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SURROGATE (REPLACEMENT) MOTHERHOOD or should the uterus be rented?

Abstract

After the birth of the “test-tube baby,” the triumphant success of reproductive technologies has dramatically accelerated scientific research in many fields and given hope to couples struggling with the problem of infertility. However, at the same time, new and numerous moral, ethical, bioethical, legal, social, cultural, and gender dilemmas and controversies have been imposed, especially in countries where trends of negative population growth are increasingly emphasized. These assisted reproductive technologies are making a difference, and not just from the aspect of medicine towards sterility. They are also profoundly affecting social and cultural patterns of marriage, partnership, parenting, and gender. Surrogate or surrogate motherhood, as part of the field of reproductive technology issues, calls for an urgent rethinking of the possibilities for institutionalized motherhood practices in contemporary society and its effects in everyday life. In other words, it is an attempt to demystify, denaturalize, and re-evaluate maternal norms, which always indicate relationships in specific material conditions of centralizing or decentralizing public or private power or sociability. However, they primarily and above all are related to the possibility of prior (bio)ethical evaluation, which would ensure sound legal regulation with respect to the possible (evil) use and commercialization of human life.

Keywords: Surrogate motherhood, bioethical evaluation, reproductive technologies, human dignity, fertility tourism

Introduction

Surrogate or replacement motherhood, and especially the question of whether the uterus should be rented, raises an increased moral-ethical discomfort today, ever since this relatively new invasion into the sphere of human reproduction came about, marked as the “reproductive revolution.” This has mainly been apparent since the dilemmas and controversies surrounding abortion (Ciccarelli and Beckman, 2005: 23), cloning, in-vitro fertilization...

Until recently, human reproduction was observed only as a phenomenon which primarily belongs to the private sphere of every woman and every man, which is confirmed by the traditional understanding of reproduction, according to which “if it is a traditional marriage, reproduction is not spoken about, even less agreed upon, and planned the least. In these traditional communities, reproduction simply occurs to man, he does not plan it, does not intervene in the fluctuations of certain external forces.” (Berić, 1992: 105)

However, the actuality of the question today gains particular importance in the conditions in which, using their cultural patterns and legal regulations, each society is attempting to norm all phases of reproduction. In these conditions, the private sphere becomes public, and that way (not)giving birth becomes not only public but also a particularly important political question.¹ Therefore, contemporary medicinal and gender responsible discourse of family planning dictates a proactive approach concerning individuals offering knowledge (doctors) and individuals receiving the knowledge (women) and in which relation there are possibilities for conscious decision-making on reproduction.² Moreover, the justification of such an approach came also from the possibility of the final resolution of the dilemma about whether the birth of a child – considered a “natural response” to socially expected parental roles – is not a realistic positive outcome attainable for everybody.

1 See more detail in the lectures of Michel Foucault at Collège de France (1977-1978) under the title *Безбедност, територија, насељение*. Фондација Отворено општество, Скопје, 2017, especially Michel Foucault, *The Order of Things. An Archaeology of the Human Science*. Vintage Books Limited, New York, 1994; then Giorgio Agamben, *Homo Sacer – Суверената моќ и голиот живот*. Сигмапрес, Скопје, 2014; as well as the compilation study by Marijan Krivak, *BIOPOLITIKA-Nova politička filozofija*. AntiBarbarus, Zagreb, 2008; but also the response of Peter Sloterdijk to Heidegger’s “Letter on humanism” under the title “Rules for a human part”, *R.E.Č.*, 57.3, 2000, p. 187-202. Available on: http://www.b92.net/časopis_reč/57.3/pdf/18.pdf. Date of access: 01.02.2019.

2 Giving birth and motherhood, which are a question of choice for a woman, have always been important themes of a feminist approach to women’s rights, national politics, as well as legal regulations for this jurisdiction.

Thus, new reproductive technologies appeared on the scene, enabling having children primarily for couples that cannot have children, and then also for homosexuals, transgender people, but also women post-menopause,³ which would be biologically connected to both parents (or at least one of them). Logically, the procedure of in-vitro fertilization has been expanding for several decades⁴, in veterinary medicine as well as in human, beginning on July 25th 1978, when the gynecologist Patrick Stepto and embryologist Robert Edwards⁵ published the birth of Lous Braun in Great Britain, the first baby conceived out of the body of a mother, but with the genetic material of both parents. (Edwards and Steptoe, 1980)

