there seems to be no apparent reason why Russia should "spend… funds on resolving

[241] Vadim Alekseev, 'Russia might introduce quotas for Surrogate Motherhood' (16 Dec 2019) Komsomol'skaya Pravda at <https://www.kp.ru/daily/27068.5/4137794/> accessed 9 Aug 2020.Translation my own.
[242] 'Someone from Above Ordered to Deal with the Doctors with Unprecedented Ruthlessness' (30 Jul 2020) *TJournal* at <https://tjournal.ru/s/health/192058-kto-to-sverhu-prikazal-oboytis-s-vrachami-s-osoboy- zhestokostyu-chem-neobychno-delo-o-torgovle-mladencami-v-moskve >.
[243] 'Fathers, Children and the Investigation Committee' (11 Jul 2020) *Kholod Media* at < https://holod.media/2020/10/11/surrogates/ > accessed 25 Jul 2020. Svitnev's children were also taken to the children's hospital.
[244] 'I was shocked to see them behind the bars: three Russian Doctors are Accused of Child Trafficking. Their Colleagues are sure they are innocent' (21 Jul 2020) *Lenta.ru* at <https://lenta.ru/articles/2020/07/21/torgovl_deti/>.
[245] Natalia Inshakova, 'New Case on Doctors or how Russia Tries to Fight Surrogate Motherhood' (20 Dec 2020) *Tatler* at < https://www.tatler.ru/heroes/novoe-delo-vrachej-ili-kak-v-rossii-pytayutsya-borotsya-s-surrogatnym- materinstvom > accessed 14 Jan 2021.
[246] Flores (n200) 415.

the demographic problems of other countries…"[247] The state has also put some mechanisms in place, that would provide protection if a child is taken abroad for residency: all children born out of a surrogacy arrangement on the Russian soil would automatically receive Russian citizenship. Whilst it is not clear how the mechanism will be enforced when a child resides on the foreign territory and therefore falling outside the scope of the Russian jurisdiction, it seems that the state seeks to establish "checks" on the surrogate children.

Overall, it is clear that the development of Russian surrogacy law could have been shaped by various factors. First of all, it appears that it could have been influenced by the Strasbourg jurisprudence, more specifically its case-law on assisted reproduction. Indeed, the cases of *Evans*[248] and *Dickson*[249] constitute a "growing maturity of the right to procreate."[250] Whilst *Evans* seeks to respect the decisions to become or not to become a parent, *Dickson*, by contrast is concerned "with an initial opportunity to realise procreation"[251] and this potentially includes the right to recourse to assisted reproduction.[252] However, the court has not developed art 8 to the extent so that it would embrace the right to surrogacy. The cases of *Mennesson, Paradiso* and *Fjolnisdottir*[253] illustrate the limitations imposed by art 8(2) that is, public policy. The Court seems to be more concerned with the best interests of children rather than the parents' right to procreation. The second candidate, that could possibly explain the liberal nature of Russian surrogacy law is the potential influence of the relationship between the national and Strasbourg legal systems. Russia and the ECtHR have undergone a period of thaw as well as coldness and borderline suspicion to the 'Western' ideals. Despite the initial optimism about the ECHR Russia ultimately saw it as a political threat, on a number of occasions questioning the necessity of the continuing membership in the Council of Europe. The relationship based on mistrust culminated in the ruling of the Constitutional Court which stated that it reserves the right not to follow the ECtHR. The media, arguably, could have constituted the driving force behind the state's approach to surrogacy. Indeed, the media has a far-reaching effect on society and may act as a catalyst for legislative changes. However, media could have hardly affected the legislative developments. First of all, the media's role is mostly reactive – it seeks to engage with the audience via alarming headlines and dramatic stories. The liberal amendments were mostly overlooked. The liberal surrogacy legislation is best explained by the increasing nationalistic

[247] Shemetov above (n200).
[248] *Evans v. United Kingdom* (app. no. 6339/05 ECtHR 10 Apr 2007)
[249] *Dickson v. United Kingdom* (app. no. 44362/04 ECtHR 15 Dec 2007).
[250] Marleen Eijkholt, 'The Right to Procreate is not Aborted' (2008) 16 *Medical Law Review* 284, 288.
[251] Ibid 284.
[252] Ibid 291.
[253] *Fjölnisdóttir and Others v. Iceland* (app. no. 71552/17 ECtHR 18 Aug 2021).

tendencies of the Russian state. Not only is this evident in the policies seeking to support parenthood and surrogacy financially, but also the recent restrictions imposed on the eligibility of the intended parents. The most recent legislation, amending the Federal Statute №323-FL appears to be a logical continuation of the preceding changes to abortion legislation, prohibiting adoption to foreigners. Thus, the law has now removed Russia as one of the most popular surrogacy destinations for foreign intended parents.

