



# ORDO IURIS

INSTITUTE FOR LEGAL CULTURE

Warsaw, 31<sup>st</sup> May 2019

**Honorable Special Rapporteur  
on the sale and sexual exploitation of children, including child  
prostitution, child pornography and other child sexual abuse material**

*Dear Madam Maud de Boer-Buquicchio,  
Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child  
pornography and other child sexual abuse material,*

The *Ordo Iuris* Institute for Legal Culture welcomes the opportunity to assist the Special Rapporteur in preparation of the next thematic report to the General Assembly in October 2019.

The *Ordo Iuris* Institute for Legal Culture is an independent legal organization established as a foundation in Poland. It gathers academics and legal practitioners who strive to promote legal culture based on the respect of human rights and dignity. The *Ordo Iuris* pursues its objectives by means of research and other academic activity as well as advocacy and litigation.

*Ordo Iuris* Institute is among the organizations that are consulted by the Polish Government within the legislative process. Third party interventions (including *amici curiae* briefs) by *Ordo Iuris* Institute have been accepted by Polish courts of all levels, including the Supreme Court of the Republic of Poland. The Institute has been also permitted by the President of the European Court of Human Rights to deliver third party interventions and allowed by the President of the European Committee of Social Rights to submit observations. *Ordo Iuris* Institute submitted its opinions to the Venice Commission, the Secretary General of the Council of Europe, Commissioner for Human Rights, the Committee on Political Affairs and Democracy of the PACE and constitutional courts of numerous countries. The experts of the Institute are consulted and allowed to deliver interventions in matters of democracy and the rule of law i.a. by the Monitoring Committee of the Parliamentary Assembly of the Council of Europe and by the Department of State of the United States of America. Moreover, *Ordo Iuris* Institute has ECOSOC consultative status with the United Nations.

We hope the Special Rapporteur will find our intervention supportive. Please find enclosed the Report of the *Ordo Iuris* Institute for Legal Culture regarding a surrogacy agreement under the Polish law.

**Jerzy Kwaśniewski**  
President of the Board  
*Ordo Iuris* Institute for Legal Culture

The Polish legislator did not explicitly regulate the possibility of concluding a surrogacy agreement, but has introduced a number of solutions that limit such a cases. First of all, according to the doctrine's view, a surrogacy agreement under the Polish law is void.<sup>1</sup> Surrogacy is contrary to the clause of public order and the basic principles of family law. Pursuant to Article 61<sup>9</sup> of the Family and Guardianship Code<sup>2</sup> "The mother of a child is the woman who gave birth to the child". This regulation appeared in Polish law in 2009 in order to dispel doubts that may arise in connection with modern techniques of assisting procreation. It should also be noted that by way of legal action, the civil status of a human being shaped on the basis of events strictly defined by the legislator<sup>3</sup> - that is, the birth of a child - cannot be changed. On the basis of family law the principle of freedom of contracts does not apply. Polish family law is based on the principles of: the best interest of the child and his or her family, and on the principle of certainty and stability of civil status. As a consequence, a surrogacy agreement should be considered invalid on the basis of art. 58 § 1 and § 2 of the Civil Code<sup>4</sup>, i.e. both due to the conflict with the law and with the principles of community coexistence, and with the principle of unambiguous and clear family relationships and the principle of the best interest of the child<sup>5</sup>.

## I. Identity, origins and parentage

**Polish law relevant to the assessment of identity, origins and parentage could be found in the following legal acts: the Constitution of the Republic of Poland<sup>6</sup>, the Family and Guardianship Code<sup>7</sup>, the Act on the Infertility Treatment<sup>8</sup>, the Act on Civil Registry Records<sup>9</sup>, the Act on Polish Citizenship<sup>10</sup>, the Criminal Code Act<sup>11</sup>, the Civil Code, the Code of Civil Procedure Act<sup>12</sup>.**

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<sup>1</sup> See i.a.: M. Frasz, D. Abłażewicz, *Umowa o macierzyństwo zastępcze i jej dopuszczalność na tle prawa polskiego*, „Rodzina i Prawo” 2008, nr 9–10, pp. 94–119; J. Holocher, M. Soniewicka, *Analiza prawna umowy o zastępcze macierzyństwo*, „Prawo i Medycyna” 2009, nr 3, pp. 43–60.