The context of reproductive technologies

After the birth of the “test-tube baby,” the triumphant success of reproductive technologies dramatically accelerated the scientific research in many fields and gave hope to couples struggling the problem of infertility. However, at the same time, new and numerous moral, ethical, legal, social, cultural, and gender dilemmas and discussions came about, especially in countries where the trends of negative population growth are becoming more emphasized. These assisted reproductive technologies are introducing changes, not only from the aspect of medicine concerning sterility, but they also profoundly penetrate the social and cultural patterns of marriage, partnership, parental roles, and gender equality. (Lin, 2004: 510) “The futuristic predictions in regards to genetic engineering and cloning, for some authors, are only logical consequences of assisted human technologies because even today, a child born with the help of these technologies can have five parents (sperm donor, egg cell donor, surrogate mother, and a couple which wants the child for themselves). Today, with only one click on the internet, you can rate a profile, select potential sperm, egg cell or embryo

3 Omkari Panvar, in 2008, at 70 years of age, gave birth to twins and became the oldest woman who gave birth to a son and daughter, using in-vitro fertilization, which she paid for by selling her entire estate and taking out a loan, with the goal of finally having a son (next to two grown daughters and five grandchildren they had among each other). “Woman in India ‘has twins at 70”*, BBC News*, 05.07.2008. Available at: <http://news.bbc.co.uk/2/hi/7491782.stm>. Accessed: 03.01.2019.

4 It is estimated that, until 2018, using in-vitro fertilization, around 6 million children were born globally. B. Radivojević, „Prva beba iz epruvete slavi 40. rođendan“, *Вечерње новости Online*, 25.07.2018. Available at: <http://www.novosti.rs/vesti/planeta.299.html:740285-Prva-beba-iz-epruvete-slavi-40-rođendan>. Accessed: 01.02.2019.

5 Who received a Nobel prize in 2010 for developing the procedure for extracorporeal fertilization.

donors, but also a surrogate mother who will give birth to a child for a certain favor, generally for money.” (Pele, 2014: 8)

This opened and is still opening, an enormous number of problems and dilemmas. Even with the evident number of “happy endings” – beginning from the images of joyous couples becoming parents, news such as the one regarding Elton John who created a family this way (Katz, 2010), texts published on the recently born Ronaldo twins (Selby, 2017), or one of the many stories on the reality show queen, Kim Kardashian, who plans on having four children with her husband, Kanye West, i.e. second using a surrogate mother (Слободен печат, 2019) – there is still a more significant number of scandals, exploitations, abuse, and judicial processes. The consequences of this invasion are much more profound, beginning with the famous American “Baby M” case from the 1980s (In re Baby M, 1988), when a surrogate mother changed her mind and asked to keep the baby⁶, right up until the scandal with the Japanese billionaire who ordered children in Thailand from 12 different surrogate mothers (Head, 2018), as well as the story on the Australian homosexual couple who refused to take a child born with the Down syndrome, only taking his healthy twin sister. (Dean, Cheer and Mills, 2014)

Reproductive technologies have an ambivalent character and most often contain contradictory options. Women who, for example, focus on their careers, can prolong pregnancy using the so-called social freezing, using surrogate motherhood, at which point they are looked at as a possibility of independent decision-making for life plans, as well as equality of sexes in the labor market, as well as in the frameworks of leading positions. Moreover, the results of research relating to supposed genetic predispositions for carcinoma point to a large number of women who decide on preventively removing their ovaries and/or breasts. With that, the principle of medical prevention is transferred into the area of self-determination and responsibility.

Because of these “excuses” (Ammer, 2009: 403), social norms, invading privacy, surrogate motherhood, as a part of the area of the question of reproductive technologies, requires immediate review of the possibilities for institutionalized practice of motherhood in contemporary society and its

6 See more on this case in Elena Ignovska et al. (2016) Новите репродуктивни технологии и правото. УКИМ, Скопје, p. 249-253. Also, Debora L. Spar (2005) For Love and Money: The Political Economy of Commercial Surrogacy”, *Review of International Policical Economy*, vol. 12, no.2, p. 288. See also Carol Sanger (2007) Developing Markets in Baby-Making: In the Matter of Baby M. *Harvard Journal of Law & Gender*, no. 67, vol. 30, p. 67-97.

effects in everyday life. Namely, it is an attempt to demystify, denaturalize, and re-evaluate norms of motherhood, which always point to relations in specific material conditions of centralizing or decentralizing public or private power or sociality. However, they, first and foremost, relate to the possibility of doing a (bio)ethical analysis beforehand, which would ensure solid legal regulations in regards to the possibility of (mis)use and commercialization of human life.

What is in reality surrogate (replacement) motherhood?

Historically, but also in a projected sense⁷, examples of surrogate motherhood can be found in ancient biblical times, written down in the Code of Hammurabi, in the Bible. There are known examples when Rachel, the wife of Jacob, asks her husband to have sexual intercourse with the slave Bilhah so that she would give birth to their child. Also, it is known that Sarah, wife of Abraham, who could not have children, talked her husband into taking a concubine with the name of Agara and that, later on, their son Ishmael was born from that relationship. In this way, Abraham, Sarah, and Agara applied surrogate motherhood using natural sexual relations with the only difference being that the unlucky Agara, given the fact she was Sarah's slave, had to consent to this act under duress.

