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CRIMINAL ASPECTS OF HUMAN EMBRYO DONATION UNDER SURROGACY ARRANGEMENTS*

1. INTRODUCTORY NOTES

As an early stage in the development of a human being, the human embryo requires special legal protection. Developments in medicine as well as research, diagnostic and treatment methods on the one hand enable successful infertility treatment, support for the embryo's growth and early detection of malformations; on the other hand, however, they carry the risk of undue interference in the integrity of the human person at the early stages of his or her development. So it has been necessary to introduce new legal provisions to officially legalise or limit various practices connected with the handling of human embryos – especially in the *in vitro* environment. The Polish legislative act *Ustawa z 25 czerwca 2015 r. o leczeniu niepłodności* (the Treatment of Infertility Act of 25th June 2015, *Dziennik Ustaw* 2017, Item 865, uniform text; hereinafter 'the Act') was an attempt to address all the reservations voiced by physicians,

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ethicists and lawyers concerning these issues¹. The problem of embryo donation is one of the particularly sensitive issues calling for the creation of an appropriate legal framework, which this Act sought to standardise.

The term ‘human embryo donation’ is defined in the Act. In compliance with the legal definition set out in Article 2(1)(9), embryo donation is the provision of an embryo for use in medically assisted reproduction; the embryo is donated to a recipient who is neither the donor of female gametes nor the spouse or cohabitant of the donor of the male gametes from which the embryo was created. In order to guarantee embryo protection as regards its use in biology and medicine in connection with infertility treatment, and to specify the conditions of the donation, collection, processing, testing, storage and distribution of human embryos intended for use in medically assisted reproduction, the Polish legislator has introduced a number of legal provisions to govern the criteria of embryo handling. The Act has thereby standardised issues relating to the operation of fertility clinics, gamete and embryo handling in medically assisted reproduction, gamete collection, and embryo donation in medically assisted reproduction, the register of gamete and embryo donors, the operation of medically assisted reproduction centres, sperm/egg cell and embryo banks etc. The purpose of these regulations is to restrict unauthorised freedom in gamete and embryo use, and to establish an appropriate institutional framework for the provision of the best possible protection and proper conduct of medically assisted reproduction.

Before the Act could come into force there was a need to verify the efficacy of the earlier legal arrangements. Previously, the lack of certain regulations had made it necessary to resort to indirect means under other legislation to address some of the practical problems which arose in connection with embryo donation. The legal provisions regulating embryo donation were incomplete and insufficient, particularly as regards criminal law provisions to prosecute offenders acting against the best interest of the embryo. In addition to administrative and legal

¹ Ustawa z 25 czerwca 2015 r. o leczeniu niepłodności, (Dziennik Ustaw 2017, Item 865); hereinafter ‘the Act’.

standards, the present Act includes regulations prescribing the penalties for specific practices intended to reduce embryo safety.

One of the practices directly related to embryo donation which calls for the examination of the premises for potential criminal liability under the Act is surrogacy and the way surrogacy arrangements are made. This phenomenon has become increasingly common, whereas its legal status remains unclear² and has raised controversy relating primarily to Polish family law (matters such as the adoption of a child born of a surrogate mother by its biological parents). However, considering the nature of surrogacy, criminal liability is an issue which should certainly be taken into account.

Surrogacy is a complex matter. It is an arrangement whereby a woman (the surrogate mother) becomes pregnant and carries a pregnancy for another woman, on the assumption that when she gives birth she will surrender the child to the other woman involved in the agreement³. The professional literature defines different types of surrogacy – traditional (partial) surrogacy, in which a designated father provides the semen and the child is genetically related to the surrogate (biological) mother, and to the sperm donor; and gestational surrogacy, in which an embryo created from the gametes of another couple is implanted in a surrogate

