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Paulina Wiktoria Arias Wojtan*

The Legal Vacuum of Surrogacy and Its Implications for Childhood Statelessness

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Abstract

Surrogacy is a reality that law as fiction has not overcome. Surrogacy as a practice dates back even to Roman law, where subrogatio allowed the substitution of one person for another in a legal relationship.[1] Nowadays, the term subrogation is not limited to criminal or civil areas but is already included within the mutable concept of family. Currently, the practice of surrogacy or motherhood by substitution is a somewhat enigmatic phenomenon that generates questions in legal and filial relationships, ergo, how this new concept of family is formed and how the rights of the parties involved can be guaranteed and safeguarded. In this sense, the discussion has almost always focused on the role of women within the surrogate relationship; however, the violation of the rights of the minor or the nasciturus (the unborn) is not fully analyzed. Surrogacy poses both physical and legal risks for the surrogate mother, but also a legal risk for the parties to these surrogacy contracts. The legal uncertainty generated by the practice of surrogacy poses a challenge to contemporary law. The lack of regulation regarding this practice worldwide is complex, but for the purposes of this article, we will focus on the analysis of Poland and Colombia. The uncertainty posed by the legal limbo surrounding legal

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1. F. Andrés Santos, *Introducción histori-co-dogmatica a la idea de subrogación real*, "Anuario de Derecho Civil", 1998, Vol. 51 (2), p. 682.

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affiliation results in the violation of fundamental rights, namely, the right to acquire nationality. The risk of statelessness, the violation of human rights, and the call for a common framework or at least legislation within countries for the practice of surrogacy are topics that will be addressed in this text.

Keywords

surrogacy, filiation, surrogate motherhood, stateless, Colombian law, Polish law

Introduction

Many countries around the world, including Poland and Colombia, lack clear and explicit legislation on surrogacy. The legal system does not expressly prohibit it, but neither does it literally permit it. However, it should be noted that there are laws in both cases where grammatical, systematic, and historical interpretations allow for a negative interpretation of the practice.

Surrogacy, also known as gestational surrogacy, is a practice whose expansion has gained increasing relevance in recent years, generating significant legal challenges that have become the subject of analysis by both the highest international courts and the courts of multiple countries, where cases pose increasingly greater levels of ethical and regulatory complexity.The practice of this central issue remains unclear in countries that have not taken the first step towards establishing explicit regulations regarding surrogacy. In this specific case, Colombia and Poland have made legislative attempts to permit surrogacy contracts under certain conditions or, failing that, to prohibit them, but these have not been successful in the legislature.

Today, literature and law have reflected a tripartite division of the practice.[2] We can identify three types of legal situations worldwide: I. Complete prohibition, II. Altruistic regulation, and III. Commercial regulation.[3] The fourth alternative I propose in this paper concerns a legal gap in the regulations: it is not prohibited, but neither is it permitted. Contracts continue to be entered into between interested parties, but these agreements ultimately give rise to problems that are resolved by courts and tribunals. This is the legal situation in most countries.

2. It clarifies that the literature has established this regulation based on the recurring practice in customary countries.

3. E. Sarnaczka, I. Demchenko, *Legal Regulation of Surrogacy in Poland and Ukraine – a Comparative Analysis*, "Review of European and Comparative Law", 2024, Vol. 57, No. 2, pp. 223–248, DOI: 10.31743/recl.17247.

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Surrogacy is not only a problem for the woman who chooses to rent her womb, but also represents a situation of defenselessness for the nasciturus or newborn. A legal limbo at the time of birth, or even before, is what both the parties and the law face today. The Permanent Bureau of the Hague Conference on Private International Law warned that: "In an era of globalization, where borders are crossed more frequently, differences in the national laws of states can give rise to complex issues of private international law regarding the establishment or recognition of the legal parentage of children, issues that affect their human rights."[4] This situation presents a true legal paradigm in the face of many circumstances that may produce the effects of the contract; however, one aspect that has not been thoroughly analyzed is the statelessness into which minors born through this practice may fall. The risk of undermining the identity inherent to every person, even before birth, is something that should be prevented at all costs, particularly within the framework of legal security that guarantees the constitutional protection enjoyed by all individuals who are members of a state, since this constitutionalism is the guarantee of society's survival.