Since then and until this day, especially after the events of 1978 and the birth of the first child using medicinally supported fertilization⁸, there came a need to create "a new legal framework to follow these new technologies. This is why the British government founded the so-called Warnock committee⁹, the president of which was the philosopher Mary Warnock, intending to review possible effects on the life of people by introducing new reproductive technologies." (Игњовска et al., 2016: 78) So, when we talk about surrogate or replacement motherhood, it is nominally an agreement with the surrogate mother based on which she

7 Because surrogate motherhood is nominally connected and talked about together with new reproductive technologies.

8 Fertilization using biomedicine.

9 Created in 1982. See more in "The Warnock Committee", *British Medical Journal*, vol. 289, 28, 1984. Available on: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1442316/pdf/bmjcred00512-0032.pdf>. Accessed: 05.02.2019. This Warnock Committee prepared a Report which lead to the medicinally regulated practice with the Act for human fertilization and embryology in 1990. See more in: Jacqueline A. Priest, „The Report of the Warnock Committee on Human Fertilisation and Embryology“, *The Modern Law Review*, vol. 48, No. 1, 1985, p. 73-85. Available at: <https://embryo.asu.edu/pages/report-committee-inquiry-human-fertilisation-and-embryology-1984-mary-warnock-and-committee>. Accessed on: 05.02.2019, as well as https://www.bioeticacs.org/iceb/documentos/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf. Accessed: 05.02.2019.

will be artificially fertilized with the sperm of the biological father or a donor embryo to carry and give birth to a child, and then waive parental rights and give the child to its “intended parents” (Veilleux, 1989). During the course of the entire process, the main character is the so-called “surrogate mother”, defined as a female individual of age who, without compensation or acquiring any kind of monetary gain, carries an embryo conceived using medically enhanced fertilization and who, after 9 months, is supposed to hand over the child to the biological parents. (Fabre, 2013: 5086-5092)

At this time, we highlight that there are two basic types of surrogate motherhood.¹⁰ The first one is when a woman gives birth to a child which is genetically hers (partial, genetic surrogacy), and the other one is when the surrogate mother carries and gives birth to a child which carries the genetic code of the couple who “ordered” the baby or when she has been fertilized with egg cells by a third woman (donor), or when an embryo was donated (full, total, gestation surrogacy). In these cases, there are two mothers taking part in conceiving and giving birth to a child, while in the last case, there is also a third woman, who will raise the child.¹¹

Depending on which woman agrees to become a surrogate mother, surrogacy can be familial, friendly, as well as surrogacy in which there is no earlier connection between the surrogate mother and the woman who “ordered” the child. In the first case, familial surrogacy goes on when the surrogate mother and the woman who “ordered” the child are family. Therefore, the role of the surrogate mother can be taken on by a sister, mother, or daughter of the woman “ordering” the child, as well as a woman, is some next line of kinship. These cases are somewhat frequent, especially when a mother gives birth to a child

10 See more in Mirjana Radan, Suzana Vuletić, Željko Rakošec and Žarko Šperanda (2015) Bioetička kompleksnost problematike zamjenskoga majčinstvo. *Diacovensia*, vol. 23, no. 1, , p. 39.

11 Seen from a biological side of the problem, the term “surrogate motherhood” is not adequate in a situation when the gestation mother is also the genetic (partial surrogacy) mother. Namely, it is apparent that the woman who conceived, carried, and gave birth to a child is the genetic and biological mother i.e. that she does not, in any way, represent a replacement for a mother. As a rule, the child is taken care of by an infertile couple, not the biological mother and, from the couple’s aspect, it can be stated that the woman who gave birth to the child replaced the mother who will raise the child in conception and giving birth. In the case when a woman gives birth and raises a child which genetically originates from the woman who wants the child, the term “surrogate motherhood” fits the most because the woman who is carrying the child replaces the genetic mother in the function of carrying and giving birth to the child. More precisely, the mother whose egg cell has been fertilized can be called a genetic mother, while the woman carrying the child and giving birth to it – gestation mother.

for her daughter. For instance, in Great Britain, there is a case when a mother becomes a surrogate mother for her daughter, with the fertilized cells of her daughter and the sperm of her husband, simultaneously becoming a mother and grandmother to twins. (Bio News, 2005) When the roles are reversed, practice shows fewer cases – that the daughter is a surrogate mother for her mother. (Miles, 2015) This case exists when a daughter is a surrogate mother for her mother and stepfather, with fertilized egg cells of the surrogate mother and her stepfather. With this, the surrogate mother becomes a stepsister of the child, and her previously born children become stepbrothers and step-uncles of the child born using surrogacy. However, the cases in which a sister has the role of surrogate mother for her sister are relatively frequent as well (Ignasi, 2018), but a case in which a sister gives birth to a child for her homosexual brother and his partner has been noted and described, in which her egg cells were fertilized with the partner's sperm. (Welstead, 2011: 167)