² The surrogacy issue has been regulated in some jurisdictions (e.g. UK, Greece, some U.S. states). In the majority of cases however, there is a prohibition on commercial surrogacy arrangements. All that legislators permit are agreements free of charge to provide altruistic assistance to an infertile couple. See B. WALERJAN, *Nowe dylematy medycyny – zjawisko macierzyństwa zastępczego w perspektywie społeczno-etycznej*, «Annales: etyka w życiu gospodarczym» 12.1/2009, p. 39 and contained literature; Cf. also K. BAGAN-KURLUTA, *Macierzyństwo zastępcze a adopcje – symbioza czy konkurencja?*, «Miscellanea Historico-Iuridica» 13.2/2014, p. 289 et seq.; M. FRAS, D. ABŁĄŻEWICZ, *Reżim prawny macierzyństwa zastępczego na tle porównawczym*, «Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego» 6/2008, p. 31 et seq.

³ Report of the Committee of Inquiry into Human Fertilisation and Embryology, Her Majesty's Stationery Office, London 1984, p. 42, as cited in W. GÓROWSKI, *Zastępcze macierzyństwo a prawo karne – obecna ocena stanu prawnego*, «Czasopismo Prawa Karnego i Nauk Penalnych» 15.1/2011, p. 6.

mother⁴. Different methods of achieving surrogacy are available: in traditional surrogacy by (1) fertilisation by artificial insemination *in vivo* of the surrogate mother; and (2) *in vitro* fertilisation with donor sperm; (3) in gestational surrogacy by embryo transfer: the fertilisation of the biological mother's egg with donor sperm and the placement of the embryo in the surrogate's uterus⁵. The issues I address in this paper concern gestational surrogacy.

Although no provisions of Polish criminal law impose a direct prohibition on participation in a surrogacy arrangement or the activities associated with such an arrangement, certain practices pursued in its performance may bear the attributes of offences defined under the Act. This applies to practices directly related to illegal embryo donation, and practices which occur prior to donation (dissemination of advertisements on the sale or purchase of embryos, or mediation in such sale or purchase) and derivative activities which are prohibited under the Act in its provisions on the placement of embryos provided for donation in a recipient's body).

2. EMBRYO DISPOSAL OR ACQUISITION FOR THE PURPOSE OF MATERIAL OR PERSONAL GAIN

Considering the essence of a surrogacy arrangement, the first issue to be addressed is participants' criminal liability under Article 79(1) of the Act. Under this provision, any person who purchases or sells an embryo or acts as an intermediary in the purchase or sale of an embryo for material or personal gain, or participates in the use of an embryo obtained in breach of the provisions of the Act, is criminally liable. The legislator has graded offences of this type; the most serious offence is committed if the offender makes it a source of his or her

⁴ M. A. LEBENSZTEJN, *Macierzyństwo zastępcze – problemy etyczne i prawne*, «Miscellanea Historico-Iuridica» 13.2/2014, p. 300 and the literature it cites; R. TOKARCZYK, *Prawa narodzin, życia i śmierci*, Kraków, 2000, p. 179.

⁵ J. HOLOCHER, M. SONIEWICKA, *Analiza prawna umowy o zastępcze macierzyństwo*, «Prawo i Medycyna» 11.3/2009, p. 45.

regular income (Article 79(2)). The purpose of this provision is to protect embryos against illegal trading or uncontrolled applications likely to involve their use in humans or in other research-related activities. The literature observes that the legal admissibility of commercial embryo donation would commoditise human life, which might subsequently lead to serious abuse⁶.

The potential criminal liability under this provision shows there is a need to examine the substance of surrogacy agreements and the obligations of the parties to them. The specific *essentialia negotii* of such agreements may therefore include the surrogate's commitment to become pregnant for the contracting individuals and to surrender the child on birth, as well as to give up her parental rights to the child. The other contracting party undertakes to pay a specified sum of money and to collect the child⁷. So we may assume that the performance of a commercial surrogacy agreement bears the attributes of the offence defined in Article 79(1). Parties who purchase and sell an embryo are committing an offence because they are focusing on earning a specific relevant gain.