<sup>2</sup> The Act of 25 February 1964 - *Family and Guardianship Code* (Journal of Laws No. 2017, item 682, as further amended).

<sup>3</sup> J. Ignatowicz, *Stan cywilny i jego ochrona*, „Annales UMCS” 1963, vol. 10, p. 149.

<sup>4</sup> The Act of 23 April 1964 – the Civil Code (Journal of Laws No. 2018, item 1025, as further amended).

<sup>5</sup> J. Holocher, M. Soniewicka, *op. cit.*, p. 57–58.

<sup>6</sup> The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as further amended); hereinafter: the Constitution.

<sup>7</sup> Hereinafter: the FGC.

<sup>8</sup> The Act of 25 June 2015 – the Act on the Infertility Treatment (Journal of Laws No. 2017, item 865, as further amended, hereinafter the Act on the Infertility Treatment).

<sup>9</sup> The Act of 28 November 2014 – the Act on Civil Registry Records (Journal of Laws No. 2018, item 2224, as further amended, hereinafter: the ACRR).

<sup>10</sup> The Act of 2 April 2009 – the Act on Polish Citizenship (Journal of Laws No. 2018, item 1829, as further amended).

<sup>11</sup> The Act of 6 June 1997 – the Criminal Code (Journal of Laws No. 2018, item 1600, as further amended, hereinafter: the CC).

<sup>12</sup> The Act of 17 November 1964 – the Code of Civil Procedure (Journal of Laws No. 2018, item 1360, as further amended, hereinafter: the CCP).

The Constitution confirmed important rights regarding issues such as identity, origins, parentage and surrogacy:

1. Dignity is the basis of the constitutional order (Article 30 of the Constitution), and therefore all norms, principles and values contained in the Constitution should be interpreted against its background and serve its implementation. Its essence is the objectivity of man.<sup>13</sup>
2. Article 18 of the Constitution protects four basic values (marriage, family, motherhood and parenthood) related to the functioning of the individual in society, including protection of motherhood as a specific type of interpersonal relationship<sup>14</sup>. The protection of motherhood, as a family relationship, carried out by public authorities, must therefore take into account the vision of the family adopted in the Constitution as a lasting relationship between a man and a woman directed precisely at motherhood and responsible parenthood.<sup>15</sup>
3. The right of the child to know the identity of parents is a consequence of the right to know oneself, which is guaranteed primarily by the Constitution in Article 30 (protection and respect of the dignity of the person), Article 47 (legal protection of private and family life and the right to make decisions about his or her personal life) and Article 72 (protection of the rights of the child). There is currently no regulation in Polish law that will ensure the protection of the child to know his or her genetic origin.<sup>16</sup>

Regulations concerning the child's origin are based on the biological bond with the parents of the child and on the principle of the best interest of the child. The Constitutional Tribunal<sup>17</sup> stressed that the best interest of the child is a constitutional value of a particular importance regarding the right of the child to know his or her origin. This principle should be at the core of the family law and all the legal procedures regarding confirmation of the origin should be created according to it. Secondly, the Constitutional Tribunal stressed out constitutional norms give rise to the right to a well-established origin. Family relationships should be shaped in accordance with existing biological bonds. Proper shaping of the filiation bonds and ensuring the possibility of raising a child by a biological family, fully implements the principle of the best interest of the child.

**The above principles are reflected in family law, which is based on the principle *mater semper certa est* („The mother is always certain”), confirmed in aforementioned Article 61<sup>9</sup> of the FGC. Above principle does not provide for any exceptions. Thus, the biological bond (giving birth to a child)**

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<sup>13</sup> K. Burdziak, Ł. Pohl *Tzw. macierzyństwo zastępcze („surrogate motherhood”) w świetle polskiego prawa karnego. Uwagi „de lege lata” i postulaty „de lege ferenda”* in „Fundamentalne i prawne problemy surrogacy motherhood. Perspektywa polska.” [in print].