In this type of surrogacy, i.e. familial one, surrogacy can have both a positive and a negative side. The positive one is that this kind of surrogacy does not bring about complications in handing over the child, even more so because the familial relationship itself supposes that surrogacy is done exclusively for altruistic motives. However, this kind of surrogacy can also have negative sides: from the social aspect of the problem, depending on how much importance a society gives to familial relations, there is confusion in these relations in the form of so-called “doubled relations” which are entirely unusual in regular relations. Also, if a cousin refuses or is forced to surrogacy, there is a danger of disturbing familial relations.

The second type of surrogacy, friendly surrogacy, has similar characteristics to the familial one, but it does not have the basic negative sides relating to familial relations. In this case, the negative side is connected to varying understandings in regards to the acceptability of surrogate motherhood as a way of giving birth in general, but also in particular, which can also bring disturbances in relations between people connected by relations of friendship.

In the third type of surrogacy, in which there is no earlier connection between a mother and a woman “ordering” the child, there are also positive and negative sides. The positive ones are in the fact that there is no disturbance in familial relations, while the negative ones are most often in the fact they are connected to the inclusive nature of the commercial element. Namely, in countries where surrogacy is permitted and regulated, a “reward” is most often granted, which can be considered reasonable, such as medical expenses, expenses relating to

pregnancy, etc. Classic commercialization in the sense of purchasing a child is not permitted. However, what is considered “reasonable expenses” is a specific question under the jurisdiction of the court if there is a dispute. On the other hand, questions are raised regarding sanctions in a case that the assets given go over reasonable expenses and the child is already born. (Welstead, 2011: 167) Also, what if the surrogate mother refuses to hand over the child after birth, or, in the most radical case, if neither the surrogate mother nor the couple who ordered the child will not take the child because it does not fulfill their wishes (born with defects), (Sandel, 2007: 45-48) for instance, in the case of twins, or the sex of the child is not what the ordering couple wished for.¹²

Transnational reproductive industry and the business called “fertility tourism”

While having children using surrogate motherhood is regularly practiced among the rich and famous, primarily among movie and music stars, this type of motherhood is more and more becoming an option for anonymous couples from various parts of Europe who cannot have children, in which state borders and national legislature do not present a significant obstacle.¹³

The procedure of surrogate motherhood is today applied in Great Britain¹⁴, Netherlands (even though there is no legislature), Israel, Greece, Ukraine,

12 One of these classic cases is from the year 2000, when a surrogate mother and a couple refused to accept the child. Namely, one Englishwoman consented to being a surrogate mother for an Italian man and his Portuguese wife, and they lived in France. The donated sperm, received from the American sperm bank with a headquarters in Copenhagen and the donated egg cells received from the woman in England were used to create an embryo which was implanted by a doctor in Greece. The problem arose when it was determined that twins will be born. The couple who ordered the child asked the surrogate mother to abort the pregnancy, but she refused. When the children were born, nobody wanted to accept them. In the end, using an agency, the children were given for adoption to a lesbian couple in California, given that the children were born in California. (Ibid.; as well as Elizabeth S. Stark (2008) *Born to no Mother: In re Roberto D.B. and Equal Protection for Gestational Surrogates Rebutting Maternity. Journal of Gender, Social Policy and Law*, vol.16, no. 2, p. 6.)

13 See more in Бернадет Бордаш (2014) О потреби међународног регулисања сурогат материнства: Судска пракса и активности у 2014. In: Зборник радова Правног факултета у Новом Саду, Нови Сад, 2, p. 151-171.

14 „Human Fertilisation and Embryology Act“. Available at: <https://www.legislation.gov.uk/ukpga/2008/22/contents>. Accessed: 05.02.2019.

Armenia, Georgia, USA, and Australia¹⁵, and it is forbidden in France, Canada¹⁶, Austria, Italy¹⁷, Spain, Switzerland, Slovenia. In many states, there is not even a legal regulation, while in some it is considered undesirable¹⁸, as is the case, for instance, in Sweden. In Russia, in the family code, motherhood is regulated in various cases of medicinally supported conception, including surrogate motherhood (Stanić, 2001: 491-507). This is paradoxical if one knows that the Russian law against LGBT propaganda predicts that children be protected from information connected to the LGBT people and non-traditional family forms. Even though surrogate motherhood is legal, it is still not permitted for same-sex couples. In the Czech Republic, and apart from the fact that it developed the highest quality method of in-vitro fertilization, the civil code from 2014 mentions surrogate motherhood, but only in articles pertaining to adoption (Article 804), where it is highlighted that adoption is not permitted for first cousins between brothers and sisters, but that this does not pertain to surrogate motherhood. However, the Law for specific medicinal/healthcare services in 2012 does not regulate surrogate motherhood, i.e. surrogate motherhood is forbidden, apart from cases with serious illnesses involved.