7. CONCLUDING REMARKS

Surrogacy has been practiced from time immemorial – it has been referred to in the Bible and Babylonian law. It is seen as a mechanism for helping single parents, same-sex or infertile couples reproduce. Having received wide public and legal recognition after the *Baby M* case[1] in the US surrogacy kept pushing the boundaries for assisted reproduction allowing the relatives of the deceased to become parents by using frozen gametes. The cases of grandmothers becoming "surrograndmothers"[2] are becoming rather common. Imbued with controversies, surrogacy has also polarised public opinion. On the one hand, it was criticised for promoting, amongst others, "baby selling, womb renting, [and] exploitation of women."[3] Surrogacy, especially its commercial type, was assailed as an immoral practice, reducing the children to a physical item or an object and ignoring the feelings of a woman that carried a child, treating her as a soulless incubator. It also raises concerns in relation to parenthood and residency of the children, who are born with genetic defects prompting some states to impose certain restrictions on the availability of surrogacy arrangements for foreigners or allowing it to the nationals of the state only. On the other, however, the opponents of commercial surrogacy seem to ignore that these concerns may only realise in the unlikely event of the arrangement that does not go according to plan. In reality, surrogacy may be praised as a "miracle cure for infertile couples."[4] It offers a unique opportunity for the intended parents to become genetic parents and see the 'continuation of themselves' in their offspring.

However, there is no single international instrument governing surrogacy, and the legal responses across the world are not uniform, varying from complete prohibition or partial permission to liberalism. Some states, such as the UK, only accept altruistic surrogacy, whereby the surrogate is not compensated beyond the reasonable expenses. In others, for example some states in the US, such as California, commercial surrogacy is perfectly legal. Ukraine, a former USSR republic, allows both commercial and altruistic surrogacies for its own citizens as well as the foreign intended parents. Some states may allow surrogacy as a matter of political choice, rather than explicitly allowing it on a legislative level. In these states surrogacy arrangements would be tolerated but unenforceable.

[1] *In the Matter of Baby M* (1987) 537 A.2d 1227.
[2] See e.g. Kait Hanson, '51-year-old grandma gives birth to her own granddaughter.' 'Surrograndma' gives birth to granddaughter as a gestational carrier for her daughter' (10 Nov 2020) Today at https://www.today.com/parents/surrogate-grandma-gives-birth-grandaughter-t198486 accessed 30 Nov 2022. Postmortem reproduction has been briefly discussed in 1.2. For more detailed discussion see above 4.3.
[3] Linda M. Whiteford, 'Commercial Surrogacy: Social Issues Behind the Controversy' in Linda M. Whiteford, Marilyn L. Poland (eds.) *New Approaches to Human Reproduction* (Routledge 1989) abstract to chapter 10.
[4] Ibid.

Some previously surrogacy-friendly states, e.g. India and Thailand, reconsidered their stances following the cases that caused public outcry. Thus, India and Thailand restricted the access to surrogacy for non-nationals.