In this sense, the purpose of this article is to explore the mechanism of assisted reproduction (surrogacy) through a theoretical analysis of what has been discussed in jurisprudence, legal doctrine, and the literature in recent years in Poland and Colombia. In order to achieve the research objective, dogmatic and legal analysis, as well as comparative analysis, were used. The study was based on observation and analysis of content covering legal literature, dogmatic achievements, and case law on surrogacy, in order to identify, compare, and determine the meaning, structure, and logical consistency of the analyzed legal solutions. The approach adopted is not limited to an isolated review of norms but combines doctrine with jurisprudence; the information is organized and interpreted horizontally (non-hierarchically), which allows the subject of the research to be considered in its complex context. At the same time, a comparative analysis was used as a technique for comparing dogmatic and normative elements from different legal systems; the comparison is strictly technical and limited to the analysis of texts (normative and doctrinal), excluding non-legal factors.

The choice of Polish and Colombian legislation is not based solely on the author's personal experience, which nevertheless constitutes an important source of a unique research perspective. The decisive factor here is primarily the convergence of a key regulatory gap in the field of surrogacy, accompanied by the dynamic development of case law in both countries. Both Poland and Colombia lack an explicit prohibition or explicit permission for the use of surrogacy, which creates particularly favorable conditions for analyzing the domino effect – especially in the context of the risk of

4. Permanent Bureau of the Hague Conference on Private International Law in its 2016 Report: "The private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements." See: *Report of the February 2016 Meeting of the Experts' Group on Parentage / Surrogacy*, Hague Conference on Private International Law 2016, https://assets.hcch.net/docs/f92c95b5-4364-4461-bb04-2382e3c0d50d.pdf, (access 11.08.2025).

statelessness for children born through assisted reproduction procedures. The contrast between the applicable citizenship regimes provides additional cognitive value, allowing for a comparative approach with significant practical implications. The clash between different rules for acquiring citizenship and ambiguous regulations on surrogacy allows for in-depth reflection on the legal and social consequences of these solutions. Importantly, there is still a lack of parallel, in-depth analyses in the literature comparing the legal dogma and jurisprudence of Poland and Colombia. Thus, the choice of this pair of countries appears to be particularly heuristic for identifying the mechanisms leading to statelessness and for assessing the consistency and adequacy of the regulations in force.

This article will analyze the legal, doctrinal, and regulatory observations of two states whose legislation provides a useful perspective on the discussion of nationality and surrogacy, as well as their jurisprudential and doctrinal developments on the topic and the way in which the legal dialectic has been constructed around the questions raised by their practice. For the purposes of this article, it will also analyze international regulation and, where appropriate, propose paradigms that merit future study. Before continuing, it is pertinent for the reader to consider the following question: Are states dealing with stateless children?

What is Surrogacy?

Surrogacy, also known as gestational surrogacy, is the reproductive act that results in the birth of a child carried by a woman bound by an agreement or commitment under which she must cede all rights to the newborn to another person.[5] This practice, whose expansion has gained increasing relevance in recent years, is generating significant legal challenges that have become the subject of analysis by both the highest international courts and the parliaments of various states, where cases pose increasingly high levels of ethical and regulatory complexity.

Surrogacy – also known as gestational surrogacy – has sparked a complex debate in various jurisdictions. The controversy transcends the strictly legal sphere, extending into bioethical and social dimensions. Today, there is talk of a tripartite division, but a fourth alternative is proposed that is worth analyzing, given the legal vacuum that allows the practice but does not guarantee legal certainty. Below is the division that has been adopted in various regulations in different states.

The first type is complete prohibition. Based on the literal interpretation of the term, it indicates an absolute impediment to carrying out the practice. This means that the law does not allow for

5. Y. Gómez Sánchez, *El Derecho a la reproducción humana*, Marcial Pons 1994, p. 136.

any agreement between the parties and that any legal act entered into will be null and void. Often, countries that seek to prohibit the practice through regulatory law do so in order to safeguard women's human rights relating to human dignity, privacy, autonomy, equality, and health, as well as the unborn child's right to life and the right to a family. Among such countries are Spain, Burkina Faso, Japan, and Guatemala.[6] Their legislation prohibits the practice and the execution of any legal act in which a woman is obliged to renounce maternal filiation in favor of the contracting party, as well as any agreement between the parties intended to form such a contract.

The second type is altruistic regulation. This refers to the provision of services without any financial compensation, or rather, without the expectation of any monetary or material reward, prohibiting any commercial practice of the activity. The non-profit motive is based on the principle of solidarity, and although this concept has a broad scope of interpretation, in this context it refers to fraternity, mutual aid, and generosity.[7] In such cases, the financial compensation permitted is limited to the commissioning party covering the costs associated with carrying the pregnancy to term. Altruistic regulation is an option adopted by several countries that have sought to regulate surrogacy, including Brazil, Greece, India, and South Africa, among others.