Considering that the legal framework, in regards to sexual and reproductive rights and biomedical research differ from country to country¹⁹, a full pallet of bans and permits has been created, as well as legal frameworks in relation to a transnational reproductive industry and fertility tourism, the primary characteristic of which is social inequality between classes and ethnicities, as well as the “imperial” way of life between the North, East, and South (Feyerabend, 2010; Bergmann, 2014: 280-289; Brand and Wissen, 2017). This gives us a right to claim that an entire commercial reproductive branch and trade of bodily substances and organs were created based on the reproductive and regenerative medicine in the last few decades.

15 See more on the condition of surrogate motherhood in Australia in the text by Jenni Millbank, “The New Surrogacy Parentage Laws in Australia: Cautious Regulation or “25 Brick Walls”?”, *Melbourne University Law Review*, vol. 35, 2011.

16 For instance, in France and Canada, the sale of reproductive material is forbidden. Assisted Human Reproduction Act, 2004 S.C., ch 2, 87 (Can), as well as French Law Concerning Medically Assisted Reproduction. 1843, 1845, 1996. In France it is not even permitted to use new reproductive technologies post-menopause or posthumously. International Federation of Fertility Societies Surveillance 07, 87 Fertility and Sterility S8, S12, 2007.

17 Italy is the most restrictive regarding the usage of new reproductive technologies. Law 40/2004, Gazz Uff. No. 45, Feb. 19, 2004.

18 In regards to Europe, it is notable to look at *A comparative study on the regime of surrogacy in EU Member states*, Directorate general for internal policies, European Parliament, 2013.

19 „Surrogacy By Country“. Available at: <https://www.familiesthrusurrogacy.com/surrogacy-by-country/>. Accessed: 05.02.2019.

Namely, the transnational reproductive market is spreading fast in the constant interaction of supply and demand, in which the production of human life becomes a production process in which biologically necessary parts can be bought and services offered. That way, bioeconomy, obviously, continually reacts to unfulfilled needs, diseases, and reproductive rights. For instance, Indian biologist Sunder Rajan, while exploring the genome, showed that the “actual biotechnology could be understood only in the context of interactions of pharmaceutical companies and the development of medicine. What scientists and explorers are producing in biotechnological laboratories and the reproductive chain of value, that presents bio-capital and creates a technological-scientific form of capitalism.” (Rajan, 2006)

If we explicate the thesis until its end, this industry, which is becoming ever more diverse, is being used for social injustice, international competition, and differences in legal systems. A necessary prerequisite is the supply of biological material. Also, in this segment of the market, including reproductive clinics and middle-man agencies in different countries, three comparative advantages are being used. *Firstly*, these companies are focused on services for which there is a high level of demand in agreement with specific social and cultural norms, as is, for instance, the determination of a child’s sex is in Southern and Eastern Asia. *Secondly*, in the spirit of global competition, medicinal services in Southern and Eastern Europe are much cheaper than those in the North (for instance, Hungary, Czech Republic, Poland, and Ukraine in comparison with Northern and Western Europe). *Thirdly*, these companies are concentrated on medicinal and reproductive services, which are banned in many countries, but for which there is a high demand on an international level, as is the case with surrogate motherhood in Russia, Ukraine, and India. For instance, an Australian mediation agency can set up contact between homosexual couples from Israel and egg cells donors from the USA, or surrogate mothers from India. This is how it looks in practice and through numbers: for instance, at the surrogate motherhood fair “*Families through Surrogacy*,” held on March 2015 in London, numerous agencies with different offers were presented. In India, for example, there is even a guide for the entire process of surrogate motherhood.²⁰ This is because such clinics rely on the comparative advantage of the South: in India, prices range between 25.000 and 50.000 dollars, which is far less than the average price in the US, which is between 80.000 and 100.000 dollars.

20 “Intended parents: All you need to know about completing a surrogacy in India”. Available at: <https://surrogate.com/intended-parents/international-surrogacy/surrogacy-in-india/>. Accessed: 04.02.2019.

These “backdoor actions on the free global market” (Hochschild, 2012: 1125-1138; Rudrappa, 2012) are a confirmation of the mutual benefit myth, which is typical for globalization. The agreement on labor and services between wealthy parents who want to have a child and the mother is being mystified, and in practice it is transformed into a “reproductive assembly line” (Hochschild, 2012: 1125-1138; Rudrappa, 2012) for the future. In India, 3.000 reproductive clinics are registered, and surrogate motherhood reaches a yearly turnover of around 450 million dollars, out of which 25.000 babies have been “ordered” from abroad. The Indian government supports this kind of medicinal tourism, as well as other export industries with reduced taxes and customs.