<sup>14</sup> Judgement of the Polish Constitutional Tribunal of 22 July 2008, K 24/07.

<sup>15</sup> Judgement of the Polish Constitutional Tribunal of 12 April 2011, SK 62/08.

<sup>16</sup> B. Trębska, *Uwaga do art. 61<sup>9</sup> k.r.o.*, in *Kodeks rodzinny i opiekuńczy. Komentarz*, eds. J. Wierciński, Warszawa 2014, pp. 583–584;

<sup>17</sup> Judgements of the Polish Constitutional Tribunal of 28 April 2003, K 18/02 and of 16 July 2007, SK 61/06.

and not the genetic bond decide about the relationship of motherhood.<sup>18</sup> In the case of establishing paternity, the presumption of parentage of the child from the husband's mother, regulated in Article 62-70 of the FGC, applies under Polish family law. There is a strong correlation between the establishment of motherhood and the paternity. A necessary statutory requirements for establishing paternity is the prior determination of motherhood.<sup>19</sup> The consequence of this approach is the principle that determining the non-existence of motherhood automatically eliminates the paternity of a man in relation with the mother.<sup>20</sup> Moreover, in the Polish family law there is the principle of indivisibility of civil status, which means that a child can come from one woman and one man (respectively as one mother and one father).<sup>21</sup> The above rules mean that the genetic bonds of parents with the child have no influence on the determination of the parental relationship. A surrogacy agreement cannot have any impact on the legal creation and determination of a parent-child relationship. There is no possibility of entering into the birth certificate as parents for a commissioning couple. In such a case, according to the Polish family law, the surrogate is the mother of the child and not the commissioning woman. For this reason, on the basis of Polish family law, the institution of adoption and the regulations regarding the determination and denial of motherhood and the denial, acknowledgement and judicial establishment of paternity may be used to assess the transfer of custody of a child between the surrogate and the commissioning couple and obtaining parental authority.

**Determination of the motherhood** may be requested if parents are not named in the birth certificate or the mother of a child in a birth certificate is denied.<sup>22</sup> One of such cases is submitting to the head of the civil register office information that a woman who has not given birth to a child is his or her mother. An action to establish maternity is brought by a child against the mother or, if the mother is dead - against the custodian appointed by the court of protection.<sup>23</sup> The genetic mother cannot bring an action for denial of maternity of a woman who is registered in her birth certificate as a mother (mother who gave a birth to the child). In order to protect the best interest of the child, the legislator introduced a ban on bringing an action by the mother to establish maternity after a child has reached maturity<sup>24</sup> and ban on establishing maternity after the child's death, except cases when establishment of maternity may be pursued by the child's descendants, who brought an action before his or her death.<sup>25</sup> **The denial of maternity may be requested** if a birth certificate names as the mother a woman who did not give birth to the child.<sup>26</sup> An action for denial of maternity may be brought by: a child, a biological mother of the child<sup>27</sup>,

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<sup>18</sup> B. Trębska, *op. cit.*

<sup>19</sup> J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2012, p. 267.

<sup>20</sup> *Ibidem.*

<sup>21</sup> *Ibidem*, p. 266.

<sup>22</sup> Article 61<sup>10</sup> of the FGC.

<sup>23</sup> Article 61<sup>10</sup> § 3 of the FGC.

<sup>24</sup> Article 61<sup>11</sup> of the FGC.

<sup>25</sup> Article 61<sup>15</sup> of the FGC.

<sup>26</sup> Article 61<sup>12</sup> § 1 of the FGC.