Importantly, the legislator has not limited the offence only to the payment of a specific sum of money, but extended the scope of the offender's motivation by including other forms of material benefit (e.g. acquisition of property rights, release from a debt, waiver of a claim, use of services or someone else's property)⁸ and personal benefit⁹.

⁶ Cf. J.A. ROBERTSON, *Ethical and legal issues in human embryo donation*, «Fertility and Sterility» 64.5/1995, p. 890.

⁷ J. HOLOCHER, M. SONIEWICKA, *op. cit.*, p. 46. The authors make a point that it is possible to make an agreement under which the surrogate undertakes to become pregnant and give up the child in return for another material or personal benefit, as well for no compensation. Cf. also A. MAKOWIEC, *Dopuszczalność zastępczego macierzyństwa w prawie polskim – rozważania 'de lege lata' i 'de lege ferenda'*, «Internetowy Przegląd Prawniczy TBSP UJ» 6.1/2011, p. 62 et seq.; M. SAFJAN, *Prawo wobec ingerencji w naturę ludzkiej prokreacji*, Warszawa, 1990, p. 433 et seq.

⁸ M. GAŁĄZKA, [in:] *Kodeks karny. Komentarz*, ed. A. GRZEŚKOWIAK, K. WIAK, Warszawa 2017, p. 689 and the literature it cites.

⁹ At the same time, no penalisation of such practices pursued for altruistic reasons should be seen as a negative phenomenon. Article 79 of the Act not only provides

The embryo donors, i.e. the biological parents, provide the embryo primarily to derive a personal gain, that is to have a child of their own (especially if the biological mother cannot become pregnant). The surrogate will be liable on the grounds of having acquired and used the embryo in breach of the provisions of the Act, that is by undergoing embryo implantation. It should be assumed that her chief motive is to obtain a material benefit in form and amount previously agreed with the embryo donors. Moreover, on the basis of testimonials given by women who have acted as surrogates¹⁰, it cannot be ruled out that they were motivated by personal benefit. Hence the assumption of the surrogate's criminal liability should not be dismissed outright, even if the surrogacy arrangement does not provide outright for her material benefit.

In the context of the criminal aspects of human embryo donation under surrogacy arrangements, it is also important that the Act does not exclude the possibility of a woman who is not the child's biological mother giving birth to it. This is one of the outcomes of the way the Act defines legal embryo donation. To engage in legal embryo donation the parties involved must meet the conditions laid down in the Act. Article 36(1) presents a list of cumulative requirements which must be met to make an embryo donation legal. In view of the nature of these

protection against illegal human embryo handling, but in the long term it is expected to protect the dignity of embryo donors (Cf. K. NAZAR, [in:] *Pozakodeksowe przestępstwa przeciwko zdrowiu. Komentarz*, ed. M. MOZGAWA, Warsaw 2017, p. 139) as well as the health and life of the child conceived. Cf. also P. WITCZAK, *Prawna sytuacja matek zastępczych*, «Iustitia» 24.2/2016, p. 88 et seq.; Cf. also K. SZCZUCKI, *Prawo dziecka poczętego metodą in vitro do poznania własnej tożsamości biologicznej*, [in:] *Współczesne wyzwania bioetyczne*, eds. L. BOSEK, M. KRÓLIKOWSKI, Warszawa, 2010, p. 184 et seq.; P.W. CHEŁMOWSKA, *Prawo dziecka poczętego w wyniku zastosowania medycznie wspomaganey prokreacji do poznania swojego pochodzenia genetycznego – kilka słów o ustawie z dnia 25 czerwca 2015 roku o leczeniu niepłodności*, [in:] *Prawo Matżeńskie i jego relacje z innymi gałęziami prawa*, eds. I.A. JAROSZEWSKA, G. ĆWIKLIŃSKI, Olsztyn, 2017, p. 22 et seq.). The general non-penalisation of practices related to free embryo donation or receipt contrary to the provisions of the Act makes the anticipated protection imperfect and may leave room for abuse.