The reproductive medicinal procedure is subject to the market principle of efficiency: in order to increase the chances that the uterus of the surrogate mother will accept the embryo, the implantation of five embryos is executed as a rule. As a consequence, pregnancy with twins and triplets is becoming a regular thing. If the customer only wants one baby or twins, the other embryos are aborted. During pregnancy, the surrogate mothers live in a home next to the clinic, under constant surveillance and control, similar to workers in China who live in sleeping halls next to their factories. They are disciplined to such an extent because they have to give their best for nine months in order to create a high-quality product (and get paid 6.000 to 7.500 dollars for it in the leading clinics in India) for somebody else, without developing an emotional attachment to the baby in that time. Even worse, in the case of a spontaneous abortion or a stillborn child, these women are not paid the money they were promised.

Let us summarize, as Amrita Pande, who worked on an ethnographic research of surrogate motherhood in India for eight years prior, states: “such outsourcing and neoliberal transnational reorganization of reproduction is called neo-eugenics”. (Pande, 2014: 104-128; Vora, 2013: 97-106) The women from the South perform services for the reproduction of the people from the North, and thereby enable the transnational reproductive business acquirement of vast profits, while the inequality among women and the social stratification of reproduction increases. (Ukeles, 2013: 1246) This enables couples from the global middle class to realize their reproductive rights as part of their “imperial” way of life, while a new world order of reproduction is created at the same time. (Temman, 2008: 1105)

Moral-(bio)ethical dilemmas, implications, and consequences

We can state many examples that implicate (bio)ethical dilemmas. In Russia, surrogate motherhood can be arranged for 11.250 Euros, and apart from finding the surrogate mother, donor, accommodations, prenatal care, and other medical services, clients are enabled the acquirement of visas, reservations of hotels, and other collateral services. Russia and Ukraine are the only countries with no limitations on surrogate motherhood, and for years they have been the destination for infertile couples who cannot be sure to have a child this way in their home countries. Great Britain is the same, but only for its citizens, while the Czech Republic pays for surrogate motherhood to its citizens if they cannot have children due to oncological diseases. All this creates a large number of moral-ethical and bioethical dilemmas.

Even though this type of motherhood for commercial gain is legally permitted only in a certain number of countries, while not being permitted in others and while also being a form of treatment for infertility, it is a situation which requires a need for an open debate on the dilemmas, implications, and especially the consequences. Namely, surrogate motherhood is ethically suspicious for many, primarily due to the tendency of it becoming trendy. This becomes even more actual because the medical profession supports this as a way of reaching a child, but only with medical justification, i.e. only for women who cannot have a child in any other way. Therefore, a significant number of moral-(bio)ethical dilemmas must be reviewed. In an attempt to systemize them, at least when only talking about the participants in surrogate motherhood, these dilemmas can be reduced to the following systematic summarization (Radan, 2018):

- Questions in connection with the relationship between the “client” and surrogate mother;
- Questions in connection with the relationship between the surrogate mother and the person they are signing the surrogacy agreement with;
- Questions in connection with the relationship between the surrogate mother and her immediate family;
- Questions in connection with the relationship between the “ordered” child and other surrogacy participants;
- Questions in connection with the role of surrogacy on the broader family environment (friends, family, neighbors, acquaintances);

- Questions in connection with the agreement, legal regulations, offenses, courts, as well as the creation of other possible damages for the family;
- Questions in connection with encouraging negative social instances.

This selection arises foremost from the need to view surrogate motherhood in the complexity of interhuman relations. To illustrate, we can state the first case of surrogate motherhood from 1986 in the US, when the surrogate mother, who was also the egg cell donor at the same time, went to get the child 24 hours after giving birth, took it from its parents and out of the country. A year later, the court of New Jersey assigned guardianship over the child to the parents (because of the violation of the surrogacy agreement), while it only allowed visitation for the surrogate mother. Also, when dealing with the review of questions connected to the encouraging of negative social instances as a result of practicing surrogate motherhood, one should not forget that, for instance, even today, women in India are renting their uterus for a dumping cost of 5.000 Euros in order to escape their villages into the urban parts of the country, which is a chance for a better life in their eyes.

Nevertheless, the corpus of dilemmas generally revolves around viewing the relationship between the couple “ordering” the child and the surrogate mother; the firm connection between the surrogate mother and the child being born; the relationship between the surrogate mother of the child and her own family; the relationship between the children of the surrogate mother and the “ordered child” their mother is giving birth to; questions asked with the surrogate mother and her family and relationship out of the family, i.e. the influence of her action on their immediate and broader environment; as well as the problem of heterological parenthood. There are also the inevitable questions on the consequences of this procedure to the physical, psychic, and spiritual health of the surrogate mother.