The third type is commercial regulation. As its name suggests, this model allows the practice to be carried out for commercial purposes – that is, there is financial compensation for the service provided. This approach entails the commercialization of a woman's reproductive capacity and the commodification of the newborn.[8] Unlike the altruistic practice of surrogacy, this involves not merely a monetary transaction to cover expenses related to the pregnancy process, but a commercial purpose between the contracting parties. In countries such as Ukraine, Russia, and India,[9] the practice is fully supported by legislation – albeit with exceptions and varying degrees of permissiveness regarding the formation of such contracts.

Within the framework of this research, I maintain that there is a fourth alternative: countries where the practice is neither explicitly regulated nor expressly prohibited. This fourth category includes many countries that choose neither to ban nor to endorse this method of assisted reproduction. In these cases, although there are national and international rulings and jurisprudence on the subject, the issue has not been regulated, nor is there an early consensus in the legislature. The only roadmap is the rulings that have been issued; however, rather than providing a solution, these tend to perpetuate the situation, as surrogacy contracts often leave the parties in legal limbo – the

6. P. Rosas, *In which countries is surrogacy legal, and what is the situation in Latin America?* [*En qué países es legal la gestación subrogada y cuál es la situación en América Latina*], BBC 2023, https://www.bbc.com/mundo/noticias-65196202, (access 11.08.2025).

7. E. Uribe Arzate, J. Olvera Garcia, *El principio constitucional de solidaridad, como directriz para la sociedad humana*, "Revista de Derecho", 2020, Vol. 54, pp. 10–30, DOI: 10.14482/dere.54.342.

8. M.J. Pietrini Sanchez, *¿Es la gestación subrogada comercial moralmente inadmisible? La objeción de la mercantilización*, "Diánoia", 2022, Vol. 67, No. 89, pp. 3–38, DOI: 10.22201/iifs.18704913e.2022.89.1932.

9. India allowed a commercial regime until 2015. Since 2021, it has regulated exclusively the altruistic practice of this method.

creditor, the debtor, and even the beneficiary of the contract, the nasciturus or newborn – each case being considered individually.

Nationality as the Axis of Identity – Imminent Risk of Statelessness

Contemporary states and international organizations declare their commitment to protecting first-generation rights but their institutional instruments are increasingly proving insufficient in the face of the challenges posed by the development of assisted reproductive technology. Legal mechanisms that seemed adequate only a few years ago are now revealing significant gaps and shortcomings, particularly in the context of protecting the rights of children born through procedures such as surrogacy. The legal fiction on which many legislative solutions are based remains stagnant, failing to keep pace with social and medical advances. An individual's identity, understood as a sense of belonging, of being seen and accepted, finds its formal expression in citizenship – one of the basic attributes of legal personality. Citizenship not only provides access to rights and protection but also constitutes a defining element of identity in both legal and social dimensions. Although the principle of *jus sanguinis* allows a newborn to acquire the citizenship of its parents, in practice this is not always possible. In situations where citizenship is denied, the rights of the child remain without effective protection and its legal status is compromised. In response to these threats, international law offers a number of instruments aimed at safeguarding the identity of the child. Articles 7 and 8 of the Convention on the Rights of the Child oblige States Parties to ensure that every child has the right to preserve their identity, including citizenship. Article 2 of the same Convention emphasizes that these rights must be respected regardless of the circumstances of the child's birth or legal status. In this context, citizenship appears not only as formal nationality but as the foundation of legal and social protection, the absence of which can lead to statelessness – a phenomenon with serious consequences for both the individual and the international order.

Nationality is the legal attribute of personality through which a legal, political, and spiritual relationship exists with a country. In other words, it is a legal bond that unites individuals with a particular state.[10] The doctrine defines this legal bond of nationality as the right to have rights,[11] since it grants recognition before a state, thereby ensuring that the individual, as a subject of law, can satisfy the legal expectations that correspond to him and, in turn, guarantee the exercise of his rights and the fulfilment of his duties and obligations. Not being a member of, or failing that, not being recognized by any state renders a person stateless[12] – someone invisible in the eyes of a nation. In such a case, the person faces a serious risk of lack of protection and legal uncertainty. This is why the situation of the

10. Colombian Constitutional Court, Judgment T-893 of 2009 (December 2, 2009).

11. L. Ramírez Bolívar, S. Ruíz, *The right to have rights, the debate on nationality in Colombia* [*El derecho a tener derechos, el debate sobre la nacionalidad en Colombia*], Dejusticia 2019, https://www.dejusticia.org/column/el-derecho-a-tener-derechos-el-debate-sobre-la-nacionalidad-en-colombia/, (access 11.08.2025).

