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Bioethical and legal challenges of surrogate motherhood in the Republic of Croatia¹⁴

ABSTRACT

Surrogate motherhood represents an increasingly common method of human reproduction, which helps overcome successfully the obstacles of infertility. However, surrogate motherhood, due to its imprecise legal regulation and complex nature, entails many controversies. Therefore, the aim of this paper is to determine the need and the necessity for such regulation in Croatia, taking in account the already existing methods of medically assisted reproduction. Given the adequate level of public awareness of acceptability of surrogate motherhood, we propose an appropriate legislative solution, based on a prior comparative analysis of the existing legal regulation in different countries. Due to the fact that surrogate motherhood raises many, not only legal, but also medical and bioethical questions, it was impossible to avoid those aspects of the problem.

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1. Introduction

1.1. Preliminary considerations⁵

*"Mrs N.P., a 39-year old woman, Mr O.P. whom the former married two years ago, and Miss R.S., Mrs N.P.'s 21-year old unmarried daughter from her first marriage, came to the Citycentre IVF Clinic. Mrs N.P. explained that she and Mr O.P. propose to provide ova and sperm for the purpose of in vitro fertilisation and, because Mrs. N.P. cannot carry a pregnancy for medical reasons, R.S. will be a surrogate mother for them to gestate the embryo(s). The local laws allow surrogate motherhood provided that surrogates are at least 20 years old, that they act voluntarily, and that it does not include financial compensation, except coverage of the expenses actually incurred. During a personal interview, Miss R.S. explained that she wants her mother and Mr. O.P. to have a baby to ensure that they stay together, and that her pregnancy will be inexpensive because she is living with Mrs N.P. and Mr O.P. during the final year of her college program."*⁶

The above mentioned case is only one of the numerous cases of surrogate motherhood in states where surrogate motherhood is considered a common method of human reproduction. The complexity of such procedure that entails many medical, ethical and legal controversies could be seen in this case. The questions that are imposed in such a case are of problematic nature and sometimes entail ambiguous answers. These questions would be, as follows, should a doctor implant the embryo of the mother and stepfather in her daughter's uterus? What will be the degree and kind of the kinship relation between the child born that way and the woman who gave a birth, in other words, will the application of surrogate motherhood include legal bonds between the child and the surrogate mother? Is the daughter's decision to bear a child on behalf of her mother autonomous and voluntary or could it be anticipated that the girl has somehow been pressured to do it? Is this kind of surrogate motherhood entirely altruistic or is it a sort of commercial surrogate motherhood which inevitably implies certain compensation? Is the referring national law that regulates surrogate motherhood clear enough or does it contain some legal gaps, and what characterizes the legal practice of the state in question regarding the application and realization of surrogate motherhood?

⁵ Note: We are particularly grateful to prof.dr.sc. Hrvoje Vričić i doc.dr.sc. Ana Borovečki, Faculty of Medicine, Zagreb, who have greatly helped the preparation of the paper with their professional explanations.

⁶ Dickens, B.M., Cook, R.J., Kismodi, E., Reproductive health- Case studies with ethical commentary, The UNESCO Chair in Bioethics Office, 2006, case No.25, p. 55. See also the Croatian edition, Reproduktivno zdravlje- analiza slučajeva s etičkim komentarom (i priložima), Unit of UNESCO Chair in Bioethics, Faculty of Law of the University of Zagreb, Turković K., Roksandić Vidlička S., Maršavelski A.(ed.), Zagreb, 2011., p.57

Only some questions which might arise from this case are stated here. These questions are fundamental to this paper and we will try to find acceptable legal solutions to them.

The science which deals with research in human reproduction is a new branch of medicine. It can be freely called "a post-industrial miracle" which has emerged due to an extremely rapid growth of high technologies, biochemistry, microsurgery and genetic engineering.⁷ Surrogate motherhood is one of the methods of human reproduction which owns its application to new advances and scientific achievements. However, while medicine has taken the path of a very rapid development, ethics and law are trying to keep pace with it and set certain boundaries. Namely, it is necessary to provide, to the greatest possible extent, frameworks for medical procedures, so that mankind could benefit from them and prevent their abuses. It is the law that provides for normative restrictions while ethics offers moral and social ones.

Surrogate motherhood is a highly controversial method of reproduction which is subject to criticism in many countries, including the Republic of Croatia. On the other hand, in countries where this method is regulated, the respective legislation is not standardized concerning its application in practice.

The purpose of this paper is to provide answers to the questions if there is a need for regulation of surrogate motherhood method in Croatia, and if such method is necessary taking in account already existing methods of medically assisted reproduction. In case the public awareness of the acceptability of surrogate motherhood is developed to an appropriate extent, this paper could offer a basis for its legal regulation. This regulation results from a prior comparative analysis of the existing legislation in different countries. However, due to the fact that surrogate motherhood implies many, not only legal, but also medical and bioethical questions, it was impossible to avoid those aspects of the problem.