<sup>27</sup> Article 61<sup>12</sup> § 3 of the FGC.

a woman named as the mother in the child's birth certificate,<sup>28</sup> a man whose paternity was established in association with the maternity of the woman named as the mother in the child's birth certificate<sup>29</sup>. Denial of maternity is not possible after the child's death.<sup>30</sup> Due to the unambiguous regulation contained in Article 61<sup>9</sup> of the FGC it is not permissible to deny the maternity of a surrogate named in the child's birth certificate.<sup>31</sup> Whereas a surrogate can bring an action against commissioning woman, who did not give a birth to the child but is named in the child's birth certificate. An action for establishment or denial of maternity may also be brought by a prosecutor, if it is required to protect the child's interest or to protect social interests.<sup>32</sup> The biological mother of the child or the woman named as the mother in the child's birth certificate may bring an action for denial of maternity within six months of the issuance of the child's birth certificate.<sup>33</sup> The same period to bring an action for denial of maternity is envisaged for the man whose paternity was established in association with the maternity of the woman named as the mother in the child's birth certificate, counted from the day he discovers that the woman named in the child's birth certificate is not the child's mother, but not after the child has reached maturity.<sup>34</sup> On the contrary, a child may bring an action for denial of maternity within three years of reaching maturity.<sup>35</sup> Shorter time limits for bringing an action for denial of motherhood are dictated by the principle of the best interest of the child. Denial of motherhood may lead to the deterioration of the child's legal situation.<sup>36</sup>

**Regarding paternity in surrogate cases, the institutions of acknowledgement<sup>37</sup>, judicial establishment<sup>38</sup> and denial of paternity<sup>39</sup> deserve attention.** Acknowledgement and the establishment of paternity refer to the paternity of a child born out of wedlock. There are two important provisions, i.e. Article 73 and 75<sup>1</sup> of the FGC. The first article concerns the situation in which a child was born naturally and the second concerns the conception of a child following the procedure of medically assisted procreation. Acknowledgement requires submitting the declaration by the man from whom the child descends, to the head of the registry office that he is the father of the child and confirmation of the statement by the child's mother. Judicial establishment of the paternity based on the assumption that a father of the child should be the man who had sex with the mother of the child no earlier than three hundred days and no later than one hundred and eighty one days before the birth of the child, or the man

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<sup>28</sup> Article 61<sup>12</sup> § 4 of the FGC.

<sup>29</sup> Article 61<sup>12</sup> § 5 of the FGC.

<sup>30</sup> Article 61<sup>15</sup> of the FGC.

<sup>31</sup> H. Haak, *Kodeks rodzinny i opiekuńczy. Komentarz to Articles 617–91*, Toruń 2009, p. 18.

<sup>32</sup> Article 61<sup>16</sup> of the FGC.

<sup>33</sup> Article 61<sup>13</sup> § 1 of the FGC.

<sup>34</sup> Article 61<sup>13</sup> § 2 of the FGC.

<sup>35</sup> Article 61<sup>14</sup> of the FGC.

<sup>36</sup> J.M. Łukasiewicz, *Ustalenie i zaprzeczenie macierzyństwa (Chapter 6.2)*, in „Instytucje prawa rodzinnego”, eds. J.M. Łukasiewicz, Warszawa 2014

<sup>37</sup> Articles 73-83 of the FGC.

<sup>38</sup> Articles 84-86 of the FGC.

<sup>39</sup> Articles 62-70 of the FGC.