In this sense, the singularly essential questions for bioethics are the ones connected to the instrumentalization of human dignity and the dignity of human birth (Anderson, 2000: 19-22), as well as the instrumentalization of a child born from an arrangement involving surrogacy. (Edelmann, 2004: 129) The question on possible misuse is not any less important, especially in the commercialization of surrogate motherhood, but also the questions relating to freedom of choice and sexual and reproductive rights which are based on the assumption that the body is personal property – “My stomach belongs only to me!”²¹ Namely, the

21 This is the main slogan which appeared in the European woman movement in the fight to legalize abortion.

concept of right of private property means that the owner has freedom of choice and disposition of their body; that they have a right to make decisions on if and how they will use their body; that they can sign a donor, renting or sale agreement for its parts based on “informed consent”. (Gehring, 2006; Petchesky, 1995: 387-406) According to the same concept, a woman is observed as an active subject, taking her life into her own hands and has control over it: the same goes for a woman who can decide whether she wants to use reproduction techniques or rent a surrogate mother to have a child, or a woman donating an egg cell or offering her uterus to give birth to a child for somebody else or a woman offering sexual services for money.²²

Nevertheless, the concept of individual freedoms of choice and autonomy fogs the unequal social statuses and relations in which these decisions are being made. Access to commercial services of the reproductive industry depends on the buying power of the entire middle and consumer class. Agreements between unequal partners will increase social equality much more than they will reduce it.²³ In this context, for instance, in order to oppose the misuse objections, the reproductive clinics in India use the expression “informed consent” and highlight that the doctors informed the surrogate mother and her husband on the procedure in order for them to be able to decide whether they want to sign the contract or not. However, given that doctors do not provide sufficient information, as well as because of the surrogate mother’s poverty, freedom of choice becomes an entirely abstract concept! Even the idea of control over one’s own body is annulled because the material which is kept in refrigerators is not under the control of the donors. Or, what if the surrogate mother has an abortion or the sex worker suffers violence at the hands of a client? From there, a logical question is asked: “Is the freedom of choice only an illusion, and how much is self-determination only a fetish in modern capitalist societies?” (Wichterich, 2015: 25)

The documentary “Breeders also show the extent to which this theme is a topic of moral-ethical and bioethical discussion: A Sub-Class of Women”²⁴ by the producer Jenifer Lahl, founder and president of the Centre for Bioethical Culture in California, USA, where attention is being brought to the misuse

22 For similarities between surrogate motherhood and prostitution, see more in Jean, M. Sera (1997) Surrogacy and Prostitution: a Comparative Analysis”, *Journal of Gender & the Law*, vol. 5, p. 343.

23 In re Baby M, 537 A 2d 1227,1249. Available at: <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1347&context=lawineq>. Accessed: 03.02.2019.

24 “Breeders: A Subclass of Women?”. <http://breeders.cbc-network.org/>. Accessed: 20.01.2019.

of surrogate motherhood in which wealthy couples exploit women of lower-income status which “carry” their children for them. In this context, to illustrate, Europe today is still far from a wholesome legalization of surrogate motherhood. This is also shown by protests in France where surrogate motherhood is being equalized with modern slavery and internet sale of children. This means that surrogate motherhood does not always have a happy end. On the contrary, there are numerous examples of couples who do not adhere to the agreement and leave a surrogate mother with a child and without money. There has also been a noted case where a couple got divorced during pregnancy of the surrogate mother, and the child ended up being given to its grandmother. Also, there are cases when a certain number of couples return from India without children because the authorities refuse to issue travel papers for the children.

Based on all these experiences, we can conclude that we are dealing with a complexity of an area containing factors and inputs which are infrequent collision due to their complex internal medicinal-social-legal-bioethical, psychosomatic, and “emotional” structure, and which area, as such, becomes a source and cause of new, unforeseen problems, controversies, temptations, and dilemmas: who is the real mother or whether, and to what extent, can surrogate motherhood disturb the unity of marriage, the personal integrity of the child and the dignity of the very act of giving birth?