¹⁰ Cf. e.g. <https://www.growinggenerations.com/surrogacy-program/surrogates/surrogate-stories/successful-surrogate-stories-tina>.

prerequisites, surrogacy agreements may fail to meet a significant number of them, and consequently the performance of surrogacy agreements should be regarded as a manifestation of illegal receipt, provision of or participation in the use of a human embryo.

One of the basic prerequisites is the anonymity of the recipient of the embryo. This provision is intended to prevent embryo trading. It is also designed to prevent commercial surrogacy agreements. As I have already said, one of the fundamental components of surrogacy agreements should be the commitment of specific individuals regarding the provision of the embryo; the surrogate is to commit herself to give birth to a child and renounce her parental rights to it. She should be allowed adequate compensation for her services. Other provisions that might appear in the substance of such agreements include the rights and prohibitions the surrogate must observe during the pregnancy and the consequences if she fails to comply with these obligations, her commitment to undergo diagnostic procedures etc.¹¹ Notwithstanding these requirements which should be formulated in an agreement drawn up in accordance with the provisions of civil law and considering the norms in surrogacy agreements which provide for the implementation of their provisions, we must assume that it is not possible to enter into such an agreement with one party remaining anonymous.

Apart from the anonymity of the embryo donors, other conditions which must be met under Article 36(1) of the Act include the following. A physician with the appropriate specialist qualifications and applying state-of-the-art medical expertise must establish the medical grounds for the provision of the embryo and its implantation in the recipient's body. He must also examine the candidate recipient's medical history and conduct the necessary laboratory tests to ascertain that the risk she will undertake if the embryo is implanted in her body is not outside the prescribed limits for this kind of medical procedure, that it shall not do considerable harm to her health, and that it is possible to keep the

¹¹ M. MIKLUSZKA, *Czy można kupić dziecko, czyli problemy prawne i etyczne związane z macierzyństwem zastępczym*, [in:], *Współczesne wyzwania bioetyczne*, eds. L. BOSEK, M. KRÓLIKOWSKI, Warszawa, 2010, p. 325.

risk of an adverse event or significant adverse reaction in the recipient and any children born as a result of the use of the embryo in medically assisted reproduction down to a minimum. An individual must be found and selected out of the pool of those who have consented to engage in embryo transfer whose phenotypic characteristics are similar to those of the embryo donors. The prospective recipient must be provided with the relevant information before she consents to receive the embryo, and she must confirm this in a written declaration. In addition she must confirm in writing that all the information she has provided on her medical history is true to the best of her knowledge; she must have full capacity to enter into legal transactions and she must give her written consent to accept and use embryos in medically assisted reproduction. If the recipient is married or cohabiting her husband or cohabitant must issue his consent. The embryo is to be used within 14 months of the issue of the declaration referred to in Article 36(1)(7)(b) of the Act. Before the embryo donors give their consent they must be provided with the relevant information on the legal effects of embryo transfer (e.g. they must be told that they will have no rights and obligations regarding the child born as a result of medically assisted reproduction). The embryo donors must have full capacity to enter into legal transactions; they must give their voluntary written consent in the presence of an employee of the gamete and embryo banking facility to transfer embryos for donation; and they must make a written declaration that they are aware of the legal effects of embryo donation. These conditions and other provisions specified in the Act (in particular, conditions to be met by medically assisted reproduction centres and gamete and embryo banking facilities) constitute the formal procedure to ensure the protection of embryos against their uncontrolled use and distribution, and to ensure that medically assisted reproduction is conducted properly. Legal embryo donation is only possible once all of these prerequisites have been met. So we should conclude that a surrogacy arrangement is a type of agreement intended to circumvent the law and ignore the prescribed formalities; and therefore its provisions are not binding on the parties. The legal grounds which could be cited to show the illegality of such an act would be, for instance, the provision under Article 58 § 1 of *Ustawa z 23 kwietnia*

1964 r. *Kodeks cywilny* (the Civil Code Act of 23 April 1964)¹², which states that legal transactions concluded in breach of the law are invalid¹³.