Russia's position on reproduction appears to be rather peculiar. From the Soviet times, the now Russian state has always had an interest in the sphere of family and other aspects of private life. From childlessness tax to constantly changing laws on abortion, Russia has been very involved in the regulation of reproductive rights via various administrative legal regulations.[5] Khazova observes that such approach fit the overall paternalistic model of the doctor-patient relationship.[6] The state's interference may be explained by various social and economic turmoils. The wars, the early 20th century flu pandemic and the subsequent famine have wiped out a significant proportion of the Russian population calling for more stringent rules on reproduction. The medical advancement in the late 20th century has resulted in the introduction of assisted reproduction technologies allowing the infertile couples to become parents. In fact, Russia is one of the states that pioneered in assisted reproduction, and the first successful surrogacy birth took place in St Petersburg in 1995. A friend of the intended mother acted as a surrogate, who carried and gave birth to twin children.[7] This innovative way of treating infertility has received the first statutory footing in the Family Code 1995 explicitly legalising surrogacy. The state has initially adopted what was labelled as "… a relatively neutral approach to surrogacy [but where] surrogacy is regulated."[8] The Family Code seems to have simply recognised that surrogacy became legally available. The Code, however, did not offer any clarification as to whether the legalisation applied to altruistic surrogacy only – by default it could be assumed that commercial surrogacy also became legal. Some scholars suggested that the lack of a clear either criminal or civil prohibition of commercial surrogacy meant that the parties were free to conclude a contract[9] presumably including a provision stipulating the surrogate's financial remuneration. The local registries also seem to have accepted the applications for registration of children born as a result of a surrogacy arrangement irrespective of the latter being of commercial or altruistic nature.[10] Thus, the reference to surrogacy, clearly a progressive feature of the Code, may be described as the

[5] Olga Khazova, 'Genetics and Artificial Procreation in Russia' in *Biomedicine and Human Rights* (Brill Nijhoff 2002) 377.
[6] Ibid 378.
[7] Generally, ibid 377-391.
[8] Olga Khazova, 'Chapter 19: Russia' in Katarina Trimmings and Paul Beaumont (eds) *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013) 311.
[9] Olga Khazova, 'Three Years after the Adoption of the New Russian Family Code' (2000) *International Survey of Family Law* 323, 328.
[10] Even before the provisions allowing commercial surrogacy came into force, there seems to be no single case where a child's registration was refused because he was born as a result of a commercial surrogacy arrangement.

development that was at odds with the generally ideologically and theoretically stagnating Russian family law.[11] Surrogacy appears to be the point where neo-conservative ideology met the parties' right to self-determination.[12]

The thesis offered an analysis of the rather extensive Russian legal framework on surrogacy from the days of the inception of the Family Code 1995 which was followed by the introduction of various administrative orders seeking to fill the gaps left out by the Code. Yet, it was not until 2012, when another milestone in the development of surrogacy legislation and assisted procreation more broadly, was achieved. This year signified an era of legal liberalisation of surrogacy and Russia's growing potential to become one of the leading countries on surrogacy market. For the first time, the Federal Statute №323-FL recognised surrogacy as a method of infertility treatment.[13] This legal recognition symbolised that in the eyes of the Russian state, surrogacy was no longer simply a "complex biological phenomenon"[14] but a powerful tool accepting the "flexibility in family formations."[15] Moreover, importantly, the Statute explicitly provided that commercial surrogacy became legal. The full legalisation of surrogacy made Russia a very attractive surrogacy destination for the nationals of the states where surrogacy was not readily available.

The research discovered that Russia does have one of the most liberal legislative frameworks on surrogacy. It respects the surrogate's right to self-determination as well as the intended parents' choice to create a family in a non-traditional way. This is apparent from the relatively straightforward eligibility criteria for surrogate mothers and the intended parents. Thus, the Order №107n requires surrogates to be of certain age, physiologically fit and voluntarily consent to the arrangement. Although the criteria were said to limit the pool of eligible surrogate mothers,[16] they seek to avoid health-related problems as well as address the possibility of a surrogate mother being pressurised to enter into the arrangement. The Order also contains the medical criteria that would make the intended parents suitable for the arrangement. The list expands on the four previously very strict grounds provided by the preceding Order № 67. However, the commissioning parents also have to satisfy the

[11] Maria Antokolskaia, 'The 1995 Russian Family Code: A New Approach to the Regulation of Family Relation' (1996) 22 *Review of Central and Eastern European Law* 635, 637.
[12] Natalia Khvorostianov, 'The Motives Behind Post-Soviet Women's Decisions to Become Surrogate Mothers' (2022) 27 *Sexuality & Culture* 38, 41-42.
[13] Art 55(9) of the Federal Statute №323-FL from 21 Nov 2011.
[14] Ayesha Rasheed, 'Confronting Problematic Legal Fictions in Gestational Surrogacy' (2021) 24 *Journal of Healthcare, Law and Policy* 179, 179.
[15] Ibid 182.
[16] Discussed in 4.1 above.