12. International law defines a stateless person as "a person who is not considered to be a national of any State under its law." See: *About statelessness*, The UN Refugee Agency, https://www.unhcr.org/what-we-do/protect-human-rights/ending-statelessness/about-statelessness, (access 20.10.2025).

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nasciturus (unborn) or the already born becomes extremely complicated when reality surpasses the fiction of the law. In many legal systems, it is not enough to be born in a certain territory to acquire *jus soli*; there are additional requirements that must be met to obtain nationality. *Jus soli* (right of soil) and *jus sanguinis* (right of blood) are legal principles that determine a person's nationality. These constitute the bond that allows for the relationship between the state and the individual.

In the Colombian case, Article 96 of the Colombian Constitution establishes the requirements for acquiring Colombian nationality, emphasizing this as a human and constitutional right intrinsically linked to human dignity.[13] Both principles apply in Colombia, albeit with certain exceptions in each case. *Jus soli* grants nationality to anyone born in Colombian territory; however, this alone is not sufficient, as certain conditions must also be met. Therefore, the child of a foreigner born in Colombian territory does not automatically acquire Colombian nationality. Before this can occur, the parents must prove that at least one of them was domiciled in the country at the time of birth or, failing that, was resident there at that time. In Colombia, it is very common for surrogacy contracts to result in the contracting party contesting motherhood. Therefore, when a birth certificate is issued, the mother's name is usually listed as "no information."[14] In most of these cases, the contracting party is not naturalized as Colombian and, for various geopolitical reasons, cannot register the newborn in their country of origin. Simply being born on Colombian territory does not guarantee citizenship. The formal requirements are extensive, and if they are not met, children born through surrogacy remain stateless. The Colombian Constitutional Court has already drawn attention to this problem, issuing six rulings calling for its regulation. Despite this, no legislative changes have been introduced to date, which exacerbates the state of legal uncertainty and the risk of systemic statelessness.[15]

In the Polish case, Article 34 of the Constitution of Poland states that Polish nationality shall be granted to anyone born to Polish parents; however, it also specifies that other cases will be defined by law. Articles 14 and 15 of the Act of 2 April 2009 on Polish Citizenship provide that a person born on Polish territory whose parents' whereabouts are unknown, or whose nationality is not specified or identified, shall be granted Polish citizenship. This suggests that the ultimate goal of the Polish legislator in this case was to create a rule intended to prevent minors from becoming stateless.

13. Colombian Constitutional Court, Judgment C-520 of 2016 (September 9, 2019).

14. Colombian Constitutional Court, Judgment T-127 of 2024 (May 8, 2024).

15. Colombian Constitutional Court, Judgment T-232 of 2024 (July 9, 2024); Colombian Constitutional Court, Judgment T-275 of 2022 (August 30, 2022); Colombian Constitutional Court, Judgment C-602 of 2019 (March 30, 2022); Colombian Constitutional Court, Judgment T-316 of 2018 (August 10, 2018); Colombian Constitutional Court, Judgment T-398 of 2016 (September 09, 2016); Colombian Constitutional Court, Judgment T-968 of 2009 (December 18, 2009).

Confrontation between Nationality and Human Dignity

However, it is worth emphasizing that there are minimum axiological standards that positive law cannot ignore, and human dignity is one of the most fundamental. Due to its inherent nature, constitutional provisions do not so much construct the concept of dignity as confirm its prior existence as a supreme value and establish an absolute obligation to respect it.[16] As Hans Welzel notes, human dignity is subject to objective logic – it is a value that the legislator cannot ignore or relativize in the process of lawmaking.[17]

Despite the existence of case law relating to the issue of surrogacy, the current regulations still do not guarantee the parties the full realization of the rights already enshrined in the constitution. The legislative gap creates a deficit in the protection of the fundamental rights of children born through surrogacy, which compels judges to actively exercise their judicial powers in order to protect their interests. Human dignity, as a fundamental right, is not only an independent foundation of the legal order but also the source of all derivative rights – both inherent and acquired – arising from the recognition of human beings as subjects deserving respect simply by virtue of being human.

In this context, it can reasonably be argued that restricting or refusing to recognize citizenship does not violate only one fundamental right but constitutes a double violation: of human dignity and of the right to citizenship as a constitutive element of an individual's legal identity. The lack of nationality not only deprives a child of institutional protection but also undermines their status as a full member of the political community, which, in light of constitutional guarantees, appears unacceptable.