3. DISSEMINATION OF ADVERTISEMENTS FOR EMBRYO PROVISION OR RECEIPT FOR PAYMENT

The fact of entering into a surrogacy agreement which provides for a material or personal benefit does not constitute an offence in itself. We should assume that a surrogacy agreement as such is a preliminary stage when the potential offenders create the circumstances to help them commit the offence – the receipt or provision of an embryo or participation in the use of an embryo obtained in breach of the Act. Article 16 § 2 of *Kodeks karny* (the Polish Criminal Code)¹⁴ says that making preparations for the commission of an offence is punishable only if an act of legislation penalises the said activities, and since the practices referred to in Article 79 of the Act have not been penalised by any act of legislation, therefore it should be assumed that the mere entrance into a surrogacy agreement involving embryo transfer is not an offence.

However, the publication of an advertisement with an offer of surrogacy (for embryo receipt), or in search of a surrogate (for embryo provision) for a fixed sum of money may be an exception to this rule¹⁵. Such practices may constitute an offence defined under the provisions of Article 76 of the Act, which should be regarded as a punishable preliminary activity in preparation for activities such as the offence defined in Article 79 of the Act. However, considering the attributes

¹² Ustawa z 23 kwietnia 1964 r. *Kodeks cywilny* (Dziennik Ustaw 2018, item 1025, unified text).

¹³ P. WITCZAK, *op. cit.*, p. 90; Cf. also M. MIKLUSZKA, *op. cit.*, p. 328 et seq.

¹⁴ Ustawa z 6 czerwca 1997 r. *Kodeks karny* (Dziennik Ustaw 2018, item 1600, unified text).

¹⁵ However, it should be emphasised that this is an earlier stage preceding the agreement, which does not have to be the outcome of the earlier dissemination of the advertisement as specified above.

of the offence, it should be noted that some offending practices shall remain beyond the regulating scope of this provision.

Pursuant to the provisions of Article 76 of the Act, an individual disseminating advertisements on the sale, purchase or mediation in the sale or purchase of gametes or embryos may be assumed to be criminally liable¹⁶. Embryos and gametes constitute non-tradable goods. If the dissemination of such advertisements is to bear the attributes of the said offence, the advertisements must explicitly offer provision, receipt or mediation in return for payment. Dissemination of advertisements on gamete or embryo donation free of charge does not constitute an offence. The practices in which an offender engages are not conducted for altruistic reasons¹⁷.

The provision on “payment” may raise some doubts. An analogous prohibition is defined in the provision of Article 28(1) of the Act, under which the sale or purchase of gametes or embryos, or mediation in such operations are strictly prohibited. If treated together with the provisions of Article 76, this would suggest that only the dissemination of an advertisement for the provision or receipt of gametes or embryos, or mediation therein, for which the provider, recipient, or intermediary is to receive a material benefit in the form of cash payment constitutes an offence. The scope of the prohibition does not appear to cover other forms of material or personal benefits. However, Article 28(2) prohibits the demand of payment or *any other material or personal benefit* for gametes collected from a donor, or for the use of embryos. What is more, since the preliminary described in Article 76 for the offence specified in Article 79 is a criminal offence on its own account, it appears that

¹⁶ Importantly, the offence defined in Article 76 of the Act is a common crime - it can be committed by any person involved in the dissemination of illegal advertising. A person willing to donate or receive an egg cell or an embryo may also be an offender on this count. Cf. V. KONARSKA-WRZOSEK, [in:] *Szczególne dziedziny prawa karnego. Prawo karne wojskowe, skarbowe i pozakodeksowe. System Prawa Karnego*, XI, ed. M. BOJARSKI, Warszawa, 2017, p. 526 et seq.