2. Medical aspect of surrogate motherhood

2.1. Medical, legal and social background of infertility

Surrogate motherhood represents one of reproduction methods that causes many legal and ethical dilemmas. However, these dilemmas can not be finally resolved without understanding the pain inherent in infertility. Infertility is a common condition in young couples today and it represents an obstacle to the fulfilment of their desire to become parents. Statistics show that infertility affects between 10 and 15%

⁷ Spar, D.L., *The Baby Business: How Money, Science and Politics Drive the Commerce of Conception*, Harvard Business School Press, Boston, Massachusetts, 2006, p.17 of Introduction

of couples in the world, and a similar case is in Croatia. Important indicators are also fertility rates according to which the rate of natural growth in Croatia is dropping.⁸ Our lifestyle today greatly contributes to such a condition, where stress is a common occurrence which leads to compromising the important bodily functions, causing a situation where fertility becomes a secondary concern.⁹ The fast pace of life and delay of the decision to become parents create an evolutionary shift in importance of certain body functions.¹⁰ At the age that is most suitable for reproduction (18-25), young people are focused on completing their education and creating a career, not on starting a family. Postponements often cause difficulties when a woman, that is, a couple, decides to start a family, at the age that is not optimal for giving birth to a child. A desire for offspring is not the only reason why couples are increasingly turning to methods of medically assisted reproduction. The expectations of society may equally affect the decision the couples make, to use the stated methods, especially in cultures where barren, or even infertile men are greatly discriminated.

Infertility is considered a disease according to modern medical standards,¹¹ therefore, treatment of infertility, as well as other diseases, must be provided to those affected. The right to health care is a basic human right and is as such guaranteed by the Constitution of the Republic of Croatia,¹² the International Covenant on Economic, Social and Cultural Rights¹³, and by the Health Care Law.¹⁴ Yet, some of the methods of assisted reproduction are not equally available to everyone. Various treatments are often limited by legally based assumptions, which limit their use on the basis of the marital status of the person asking for proper medical help. In most countries medical fertilisation is available only to couples, and

⁸ Statistical Yearbook of the Republic of Croatia 2010, Croatian Bureau of Statistics, ISSN 1333-3305; pp.110-111.

⁹ As pointed out by prof. dr.sc. Hrvoje Vrčić from the Clinic for Gynaecology and Obstetrics in Petrova Street, based on an interview conducted by the authors Z.K. and D.H., as part of the research for this paper

¹⁰ Taub, N., Surrogacy: A Preferred Treatment for Infertility, in: Gostin Larry, Surrogate Motherhood, Politics and Privacy, Indiana University Press, Bloomington and Indianapolis, 1990, pp. 221-229.

¹¹ "Infertility is a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse". - Zegers-Hochschild, F., Adamson, G. D., de Mouzon, J., Ishihara, O., Mansour, R., Nygren, K., Sullivan, E., van der Poel, S.; The International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organisation (WHO) Revised Glossary on ART Terminology; Fertility and Sterility, Vol. 92, No. 5, November, 2009.

¹² See article 59, *Official Gazette*, No. 85/10.

¹³ See article 12, *Official Gazette- International Agreements*, No. 12/1993.

¹⁴ See article 3, *Official Gazette* No. 150/08, 04/09, 153/09 and 71/10.

not to a woman who wants to raise a child on her own,¹⁵ while the access to it is usually available to unmarried couples.¹⁶

Even though the significance of infertility treatment is obvious in the social component, which is important for a successful demographic development of every country, the funding that community provides for the designated therapy is often limited. Therefore, the right to the highest quality of health care depends on the economic strength of a country¹⁷ and the willingness to provide infertility treatment at the expense of life saving procedures. Further issues that concern the methods for assisted fertilisation are the health risks that exist for women who undergo various hormonal therapies that stimulate egg cell production. The use of such medications to induce ovulation may cause consequences for the woman's health, or child's health.¹⁸

The above mentioned issues clearly indicate that many medical, social and legal obstacles exist in some of the medically assisted reproduction methods, so an alternative is often looked for. Such an aim, to achieve parenthood, can be realized by Adoption Institute. However, many couples give up quickly, due to legal formalities and a lengthy period of time it takes to adopt a child, but also because of the parents' desire to continue the family line with descendants that are genetically their own.¹⁹ Therefore many opt for surrogate motherhood, as a method without the stated problems, or medical risks, if the option is partial or natural surrogacy that does not require the stimulation of the female reproductive organs. Surrogacy thus appears as a form of informal adoption, controlled solely by the will of the parties, thoroughly planned and ensures a genetic link of the child with both of the parents, or at least with one parent.²⁰

¹⁵ Most countries regulate in this way, including our own Law on Medically Assisted Reproduction, *Official Gazette* No.88/09., 137/09. Many international instruments recognise the right of a child to be born in a family, including the UN Convention on the Rights of the Child, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights

¹⁶ Restrictions still exist in, e.g., Ireland, Czech Republic, Poland, and Turkey.

¹⁷ Rokсандić Vidlička, S., Actual issues concerning some criminal offences against the health of people in the light of elaborating draft amendments to the Croatian Criminal Code, *Yearbook of the Croatian Academy of Legal Sciences*, Vol. 1, No. 1/2010, especially pp. 93-102.