so-called social hurdles. The Federal Statute №323-FL added another layer of requirements for the intended parents, based on their marital status. Surrogacy, either commercial or altruistic, is explicitly available to heterosexual married couples. Yet, the law is silent on the position of single-fathers or same-sex couples. Nonetheless, despite the lack of clarity, the courts have previously allowed a single father to be entered on a birth certificate. In relation to same-sex couples, the position is slightly more complicated. Although there is no case involving a same-sex couple seeking to be registered by the Russian authorities, it is highly unlikely that the registry would accept such application. Whilst this practical restriction might appear as a limitation imposed on surrogacy, in reality it is one of the ways for the Russian state to clamp down on homosexuality, rather than restrict surrogacy arrangements themselves.

Russia's approach to postmortem reproduction via surrogacy is also rather tolerant, not requiring judicial oversight. The law itself offers very limited regulation in this sphere, confirming that one's genetic material may be used for scientific or educational purposes if the deceased granted consent. The lack of clear wording means that it is uncertain whether the deceased consented for the material to be used for the purposes of reproduction, leaving the scope of the relevant law open for interpretation. Nevertheless, the courts seem to allow surrogacy in the context of postmortem reproduction. For example, in the Zakharova case,[17] the grandmother became the legal guardian of her son's child.

The liberal features are also reflected in the simplistic administrative procedure for surrogacy births, apart from the fact that the surrogate mother needs to provide consent for the child to be handed over, it is governed by the same rules as traditional births. This consent appears to be tantamount to relinquishing parental rights, which means that no judicial oversight of the private agreement of the transfer of a child is required – there is no need for a parental order to be made. The administrative process also does not require the court's assessment to be carried out, for example based on child's welfare or verification of the eligibility criteria of the intended parents. Thus, once the surrogate grants consent, legal parenthood will automatically be vested in them: they will be entered on the birth certificate without being subject to any additional administrative hurdles.

One of the very peculiar areas in the context of surrogacy is the necessity to tax the surrogate's

[17] Discussed in 4.3 above.

income. The law seems to treat surrogacy arrangement as a job whereby the surrogate mother is supposed to contribute to the state's budget on the same basis as full-time employees. However, this does not seem to constitute a clamp down on surrogacy – the requirement that surrogates should file tax returns is not really enforced and does not intend to discourage surrogacy, but instead, it seems to normalise the practice and encourage natality.

Nonetheless, Russian surrogacy law suffers from various deficiencies, where the legal position is either unclear or unsatisfactory. For example, the law fails to provide clarity in the cases where an arrangement does not go in accordance with the plan envisaged by the parties. The thesis identified the areas which would require closer regulation from the state in order to ensure that high standards of protection are provided to all parties to the arrangement.

One of the main aspects deserving closer scrutiny is the questionable legal force of the surrogacy contract. Despite the fact that in Russia the contract is now treated as evidence of the parties' intentions and is given a stronger evidential value, it is still not enforceable, which means that the surrogate is legally allowed to keep the child. Indeed, it is rather common for personal contracts not to be specifically enforced: usually default on a contract results in action for damages. Some scholars claim that this position is correct, especially in relation to surrogacy contracts. Anderson, for example, assails surrogacy contracts on the basis of severe limitations that are usually inserted into them.[18] Satz agrees that "if the woman in a pregnancy contract defaults on her agreement and decides to keep the child, the other parties should not be able to demand performance (that is, surrender of the child); rather, they can demand monetary compensation."[19] However, this approach is not satisfactory. Specific performance is ordered in the situations where damages are deemed to be an inadequate remedy, [20] e.g. if the subject of a contract is not a fungible item. Epstein draws a parallel with the sale of land (not because he sees a child as a commodity, but because land is also seen as a "unique" subject).[21] Indeed, it is hard to argue that a child may be seen as an interchangeable item – the very fact that the intended parents opted for surrogacy means that it is not *any* child they wanted,