¹⁷ Cf. J. HABERKO, [in:] *Ustawa o pobieraniu, przechowywaniu i przeszczepianiu komórek, tkanek i narządów*, J. HABERKO, I. UHRYNOWSKA-TYSZKIEWICZ, Warszawa, 2014, «Lex/el.».

the scope of penalisation is not exhaustive. Therefore, dissemination of surrogacy ads where biological parents offer the surrogate other types of material or personal benefits in return for receiving an embryo do not constitute an offence.

4. EMBRYO HANDLING IN BREACH OF THE LEGAL PROVISIONS

Although the performance of a surrogacy agreement constitutes an act in breach of the provisions of the Act (in particular Article 36), certain potential violations in this respect do not result in the criminal liability of the donors or recipient. As regards practices likely to result in the performance of a surrogacy arrangement, the Polish legislator has put more emphasis on the liability of individuals who conduct activities regarded as medically assisted reproduction contrary to the provisions of the Act. The Act contains loopholes allowing for a relatively wide margin of impunity for individuals directly involved in the performance of a surrogacy agreement. Also in cases where the legislator has provided for the criminal liability of such individuals, the regulating scope of the penal provisions is often narrowed down, which means that some of the practices offenders engage in cannot be classified as offences.

Such a situation may also occur with the application of Article 79. The prerequisite for criminal charges to be brought against an offender is his contractual provision of remuneration in the form of a material or personal benefit, which, as I have said, is not offered as a standard. On the other hand, this does not mean that any instance of a surrogacy agreement in which the parties failed to reserve such a condition cannot be classified as an offence, because the provisions of Article 78 should also be taken into account. Pursuant to this Article, individuals who handle gametes or embryos in breach of Article 18, Articles 20 to 22, or Article 23(1) of the Act may be held criminally liable. In the context of this paper and the surrogacy issue, violation of the provisions defined in Articles 20 and 22 of the Act acquire considerable importance.

These provisions specify the conditions for legal embryo donation¹⁸ and the premises which make donation illegal¹⁹. If the performance of a surrogacy agreement entails the breach of these requirements, the offender's conduct should be considered to bear the attributes of the offence defined in the provisions of Article 78²⁰. The donors or recipient of an embryo may be considered offenders under this article²¹.

An analysis of embryo protection in the light of Polish criminal law should consider a potential offender's criminal liability for an act defined in Article 189a of *Kodeks karny* (the Polish Criminal Code), which concerns trafficking in human beings and the preparatory activities for such an act. In itself, the receipt or provision of an embryo in return for a material or personal benefit does not bear the attributes of this offence. Embryo trading cannot be regarded as tantamount to trafficking in human beings. The difference lies in the subject of the offender's practice²². In line with the generally adopted viewpoint, under Polish criminal law protection of "the human being" starts from the beginning of labour, viz. the emergence of uterine contractions ensuring the progress of labour. In the case of a caesarean section

¹⁸ It should be assumed that under Article 20 of the Act such criteria include embryo donors' consent in writing to embryo transfer, and the lack of medical contraindications for the transfer of the embryo into the recipient's body.

¹⁹ Article 22 of the Act prohibits the transfer of embryos created for donation into the body of a recipient if the embryo donors make a written statement withdrawing their consent to embryo transfer; if the recipient makes a written statement withdrawing her consent to embryo transfer; if the recipient is married, embryo transfer is prohibited if her husband failed to give his consent to the transfer; and if there are medical contraindications against the transfer of the embryo into the recipient's body.

²⁰ For instance, a surrogate agrees to have the embryo implanted under a surrogacy agreement although she is aware that there are some medical contraindications to the transfer.

²¹ K. NAZAR, *op. cit.*, p. 154 et seq.