International Law

For the purposes of this analysis, two regional human rights protection systems will be considered: the Inter-American Human Rights System (IACtHR) and the European Human Rights System (ECHR). The IACtHR, operating within the framework of the Organization of American States (OAS), is the mechanism responsible for promoting and protecting human rights in the Americas. Guided by the principle of sovereignty, member states have adopted a number of international instruments that form the foundation of this system. Colombia, as a party to the American Convention on Human Rights since 1985, has committed itself to complying with its provisions, including respecting the rights defined by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

16. S. Zieliński, *Understanding human dignity and its importance in the process of enacting and applying law. Proposed test of compliance of legal regulations with the principle of human dignity*, "Przegląd Sejmowy", 2019, No. 4 (153), pp. 107–127, DOI: 10.31268/PS.2019.54.

17. N. Agudelo Betancur, *Curso de derecho penal, esquemas del delito*, Ediciones Nuevo Foro 2010.

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Although the Court has not yet developed case law directly related to surrogacy, the case of Artavia Murillo et al. v. Costa Rica, concerning the ban on in vitro fertilization procedures, remains an important precedent. This case was brought before the Court following a ruling by the Constitutional Chamber of the Supreme Court of Costa Rica, which declared a 1955 executive decree prohibiting the use of in vitro techniques to be unconstitutional. The argument was based on an interpretation of the right to life, recognizing its beginning as the moment of conception. However, the Inter-American Court ruled that the ban violated a number of rights enshrined in the Convention, including Article 5 (right to dignity), Article 7 (personal liberty and reproductive autonomy), Article 11 (protection of private life), and Article 17 (protection of the family). In its interpretation of Article 4 of the Convention, the Court stated that the legal status of an embryo cannot be equated with that of a born person, recognizing the unborn as an object of special protection but not as a subject of law.

In contrast to the inter-American system, the European Court of Human Rights (ECHR) has developed extensive case law on surrogacy. Poland, as a party to the Convention since 1993, is subject to its jurisdiction and to the additional Protocols Nos. 1, 4, 6, 7, and 13.[18] Among the key cases that have influenced the development of the Court's interpretation are Mennesson and Labassee v. France[19] and Paradiso and Campanelli v. Italy.[20] However, the case of S.-H. v. Poland (Nos. 56846/15 and 56849/15), concerning the nationality of children born as a result of surrogacy, is of particular relevance to this analysis.[21]

In this case, the parents of twins, who held American-Israeli citizenship, applied for Polish citizenship for their children, citing the fact that one of them – a Polish citizen – had provided genetic material for the assisted reproduction procedure. Although a court in the United States confirmed their parental rights, the application was rejected in Poland due to the lack of Polish birth certificates and the fact that surrogacy is not recognized in the national legal system. After exhausting domestic remedies, the case was referred to the ECtHR, where the applicants alleged a violation of Article 8 (right to private and family life) and Article 14 (prohibition of discrimination).

The Court ruled that the parental relationship had been recognized both in the country of birth of the children and in the country of residence of the applicants, and therefore there was no legal uncertainty. The dispute concerned the recognition of citizenship through confirmation of the parental relationship, which highlights the tension between national and international law. The dialogue between national courts and international tribunals enriches case law and underscores the need to harmonize human rights protection standards.[22]

18. *European Court of Human Rights* [*Europejski Trybunał Praw Człowieka*], Ministry of Foreign Affairs, https://www.gov.pl/web/dyplomacja/europejski-trybunal-praw-czlowieka, (access 11.08.2025).

19. Mennesson v. France (no. 65192/11) and Labassee v. France (no. 65941/11), Judgment of the European Court of Human Rights, June 26, 2014.

20. Paradiso Campanelli v. Italy (No. 25358/12), Judgment of the European Court of Human Rights, 24 January 2017.

21. The petitioners requested that their identities be protected; therefore, abbreviations are used.

22. Applications nos. 56846/15 and 56849/15 S.-H. against Poland, European Court of Human Rights 2021.

There are numerous international instruments – such as the Universal Declaration of Human Rights, the Declaration of the Rights of the Child, and the revised United Nations Charter – that guarantee the protection of fundamental rights. Nevertheless, contemporary society faces the growing complexity of international law, particularly in the context of new reproductive technologies. A broad interpretation of children's rights, including the right to citizenship, could significantly enhance the level of protection for individuals and mitigate the negative effects of statelessness. Citizenship, as an external dimension of identity, cannot be regarded as merely another formal attribute – its denial constitutes a violation not only of the right to nationality but also of human dignity. Even if a broad interpretation of citizenship may lead to a redefinition of its boundaries, this cannot serve as a justification for failing to respect the rights of the child.