who was the donor of the reproductive cell in the case of a child born as a result of partner donation as part of the medical procedure of assisted procreation.<sup>40</sup> Judicial establishment of paternity may be requested by the child, the mother, and the assumed father of the child. However, neither the mother nor the assumed father may make such request after the child has died or reached maturity.<sup>41</sup> **Denial of paternity** is effected by proving the mother's husband is not the child's father.<sup>42</sup> An action for denial of paternity is filed by: the mother's husband<sup>43</sup>, the mother<sup>44</sup>, the child, after reaching maturity<sup>45</sup>. In order to protect the child's interests, the right to bring the action for denial of paternity was limited to 6 months from the date on which the mother's husband learned about the child's birth, but not later than the child's reaching maturity<sup>46</sup> and up to six months after the birth of the child in the case of the child's mother<sup>47</sup>. An action for denial of paternity may also be brought by a prosecutor, if it is required to protect the child's interest or to protect social interests. Similarly as in the case of a denial of motherhood bringing an action to deny paternity may not be brought after the child's death.<sup>48</sup> However, the child after reaching maturity, may bring an action for denial of paternity of the mother's husband but no later than within three years of reaching maturity.<sup>49</sup> Regarding surrogacy also Article 68 of the FGC has an important role. Pursuant to this article, the action for determination of paternity is not admissible when the child was born as a result of a medical procedure of assisted procreation to which the husband of the mother granted his consent. This exclusion applies, among others to the situation where the mother was fertilized by the seed of another man. All the aforementioned actions are recognized in separate litigation proceedings in cases involving relationship between parents and children.<sup>50</sup>

In the context of surrogacy **the institution of adoption** deserves special attention.<sup>51</sup> As it was already mentioned, a surrogacy agreements are absolutely invalid and cannot give rise to any legal consequences in the form of establishing a relationship of parenthood between the child and the commissioning couple. The exercise of parental authority by other persons than biological parents may take place after adoption. Adoption only take place by virtue of a court judgment, issued at the request of the adoptive parent.<sup>52</sup> Adoption requires the consent of the adoptee's parents, unless they were deprived of parental authority or are unknown, or if communication with them presents obstacles that are difficult to overcome.<sup>53</sup>

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<sup>40</sup> Article 85 of the FGC.

<sup>41</sup> Article 84 § 1 of the FGC.

<sup>42</sup> Article 67 of the FGC.

<sup>43</sup> Article 66 of the FGC.

<sup>44</sup> Article 69 § 2 of the FGC.

<sup>45</sup> Article 70 § 2 of the FGC.

<sup>46</sup> Article 63 of the FGC.

<sup>47</sup> Article 69 § 1 of the FGC.

<sup>48</sup> Article 86 of the FGC.

<sup>49</sup> Article 70 § 1 of the FGC.

<sup>50</sup> Articles 453- 458 of the CCP.

<sup>51</sup> The legal institution of adoption is regulated by the Articles 114-127 of the FGC and provisions of the civil procedure defining the rules for handling cases regarding adoption (Articles 585-589 of the CCP), as well as the provisions on adoption proceedings and the functioning of adoption centers (Articles 154-175 of the Act of 9 June 2011 on supporting the family and foster care system).

<sup>52</sup> Article 117 of the FGC.

<sup>53</sup> Article 119 §1 of the FGC.

In exceptional circumstances the court may issue a judgment of adoption despite lack of consent of parents whose legal capacity is limited, if their refusal of consent is evidently contrary to the child's interest.<sup>54</sup> There is no legal possibility to adopt the child who is not yet born. According to Article 119<sup>2</sup> of the FGC “Parents may not express their consent for adoption of a child sooner than six weeks after the child's birth.”. Moreover, Article 119<sup>1a</sup> of the FGC strictly determines whom the parents may designate as an adopter. Such an adopter may be only a direct relative of the child's parents or the spouse of one of the parents. For adoption, the consent of an adopter is required. Cases for adoption are recognized in non-litigious proceedings.<sup>55</sup> Additionally, it is also worth noting that the Act on Infertility Treatment excludes donation with indication and introduce the anonymity of donors and recipients.

**In the case of surrogacy it is worth mentioning the situations in which the so-called “foreign element” occurs.** Pursuant to Article 1145 of the CCP “Rulings of foreign state courts issued in civil matters are recognised by virtue of law unless there exist obstacles as specified in Article 1146”. One of such an obstacle is the situation when recognition of the ruling would be contrary to the basic principles of the legal order of the Republic of Poland (the public order clause). Undoubtedly, one of the basic principles of the Polish legal order are: the principle of biological motherhood, the principle of the best interest of the child, the best interest of the family (protection of its durability and integrity), the principle of certainty and stability of civil status, and the principle of judicial control over adoption.<sup>56</sup> According to Article 1148 § 1 of the CCP “Any person who has a legal interest may petition the court to determine whether a ruling of a foreign state court is or is not recognised”.