²² W. GÓROWSKI, *op. cit.*, p. 15 et seq.; Cf. M. GAŁĄZKA, *Prawo karne wobec zastępczego macierzyństwa*, [in:] *'Ius et lex'. Księga jubileuszowa ku czci Profesora Adama Strzembosza*, eds. A. DĘBIŃSKI, A. GRZEŚKOWIAK, K. WIAK, Lublin, 2002, p. 120 et seq.

ending a pregnancy, protection starts from the beginning of measures to conduct the caesarean section²³.

What is more, the definition of human trafficking in the provisions of Article 115 § 22 of the Polish Criminal Code covers the purpose of acquiring cells, tissues or organs in breach of the Act, and hence gamete acquisition may constitute a form of human trafficking as defined in the provisions of Article 115 § 22. The situation is more complicated if the offender seeks to obtain embryos. The list provided in Article 115 § 22 is open-ended and only contains examples of purposes commonly pursued by offenders. However, all of them follow a general scheme which penalises human rights abuse related to the provision of services and human rights abuse in organ donation²⁴. The restriction limiting the potential scope of the attributes of human trafficking owing to the exploitation of a given individual who acts as an embryo donor is primarily due to technical issues. If we adopt the definition in Article 2(1) (28) of the Act, an embryo is a group of cells created as a result of *in vitro* fertilisation, which means it is stored outside the body of its biological or surrogate mother. Technically this eliminates the possibility of using humans for the purpose of obtaining an embryo, as in the case of the acquisition of cells, tissues, or organs.

In theory, we cannot rule out the possibility of applying the measures referred to in Article 115 § 22 of the Criminal Code to situations in which a woman acts as a surrogate for the purpose of receiving the embryo of its biological parents and giving birth to their child, and treating this as an instance of trafficking in human beings²⁵. However, such issues lie beyond the scope of the subject of this article.

²³ Supreme Court Resolution of 26th October 2006, I KZP 18/06, Legalis no. 77914. Cf. also J. POTULSKI, *Definicja pojęcia „człowiek” w rozumieniu prawa karnego materialnego*, «Gdańskie Studia Prawnicze – Przegląd Orzecznictwa» 3/2007, p. 143 et seq.

²⁴ Decision of the Gdańsk Court of Appeal of 13th August 2013, II AKz 475/13, KZS 4/2014, item 60; S. HYPŚ, [in:] *Kodeks karny. Komentarz*, ed. A. GRZEŚKOWIAK, K. WIAK, Warszawa, 2017, p. 720.

²⁵ For the voluntary iperformance of a surrogacy agreement in the context of criminal liability for human trafficking see W. GÓROWSKI, *op. cit.*, p. 15 et seq.

5. CONCLUSION

Numerous aspects of human embryo protection are open to different types of potential abuse. Considering their diversity, the amendment of *Ustawa z 25 czerwca 2015 r. o leczeniu niepłodności* (the Treatment of Infertility Act of 25th June 2015) is by all means necessary. Although the Act was intended to provide for the comprehensive regulation of this issue, it contains numerous loopholes leading to the potential impunity of certain practices in breach of the law.

Surrogacy is a question strictly associated with embryo donation. The existing legislation offers no provisions to explicitly regulate this issue from the point of view of the norms of civil (including family and inheritance), as well as criminal law. It appears that due to the fact that the aim of such agreements is to circumvent legal embryo transfer and donation procedures, these practices should definitely be regarded as an offence. Not only would this prevent the commercialisation of embryo and gamete donation, but it would also provide for a better standard of protection of the life and health of the child conceived, which is endangered by the circumvention of legal procedures, in connection with considerations such as the assessment of the health of the woman who will receive and carry the embryo. Currently the lack of appropriate regulations is leading to problems with interpretation, and hence failure to ensure sufficient protection for the human embryo.