Legal Framework in Colombia

Since the 1980s, six or seven bills on surrogacy have been presented to the Congress of the Republic of Colombia.[23] Only one of them proposed a total ban on the practice, but none of the bills completed the full legislative process required for their adoption. Despite the lack of comprehensive statutory regulation, the Colombian Constitutional Court plays a key role in shaping the line of jurisprudence that serves as a reference point for adjudicating cases related to surrogacy. Ruling T-968 of 2009[24] is considered groundbreaking, not only because it set a precedent in cases concerning motherhood, but also because it was the first ruling to analyze the legal complexity of this practice. The Court recognized surrogacy as a legal form of assisted reproduction, enabling couples and single persons to have genetically related offspring. The ruling identified ten key regulatory parameters, among which priority was given to protecting the rights of the child as a subject requiring special care. The surrogacy agreement should be drawn up in writing, in accordance with the principle of freedom of contract, to ensure transparency and legal certainty.

Subsequent rulings – T-316 of 2018, T-275 of 2022, and T-127 of 2024 – continued this line of jurisprudence but still operate within a legislative vacuum that generates legal uncertainty. It is worth noting that the Court's rulings are binding only on the parties to the proceedings, leaving persons not involved in the case outside the scope of protection.

The latest legislative initiative related to surrogacy, presented in February 2023, was a response to the Constitutional Court's clear call to regulate the issue of surrogacy.[25] The draft law, "Regulating Uterine Surrogacy in Colombia," comprising 30 articles, proposed the introduction of an altruistic

23. L. Ximena Mora Gómez, *Proceedings of the discussion forum "Legislative proposals on surrogacy in Colombia. Analysis from an academic perspective"* [*Memorias del conversatorio "Proyectos de Ley sobre la gestación subrogada en Colombia. Análisis desde la academia"*], https://geneticayderecho.uexternado.edu.co/memorias-del-conversatorio-proyectos-de-ley-sobre-gestacion-subrogada-en-colombia-analisis-desde-la-academia/#_ftn1, (access 05.06.2025).

24. A tutela ruling is a legal mechanism for the protection of fundamental rights within the Colombian legal system. It is issued by a judge in response to a tutela action and determines whether an individual's fundamental rights have been violated or are under threat.

25. Colombian Constitutional Court, Judgment T-968 of 2009 (December 18, 2009).

model, excluding commercial contracts.[26] Remuneration for the pregnant woman was to be limited to compensation for material damages and lost benefits[27] resulting from the course of the pregnancy.[28] However, the bill was rejected by the House of Representatives for failing to meet procedural requirements. In addition, its content was controversial, among other reasons because it referred to the nasciturus as a "product," thereby violating the principle of respect for human dignity. The bill also failed to specify important elements of the contract and omitted the issue of surname as an essential component of identity. It is worth noting that although surrogacy was not widely practiced in Colombia at the time, it was known and used. The draft law indicated that, as a result of the armed conflict between Ukraine and Russia – countries where surrogacy is legal – Colombia began to be seen as an alternative location for this procedure, which led to an increase in the number of cases.[29]

The December 2024 family court ruling,[30] in which the judge recognized the possibility of entering the surrogate mother on the child's birth certificate, was also groundbreaking. The case concerned a Colombian citizen whose motherhood was challenged by the plaintiff. Unlike the Polish legal system, Colombia does not have a uniform family code – regulations are scattered across various legal acts. In Poland, Article 61 of the Family and Guardianship Code clearly states that the mother of a child is the woman who gave birth to it.[31] In Colombia, however, motherhood is based on the provisions of Law No. 45 of 1936 on natural origin. In the case in question, the dispute concerned a Danish citizen and a Colombian surrogate mother. The plaintiff argued that the woman who gave birth to the child had no genetic link to it. The judge referred to the concept of dividing motherhood into two stages: biological and surrogate. He ruled that even if the surrogate mother did not provide genetic material, by participating in the process of implantation, development, and maintenance of the pregnancy, she performed the function of a biological mother. As a result, it was ruled that dual motherhood could be entered in the civil registry.

It is worth adding that Colombian legislation also contains provisions penalizing the commercialization of human anatomical elements intended for transplantation. Article 1 of Law No. 919 of 2004 prohibits any form of remuneration for the transfer of such elements, which is similar to Polish regulations prohibiting the commercialization of reproductive cells.[32] The Act requires that every donation of human tissue be altruistic and motivated by humanitarian reasons. In practice, however, there are numerous websites and centers that offer remuneration – including in foreign currencies – for the donation of reproductive material.