A similar possibility of refusal, due to the public order clause, is granted to the head of the civil registry office.<sup>57</sup> In particular, it is about situations where, under a surrogacy agreement concluded with the participation of Polish citizens in another state, the commissioning couple is registered as parents in the birth certificate, and not the surrogate. If there has been a refusal of transcription under an administrative decision, appeal should first be made to the voivode, and if he upholds the negative decision, there is a right to submit a complaint to the administrative court. On the other hand, if after the transcription was made, the circumstances of the child's birth by the surrogate came to light, the civil status certificate could be questioned according to Article 39 of the ACRR. The invalidation takes place in non-litigious proceedings at the request of the interested person, prosecutor or head of the civil registry office.

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<sup>54</sup> Article 119 §2 of the FGC; W. Lis. *Urodzenie zastępcze w świetle podstawowych zasad prawa rodzinnego*, in „Fundamentalne i prawne problemy surrogacy motherhood. Perspektywa polska.” [in print].

<sup>55</sup> Articles 585–589 of the CCP.

<sup>56</sup> R. Flejszar, *Surrogate motherhood (tzw. urodzenie zastępcze) a zagadnienia postępowania cywilnego*, in „Fundamentalne i prawne problemy surrogacy motherhood. Perspektywa polska.” [in print].

<sup>57</sup> Article 107 subpar. 3 of the ACRR.

## II. Sale of children

Poland is a signatory of the following international treaties prohibiting human trafficking, including children: Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography<sup>58</sup>, Protocol to Prevent, Suppress and Punish Trafficking in Persons, in particular Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol)<sup>59</sup>; Framework Decision 2002/629 / JHA of the EU Council of 19 July 2002 on combating trafficking in human beings<sup>60</sup> and Council of Europe Convention on Action against Trafficking in Human Beings<sup>61</sup>. On the grounds of Polish law<sup>62</sup>, the provisions on the prohibition of human trafficking, including children, have been implemented and introduced by Article 189a and Article 115 § 22 of the CC. Article 189a of the CC penalizes both human trafficking and the perpetrator's preparations to commit it. It is also punishable to attempt to commit such a crime<sup>63</sup> and direct, order, persuade to commit it by someone else<sup>64</sup>. If a child is delivered, as part of the surrogacy agreement, from one person to another then Art. 189a § 1 of the CC in connection with Article 115 § 22 of the CC will be applicable regardless of the methods and measures referred in the Article 115 § 22 of the CC were applied. However, this does not change the fact that a deliberate act of the perpetrator to use of the other man (the child) is necessary. The purpose of human trafficking is strictly defined by the Criminal Code. According to it human trafficking should be committed with the purpose of exploiting a person, even with his or her consent, including prostitution, pornography and other forms of sexual abuse, forced labour and services, begging, slavery and other forms of exploitation that are degrading to human dignity, or with the purpose of obtaining cells, tissues or organs against the statutory provisions.

**In conclusion, the surrogacy practices breach Polish constitutional and family law. It is contrary to the best interest of the child and human dignity. It undermines dignity of the child and the mother, treating them as a commodity. It easier illegal practices such as: the sale of children and exploitation of women.**

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<sup>58</sup> Journal of Laws 2007, No 76, item 494.

<sup>59</sup> Journal of Laws 2005 No 18, item. 160.

<sup>60</sup> Journal of Laws WE L 203 of 1<sup>st</sup> August 2002.

<sup>61</sup> Journal of Laws 2009 No 20, item 107.

<sup>62</sup> At the criminal law level, it is also worth mentioning the Article 211a of the CC that penalizes illegal adoption and Article 77 of the Act on the Infertility Treatment that penalizes trade of reproductive cells

<sup>63</sup> Article 13 of the CC.

<sup>64</sup> Article 18 of the CC.