[18] Some of the restrictions might include obeying the doctor's orders to "to give up her job, travel plans, and recreational activities… confine [the surrogate] to bed, regulate her diet rigidly, and order her to submit to surgery and to take drugs." See Elizabeth Anderson, *Value in Ethics and Economics* (Harvard University Press 1995) 176.
[19] Debra Satz, 'Markets in Women's Reproductive Labor' (1992) 21 *Philosophy & Public Affairs* 107, 126.
[20] Paul Mahoney, 'Contract Remedies and Options Pricing' (1995) 24 *Journal of Legal Studies* 139, 154.
[21] Richard Epstein, 'Surrogacy: The Case for Full Contractual Enforcement' (1995) 81 *Symposium: New Directions in Family Law* 2305, 2337.

but the child they helped create.[22] Unlike the surrogate mother's expenses, which may be calculated, the loss of a child, caused by the surrogate's refusal to surrender, is unquantifiable. The intended parents, anticipating the child, are usually deeply involved in the process by establishing a relationship with the surrogate, attending hospital appointments and preparing their household for the arrival of the newborn.[23]

Specific performance is appropriate even if a surrogacy contract is seen as a service contract. It has been argued that this approach might lead to the misperception that surrogates are pressurised to enter into a surrogacy arrangement.[24] Yet, the argument based on involuntary servitude seems to overlook the fact that the intended parties' contract for the surrogate's services to carry and give birth to the child – the child constitutes a crucial element to the arrangement. The surrogate's services are terminated once she gives birth to the child. Undeniably, a surrogacy contract is of a very sensitive nature, with its ramifications going beyond mere contractual obligations.

Enforcing a contract could help alleviate some of the issues surrogacy is commonly accused of giving rise to, such as exploitation of surrogate mothers. According to Candejas, whilst the enforceability of a contract would not solve all exploitation-related problems, at least it would help mitigate some of the risks.[25] Some surrogates from India confirmed that having clear terms outlined in a contract allowed them to have better understanding of the work that they were doing.[26] Lastly, and most importantly, lack of enforceability of a contract goes contrary to the best interests of the child. The parties' intentions, recorded in the contract, however, serve as an indication which party intends to raise the child. The alignment of the child's best interests and the parties' intentions has been recognised in *Johnson v. Calvert* where the court stated that "[t]he interests of children, particularly at the outset of their lives, are '[un]likely to run contrary to those of adults who choose to bring them into being."[27] This seems to imply that it is in the child's best interests to be raised by the intended parents, since it is them who planned the child's upbringing. Therefore, it would be wrong

[22] Lewis Browne, 'Due Date: Enforcing Surrogacy Promises in the Best Interests of the Child' (2013) 87 *St John's Law Review* 899, 936. If the parents decide to use donor gametes, they seek to ensure that the donors' physical features are similar to their own – see Keith Cunningham, 'Surrogate Mother Contracts: Analysis of a Remedial Quagmire' (1988) 37 *Emory Law Journal* 721, 742.
[23] Alison Young, 'Reconceiving the Family, Challenging the Paradigm of Exclusive Family' (1998) *6 American University Journal of Gender and Law* 505, 541.
[24] For the discussion see Flavia Berys, 'Interpreting a Rent-a-Womb Contract: How California Courts Should Proceed When Gestational Surrogacy Arrangements Go Sour' (2006) 32 *California Law Review* 321-353
[25] Victoria Candejas, 'It's Complicated: Advocating for Uniformity in the Enforcement of Surrogacy Contracts Notes' (2021-2022) 12 *UC Irvine Law Review* 1385, 1408.
[26] Ibid.
[27] (1993) 851 P2d 776 para 783.

to deny them parenthood in favour of a surrogate mother who only had a short-term interest in the child. In this area, some lessons could be learned from other surrogacy-permissive countries such as Ukraine. Unlike Russia, placing undue emphasis on the concept of gestational motherhood, the Ukrainian law rightly determines legal parenthood of a surrogate child in accordance with the surrogacy contract.

It is submitted that unlike in cases of traditional surrogacy, where the surrogate mother may be said to have a greater expectation to be treated as the legal parent if she reconsiders, as herself and the genetic father have an equal claim for parenthood based on genetic ties, in cases of gestational surrogacy the intended parents should have priority by virtue of genetic connection.[28] Thus, it is necessary to amend art. 48 of the Family Code in order to offer more extensive protection to the parties involved. The said provision needs to be modified so as to give greater legal weight to the role of the contract which would focus on the genetic relationship between the genetic mother and father and the child. This would help to solve the parenthood and inheritance conundrum in cases of a surrogate keeping the child in breach of agreement, the latter's death as well as in cases of posthumous conception. A surrogate's renege on the agreement would be unfair taking into account the intended parents' emotional and financial investment. The provision should also exclude the presumption of automatic fatherhood of the surrogate's husband, thereby relieving the latter from the legal obligations stemming from parental status. Whilst some steps were taken by the Constitutional Court in 2017, it is clear that the role of the contract needs to be cemented. This would clarify the parties' positions and define the penalty in case of non- performance of the contractual obligations.