26. According to the Cambridge Dictionary, an altruist is a person who cares about others and helps them despite not gaining anything by doing so.

27. Law 57 of 1887 (Civil Code [CC]) (Colombia, April 15, 1887).

28. Filing of the Statutory Law project "By means of which uterine surrogacy for gestation in Colombia is regulated" (2023). See: *Uterine Subrogation* [*Subrogación uterina*], Congreso de la República de Colombia, https://www.camara.gov.co/subrogacion-uterina-1542/, (access 20.10.2025).

29. Ibidem.

30. Family Court of Circuit 038. (2024, December 4). Judgment, Case No. 17-2023-00926-00. Bogotá, https://www.integritylegal.co/abogado/imagenes/Sentencia_Alquiler%20de%20vientres-1734041003588.pdf, (access 11.08.2025).

31. Act of 25 February 1964 - Family and Guardianship Code, Journal of Laws 1964, No. 9, item 59 [Ustawa z dnia 25 lutego 1964 r. - Kodeks rodzinny i opiekuńczy, Dz.U. 1964 nr 9 poz. 59].

32. Act of 25 June 2015 on infertility treatment, Journal of Laws 2015, item 1087 [Ustawa z dnia 25 czerwca 2015 r. o leczeniu niepłodności, Dz.U. 2015 poz. 1087].

It seems that the main argument against the legalization of surrogacy in Colombia is the fear that it could lead to child trafficking. However, this thesis does not find wide support in the legal community, as the purpose of the contract is to use the womb as an environment for the development of the pregnancy, not to transfer the child. It is crucial that there is no genetic link between the surrogate mother and the child – otherwise, according to Article 17 of the Constitution, remuneration for giving up a child could be classified as human trafficking.

In the context of the Colombian Constitution, it is worth recalling Hans Kelsen's theory. Article 42 of the Constitution states that the family is the basic social unit and that children, regardless of the form of conception, have equal rights and obligations.[33] This provision may serve as a basis for interpreting that having a child through assisted reproduction methods is permissible, provided that the normative hierarchy, in which the Constitution occupies a superior position, is respected. At this stage of the analysis, it is clear that the key issue remains the validation of the parental relationship.

33. Political Constitution of Colombia (1991), Official Gazette No. 44,537.

Legal Framework in Poland

Mater semper certa est – this is a principle of Roman law according to which the mother of a child is the woman who gave birth to it. Polish legislation has adopted this principle, as expressed in Article 61 § 9 of the Family and Guardianship Code, which states that "the mother of a child is the woman who gave birth to it."[34] This principle assumes a priori – regardless of empirical evidence – that the relationship between a woman and a child born from her body is biological in nature and requires no further confirmation. However, contemporary realities show that family ties are no longer exclusively the domain of biology; they can also be constructed and redefined by law and medicine.

34. A. Bernecka, *Prawo dziecka do poznania tożsamości genetycznej*, "Pedagogika Katolicka", 2018, Vol. 1 (22), pp. 150–160.

In Poland, surrogacy is not explicitly prohibited, but it has not been explicitly permitted either. There are regulations that imply its illegality and the invalidity of contracts concluded for this purpose, although to date there have been no reported cases of the criminalization of this practice.[35] The Family and Guardianship Code is the primary normative source indicating restrictions related to surrogacy. The aforementioned Article 61 § 9 establishes a presumption of maternity based on the birth certificate, meaning that even in the absence of a genetic link between the surrogate mother and the child, the woman who gave birth to the child is considered to be its mother. This legal construct does not provide for the possibility of challenging it.

35. J. Korus, *Surogatki. Historie kobiet, które rodzą „po cichu"*, Wydawnictwo Znak 2021.

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This raises questions about the scope of parental authority – can it be transferred, or should we rather speak of a form of adoption? The problem becomes even more complex when there is a genetic link between the surrogate mother and the child. In such a case, we are no longer dealing solely with the application of the principle of *mater semper certa est*, but with a biological relationship that complicates the process of transferring parental authority.

The Polish Senate is not indifferent to the need to regulate this issue. In recent years, there have been around six legislative initiatives concerning the use of genetic material in assisted reproduction procedures, only one of which proposed a total ban on surrogacy – similar to the Colombian proposal.[36]

In 2015, the Act on Methods of Infertility Treatment came into force, which in Article 2(1)(21) defines activities leading to the acquisition and use of reproductive cells or embryos for procreation, both inside and outside the recipient's body.[37] Currently, this is the main regulation concerning fertility issues, with a minor amendment introduced in 2024 that addressed only the rules for financing the state-run in vitro program.