Apart from a reappraisal of the legal questions related to the status of surrogacy, appropriate amendments should also be introduced in the scope of the Act's penal provisions. Attention should be paid to the fact that under the penal provisions laid down in its Chapter 12 the legislator put special emphasis on the protection of human gametes and embryo creation in medically assisted reproduction²⁶. The Act marginalises the protection of existing embryos to a certain extent, although the social

²⁶ This point is made in various parts of the Act: Article 77 (receipt, provision, and mediation in the receipt or provision of gametes), Article 84 (posthumous gamete retrieval), Article 85 (creation of embryos for purposes other than those permitted for medical reasons), Article 86 (creation of chimeras or hybrids), Article 87 (reproduction of genetic information contained in another embryo).

effects of activities running counter to such protection have turned out to be very harmful. What is more, the penal provisions in other legislation which should complement the provisions of this Act have turned out to be inapplicable in some cases²⁷.

The multiplicity and variety of problems associated with embryo donation show that this issue requires the amendment of the existing legislation. The lack of such amendment may bring numerous problems with the interpretation of the existing regulations, consequently leading to the impunity of offenders. The need for change appears to be particularly important in view of the need to protect human life at its early stage. With regard to further progress in medicine and techniques in medically assisted reproduction, we should assume that the hitherto ignored loopholes in protection may lead to more interpretation problems in the future, which will have a negative impact on human gamete or embryo handling, especially in the *in vitro* environment.

CRIMINAL ASPECTS OF HUMAN EMBRYO DONATION UNDER SURROGACY ARRANGEMENTS

Summary

This article is on criminal liability under Polish law for behaviour related to the donation of embryos that may take place as part of surrogate arrangements. I analyse the features of prohibited acts specified in the provisions of *Ustawa z 25 czerwca 2015 r. o leczeniu niepłodności* (the Treatment of Infertility Act of 25th June 2015, *Dziennik Ustaw* 2017, Item 865, uniform text) i.e. embryo disposal or acquisition to derive material or personal benefit, dissemination of advertisements for embryo

²⁷ For instance, the provision in Article 157a of the Polish Criminal Code is only applicable in the event of intentional bodily injury to the child conceived or if the child sustains a life-threatening health disorder. This makes it inapplicable in the case of interference with the integrity human embryo which should not cause such effects and is not regarded as part of medically assisted reproduction. Cf. also M. BUDYN-KULIK, *Komentarz do art. 157a k.k.*, [in:] *Kodeks karny. Komentarz*, ed. M. MOZGAWA, Warszawa, 2018, Lex/el.

provision or receipt in return for payment, and embryo handling in breach of the legal provisions. I also refer to descriptions of surrogate maternity and its status in Polish law.

PRAWNOKARNA OCENA DAWSTWA ZARODKA LUDZKIEGO W RAMACH MACIERZYŃSTWA ZASTĘPCZEGO

Streszczenie

Artykuł odnosi się do kwestii odpowiedzialności karnej za zachowania związane z dawstwem zarodka, które mogą mieć miejsce w ramach realizacji umów o macierzyństwo zastępcze. W tym celu przeanalizowano przede wszystkim znamiona czynów zabronionych stypizowanych w przepisach ustawy z 25 czerwca 2015 r. o leczeniu niepłodności (tekst jedn.: Dz.U. z 2017 r., poz. 865) – to jest: zbywania lub nabywania zarodka w celu uzyskania korzyści majątkowej lub osobistej, rozpowszechniania ogłoszeń o odpłatnym zbyciu lub nabyciu zarodka oraz postępowania z zarodkami w sposób niezgodny z przepisami powyżej ustawy. Tekst zawiera ponadto odniesienia do wyjaśnienia zjawiska macierzyństwa zastępczego oraz jego statusu w prawie polskim.

Keywords: embryo; surrogate arrangements; infertility treatment; embryo donation.

Słowa kluczowe: zarodek. macierzyństwo zastępcze; leczenie niepłodności; dawstwo zarodka.

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