Other noteworthy situations where the legislative response is patchy would be where pregnancy is either terminated by a surrogate herself or is lost involuntarily. In both cases, the Family Code currently provides no clarity as to the remedies the parties would be entitled to. The examination of the limited case-law available offers very little understanding as to how the damages are calculated. It would be necessary to cement both, the intended parents and the surrogate's entitlements. The law should also clearly state the burden of proof in case of negligent loss of pregnancy is placed upon the intended parents. The law should also clarify the eligibility for legal standing if the death occurred due to negligence of the hospital.

The Family Code does not envisage unfortunate cases of deaths of one or more parties to the

[28] Probably subject to an application by the surrogate in exceptional circumstances, e.g. where the welfare of the child requires the court not to entrust the child to the commissioning parents.

arrangement. Thus, it would be beneficial to automatically disapply the presumption of paternity and maternity in cases of surrogacy. This means that the deceased surrogate's husband would not have any responsibilities attached to his status as the legal parent and the genetic mother may establish her maternity rights on the basis of genetic connection. In other words, the surrogacy 'contract' is 'perfected' through the post-natal 'ratification' of the agreement by the surrogate mother, who has to confirm the intention to relinquish her rights. If this is not done, the transfer of parenthood by way of registration of the commissioning mother as the mother cannot be effected. This would allow Russian legal framework to become more holistic thereby providing more protection for the parties.

The research sought to identify the possible influences on Russian laissez-faire approach to surrogacy. The thesis did not seek to make a specific determination, but instead to explore the potential factors that could have shaped the law. It has looked at the extent to which, if at all, the Russian permissive stance could have been influenced by the freedom to have access to ART as created by the Strasbourg jurisprudence as well as to what extent the ECtHR could have affected the Russian position on assisted reproduction. Undeniably, Strasbourg's jurisprudence is very influential in the sphere of procreation and has made extensive advancements in the sphere. Yet, it can hardly be argued that the ECtHR case-law offers a plausible explanation for the development in Russia's surrogacy law. Russia liberalised its approach to surrogacy decades before the first surrogacy case arrived before Strasbourg in 2014. Indeed, the cases of *Evans*[29] and *Dickson*[30] indicate that significant progress has been made in relation to the recognition of the right to assisted reproduction. Nevertheless, when the reproductive arrangement involves a third party, that is the surrogate mother, the Court's approach becomes more restrictive. As evident in *Mennesson,*[31] *Paradiso*[32] and most recently *Fjolnisdottir*,[33] the Court has faced constraints imposed by art 8(2) ECHR based on public policy, precluding the Court from recognising the right to surrogacy. The Court's concern was limited to safeguarding the rights of the child already brought into existence through surrogacy. In other words, the Court focused on the rights of the children, rather than the parent's right to enter into a surrogacy arrangement.

The relationship between Strasbourg and the Russian legal system has also been rather

[29] *Evans v. United Kingdom* (app. no. 6339/05 ECtHR 10 Apr 2007).
[30] *Dickson v. United Kingdom* (app. no. 44362/04 ECtHR 15 Dec 2007).
[31] *Mennesson and Others v. France; Labassee v. France* (app. no. 65192/11 and 65941/11 ECtHR 26 Jun 2014)
[32] *Paradiso and Campanelli v. Italy* (app. no. 25358/12 ECtHR 24 Jan 2017).
[33] *Fjölnisdóttir and Others v. Iceland* (app. no. 71552/17 ECtHR 18 Aug 2021).