On the basis of this regulation, a program to finance in vitro procedures was launched in 2024, aimed at couples with fertility problems, people with frozen embryos from previous procedures, and cancer patients for whom preserving fertility is important. This program has clearly defined criteria, and its beneficiaries are people who are married or in a stable partnership. Consequently, it can be concluded that the program does not cover same-sex couples, single people, or women intending to become surrogate mothers.

In this context, the question of legislative consistency arises: since the in vitro procedure is regulated and promoted by the state, and at the same time is an indispensable element of the surrogacy process, should the ethical equivalence of both practices be considered? Although this question goes beyond the scope of this analysis, it is worth taking a critical look at the legislator's position, especially since the aim of both procedures is to realize the right to have a child.

In some cases, Article 119[1]a of the Family and Guardianship Code may apply, which allows adoption if one of the biological parents remains in a sociological relationship with the person applying for adoption. This provision may provide a loophole for regulating parental relationships in situations where traditional legal constructs prove insufficient.

36. K. Ciulkin-Sarnocińska, *Surogacja w ujęciu karnoprawnym i kryminologicznym*, Doctoral dissertation, University of Białystok, Faculty of Law, 2019, https://repozytorium.uwb.edu.pl/jspui/handle/11320/8739, (access 05.06.2025).

37. E. Sarnaczka, I. Demchenko, *Legal Regulation of...*, op. cit., pp. 223–248.

Conclusion

Surrogate motherhood is a practice as old as civilization itself. Although its form has not remained entirely unchanged, scientific progress has made it increasingly precise and refined. The need for legislative regulation is not only evident but also urgent. Courts and tribunals can no longer simply set precedents that remain open to interpretation in each individual case.

Although the creation of a uniform international legal regime for surrogacy would be a utopian proposition, each country – through its own legislative system – can and should develop a transitional regulatory model that ensures greater transparency and legal certainty in matters such as the citizenship of a child born through this procedure. Without the positivization of the norm within the legal system, it is not possible to regulate this issue effectively.

Based on the analyses carried out, it is worth emphasizing that the risk of statelessness appears to be relatively lower in Poland, where the principle of *mater semper certa est* applies, assuming that biological ties form the basis for determining citizenship. The Polish legislative model, based on family ties, finds additional support in international law instruments such as the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, which establish mechanisms to prevent situations in which minors remain without nationality.

In contrast, the situation in Colombia is much more complex. Despite the constitutional recognition of the principle of *jus soli*, its application is subject to numerous restrictions which, in practice, make it difficult to grant citizenship to children born through surrogacy. The lack of clear regulations and the incomplete implementation of international standards for protection against statelessness exacerbate the risk of legal marginalization of minors. In this context, the legislative gap becomes a real threat, leaving children – both those already born and those yet to be born – in a state of legal uncertainty that requires the intervention of supreme courts, often at the international level. This state of affairs highlights the universal nature of the problem, which transcends the boundaries of individual legal systems.

Furthermore, the rapid development of assisted reproductive technologies challenges traditional legal categories, including definitions of parenthood, citizenship, and state responsibility. Administrative issues that were originally within national jurisdiction are increasingly becoming the subject of international law. Although existing regulations often establish clear criteria for origin,

the recognition of cross-border parenthood remains problematic, especially in cases where there is no clear regulation on surrogacy. Statelessness resulting from surrogacy is therefore not a marginal phenomenon but has a domino effect that impacts the recognition of many other rights, from citizenship and legal identity to access to social protection and education.

Both national and international law are now faced with a society that has undergone profound changes. The norms of thirty years ago no longer respond to the challenges of today. What is needed is not outdated guarantees, but rather regulatory expansion capable of encompassing the new reality that is increasingly permeating our daily lives.

In conclusion, it is worth emphasizing that regulations are needed which offer real solutions rather than generating further uncertainty. It is the legislator, as the representative of the will of the original sovereign, who has the duty to give voice and form to social solutions. Courts and tribunals cannot continually perform *ultra petita* and *extra petita* functions, resolving issues that should be regulated by law. Surrogacy is a practice that has existed and will continue to exist. The lack of regulation does not prevent its use, but its regulation guarantees supervision and legal certainty in the face of potential violations of fundamental rights, including the right that mirrors all others: the right to citizenship.

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