These problems and dilemmas can be summed up in three groups: the commercialization of favors, morally unjustified and unallowable heteronomy of marital unity, as well as the problem of disrespecting the dignity of giving birth. We only highlight a few:

- When handing over the child to others after giving birth, there is a great wound being brought into his life, as well as the relations with others. The consequences of this wound are very severe in the very beginning of life, and they cannot be quantified;
- With the separation of the desire to conceive and bring a child “to this world” from, on the one hand, the desire to raise and educate it “as your own” and, on the other, there is a change in the perception of a child:
 1. Namely, the child is not wanted for itself, but something else. For instance, that can be money or, in the best case, a desire to acknowledge favors! In these circumstances, we treat the child as an object violating/harming the fundamental ethical principle: it is not permissible to create a human life to abandon it! (Krimmel, 1983: 35)

2. A woman is also reduced to a tool! Even if you take into consideration the psychological damage which can be created with the termination of motherhood (which sometimes also happens when the mother does not want to give the child to the “clients”), a woman is reduced to a role of incubator, i.e. her character is reduced to her reproductive organ! (Aramini, 2009: 202-203)
 3. A woman is asked to step away from the rich/warm relationship set up between a mother and child during pregnancy. With this, her personality (along with that of a child) is humiliated and dehumanized to the level of trading with the body of a woman!
- Eventual motivation with the help of “big heart” (generosity) concerning lending a uterus does not overcome the problem because that generosity cannot replace the actual harm which is the fundamental element of surrogacy or replacement motherhood. With this, the argument of generosity becomes an excuse!

***Mater semper certa est* or surrogate motherhood!?**

The application of surrogate motherhood today and the increase in abandonment of the millennium concept of *mater semper certa est*, according to which the mother of a child is the mother giving birth to a child, has led to severe legal, ethical, moral, and philosophical dilemmas. From moral-ethical and bioethical positions, the fundamental thesis is that there is an increased physical interaction between a mother and child during pregnancy, which points to the fact that this interaction is physical, psychic, and spiritual, and that the fundamental connection between a mother and a child is realized through it. (Wertheimer, 1992: 216; Tieu, 2009: 175) On the one hand, a mother imagines a child, fantasizes about it, “talks” to it, and, on the other, a child gets the body and shapes its spirit in this non-verbal communication with the mother. (Akker, 2007: 57) In this sense, pregnancy and giving birth to a child lead to the creation of emotional connections between a mother and a child and, it seems that it is unnatural and even inhumane to sever them. (Lawrence and Lawrence, 2011: 197)

Following this, the problems which may occur with surrogate motherhood (ethical, legal, economic...) are especially sensitive and complicated, and, in extreme cases, they are also in conflict with the principle of the child's

best interest. From there, the bioethical estimation of surrogate motherhood primarily depends on “the motives based on which people decide on this type of motherhood and then the conditions, as well as how it is realized by way of (not)respecting legal and agreed upon commitments and the commercialization of human life. The moral rating, however, greatly depends on (dis)respecting human birth and the heteronomous disturbance of marital unity”. (Radan et al., 2015: 49)

However, on the other hand, for some parents, surrogate motherhood is the only possible way to have a child genetically connected to them, which is the most crucial goal in their lives. In this context, should surrogate motherhood be permitted only in cases which are medically justified, while all other motives (aesthetic, professional...) should be treated as morally unacceptable and not be permitted? Namely, in these cases it is very important – in life situations in which there are the most diverse personal and group interests – to precisely determine which/whose interests should be protected and justified. Which interest will be protected will depend on many circumstances, among others, the ethical and bioethical aspects, as well as social acceptability, ending with the factor of dependence on the development of reproductive medicine.

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SUROGAT (ZAMJENSKO) MAJČINSTVO

Ili treba li se maternica iznajmljivati?

Sažetak

Poslije rađanja “bebe iz epruvete”, trijumfalni je uspjeh reproduktivnih tehnologija dramatično ubrzao znanstveno-istraživački rad u mnogim područjima i dao nadu parovima koji se bore sa problemom neplodnosti. Međutim, istovremeno su se nametnule nove i brojne moralne, etičke, bioetičke, pravne, društvene, kulturološke i rodne dileme i polemike, posebno u zemljama u kojima postaju sve naglašeniji trendovi negativnog populacijskog kretanja. Ove asistirane reproduktivne tehnologije unose promjene, ne samo iz aspekta medicine u odnosu na sterilnost, već duboko zadiru i u društvene i kulturološke obrasce braka, partnerstva, roditeljskih uloga i rodne ravnopravnosti. Surogat ili zamjensko majčinstvo, kao dio područja pitanja reproduktivnih tehnologija, traži hitno preispitivanje mogućnosti za institucionaliziranu praksu majčinstva u suvremenom društvu i njegovih efekata u svakodnevnom životu. Odnosno, to je pokušaj demistifikacije, denaturalizacije i reevaluacije normi majčinstva, koje uvijek ukazuju na odnose u specifičnim materijalnim uvjetima centriranja ili decentriranja javne ili private moći ili društvenosti. Međutim, oni se prije i iznad svega odnose na mogućnost da se prethodno napravi (bio)etička evaluacija, sa kojom bi se osigurale solidne pravne regulative u odnosu na mogućnost (zlo) upotrebe i komercijalizacije ljudskog života.

Ključne riječi: surogat majčinstvo, bioetička evaluacija, reproduktivne tehnologije, ljudsko dostojanstvo, turizam plodnosti