problematic to make any significant influence on Russian legislation. Despite the fact that the membership in the Council of Europe required Russia to follow the ECtHR's decisions, the political reality is completely different. The initial enthusiasm, following the succession to the ECHR has noticeably calmed down. It appears that Russia saw the Convention as a Western product, potentially threatening the national legal system. The relationship became strained even before the prospect of departure from the Council of Europe,[34] after the annexation of Crimea in 2014 Russia's voting rights were suspended.[35] Following the criticism of the government towards some decisions made against Russia, it became more apparent that Russia was not willing to continue its human rights partnership with the West. The media may be seen as a potential candidate that could have influenced Russian surrogacy laws. Indeed, the power of the media should not be underestimated, and in some states, such as the US it might trigger the change in legislation. For example, it is the media attention that put the notorious *Baby M* case in spotlight, potentially prompting the legislator to introduce the legislative amendments. However, the research revealed that the media does not play a role in prompting changes in the Russian policies. Indeed, surrogate motherhood constitutes a viable topic for talk-shows and newspapers following the first successful surrogacy birth in 1995. Nevertheless, the news outlets do not seek to make an informed and balanced contribution to public debate. The shows and articles are only interested in sensationalism by focusing on the cases where the arrangement broke down, mostly when the surrogate mother decided to keep the child, or the intended parents refused to compensate the surrogate. The news portals seek to draw the attention of the audience through the alarming headlines, framing surrogacy in highly negative light. Some articles, however, are more neutral, discussing surrogacy in a more unbiased fashion. Nonetheless, the Russian media appears to be mostly reactive, seeking to merely inform the reader of the to the legislative changes, reporting on them post factum. This position may be explained by the fact that the media lacks any independence from the government, therefore it acts as a 'loudpseaker' for the state, mostly either stepping away from criticism or agreeing with its policies, instead of being a mechanism for legal change. Thus, the view of the media on surrogacy seems to be consistent with the legislative innovations.

The thesis concluded that the most probable cause for liberalism is rooted in the state's

[34] At the time of the writing Russia was still a member of the Council of Europe. For the current position, see 'The Russian Federation is excluded from the Council of Europe' (16 Mar 2022) *the Council of Europe Newsroom* at <https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe>. See also <https://www.coe.int/en/web/portal/-/russia-ceases-to-be-a-party-to-the-european-convention-of-human- rights-on-16-september-2022>.

[35] 'Citing Crimea, PACE suspends voting rights of Russian delegation and excludes it from leading bodies' (10 Apr 2014) at < https://pace.coe.int/en/news/4982 >

resurrected interest in nationalism. It is further submitted that demographics constitute an area of significant concern for Russia. The demographic decline has been ongoing for decades, with the recent COVID-19 pandemic only accelerating the trend. In light of the falling birth rates and the rising death rates, the state has re-visited its policies on reproduction. Ignited with an explosive force, nationalist ideology and the opposition to the West nurtured by the state throughout the 20th century, the Russian state has recognised that not only would childbirth save the demographics but would also play a powerful role in uniting the society for a mutual goal – making Russia great again. Contemporary nationalism is based on the idea of "resurrection of the nation" and strengthening of the role of reproduction.[36] This is reflected in various measures enacted by the government, seeking to entrench motherhood and childhood as the core social values.[37] In this sense, the state's approach to surrogacy fits well into other policies seeking to encourage reproduction, such as the state rewards for the birth of a third child, increased maternal and paternal capital as well as the same child care support given to the intended parents and the surrogate that is provided to natural parents.[38] The state's approach also seeks to increase the sense of national belonging. The latter has found its statutory footing in the recent legislation prohibiting surrogacy for foreign intended parents, unless one of them holds the Russian nationality. The legislator explicitly stated that it would be contrary to the Russian national interests if the children born to Russian surrogate mothers were taken abroad for permanent residency. Confining surrogacy to the domestic soil would also put a stop on the eligibility of foreign homosexual parents thereby reinforcing the values so dear to the Russian nation. Without children, there will be no future building blocks for the Russian political ideology. Ultimately, the goal of 'raising Russia from its knees' may only be achieved with the assistance of its population.

[36] Tatiana Zhurzhenko, 'The old ideology of a new family: demographic nationalism in Russia and Ukraine' (7 Jan 2013) *Spilne Commons* at < https://commons.com.ua/uk/staraya-ideologiya-novoj-semi-demogra/>.
[37] 'Putin supported the introduction of the "theses on children" into the Constitution' (26 Feb 2020) Interfax at < https://www.interfax.ru/russia/696780 >.
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