¹⁸ Popular articles that are publicly available often feature texts such as: "An analysis has determined that infertility and ovulation induction medications significantly increase the risk of giving birth to an autistic child, when compared to women that are not infertile and have not used ovulation induction medications." Infertility treatments may increase the risks of having a child with autism, <http://www.neplodnost.hr/lanci-v2/opcenito/334-lijecenje-neplodnost-rizik-autizam.html>, March 1, 2011.

¹⁹ See more on the term "genetic primitivism" in chapter 3.3.

²⁰ Davies, I., Contracts to bear children, *Journal of Medical Ethics*, 11/1985, pp. 61-65.

Due to the specific nature of surrogate motherhood as a method of reproduction, we will present some of its aspects.

2.2. Existing forms of surrogate motherhood

Development of medical technology which enables the reproduction has resulted in many methods to achieve the desired effect. However, very modern reproductive methods, like surrogate motherhood, can result in separating the two basic roles of a mother- the creator of egg cells to be fertilised, and the role of a woman, who is the bearer of pregnancy.

A surrogate mother is a woman who carries a baby, after a successful natural or artificial insemination, or after an in vitro fertilisation through the implementation of an embryo,²¹ for an infertile couple (commissioning couple), based on a pre-pregnancy agreement, with the intention of handing the child to the commissioning couple who acquire parental rights and responsibilities.

Therefore, surrogate motherhood appears as a full or gestational and it is realised by in vitro fertilization using the sperm of an intended father and the transfer of the embryo to the uterus of the surrogate, thus creating a genetic link of both parents with a child. The other form, and a more common one, is partial or traditional (natural) surrogate motherhood, where the surrogate mother is the biological mother of the child, by natural intercourse or artificial insemination with the sperm of a man whose wife legally becomes the mother of the child.

Gestational surrogate motherhood allows the infertile couple to have their biological children that they otherwise could not have. However, due to the complexity of the procedure that the surrogate mother and the biological mother of the child must undergo, partial surrogate motherhood is more common. Gestational surrogacy requires medical intervention of the complex procedure of in vitro fertilisation (IVF) and the embryo transfer (ET)²² to the uterus of the surrogate mother, whereas traditional surrogacy is done in a natural way (sexual intercourse) or via assisted insemination using the sperm of the husband.

If the process involves compensation which a surrogate mother receives based on the agreement, we are talking about commercial surrogacy, which essence is to acquire compensation for rendered services. If the compensation in question only covers the expenses during pregnancy (fertility treatments, medical examinations, pregnancy and delivery expenses), we are talking about altruistic surrogacy. The reasons

²¹ Cook, R., Day Sclater, S., Kaganas, F.: *Surrogate Motherhood: International perspectives*, Hart publishing, Oxford- Portland Oregon, 2003, p. 1.

²² FIV/ET- the "test tube baby" method

why a woman becomes a surrogate mother are in this case altruistic, and the surrogacy is not motivated by a financial gain.²³

The ethical dilemmas that are inherent to commercial surrogate motherhood are often the reason it is prohibited by many legislatures that regulate this subject.²⁴ The dilemma arises because of the collision of the rights that are being realized by commercial surrogacy. There is a desire to preserve personal autonomy and the right to a free-choice on the one hand, and the moral responsibility toward the child that is being born in this way and all the parental obligations on the other.

A growing global problem of human trafficking for obtaining organs should be mentioned here. Article 175 of the Croatian Criminal Law²⁵ clearly prescribes the prohibition of human trafficking and slavery.²⁶ So a problem of exploiting women of lower financial means for "loan" of the reproductive organs or acquiring reproductive cells often appears in commercial surrogacy. These are living donors, who thus gain the money necessary for survival. Although our Law on Taking and Transplanting Human Body Parts for Medical Purpose²⁷ determines the conditions for allowed transplants, it excludes its application when it comes to reproductive tissues and organs. These matters are regulated by the Law on Medically Assisted Reproduction,²⁸ whose Article 14 prohibits the acquisition of financial gain for donated eggs or semen, and Article 23 forbids trading with gametes. Penalties for these medical procedures are prescribed in Article 242 of the Criminal Code²⁹ which deals with illegal transplants of human body parts.³⁰ Since our Law on Medically

Assisted Reproduction bans any form of surrogate motherhood³¹, the basis for the prohibition of commercial surrogacy in particular should be in international instru-

²³ The division is by Dan R. Reilly in the article: "Surrogate pregnancy: a guide for Canadian prenatal health care providers", Canadian Medical Association Journal, 176/2007, pp.483-485

²⁴ e.g. Great Britain, Austria, the Netherlands, Canada.

²⁵ *Official Gazette* No. 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08, 57/11

²⁶ See more on human trafficking and slavery felony in Criminal Law, Special Part, Novoselec P.(ed.), Faculty of Law, University of Zagreb, Turković, K., pp. 134-139.

²⁷ *Official Gazette* No. 177/04 and 45/09.

²⁸ *Official Gazette* No. 88/09 and 137/09.

²⁹ See more in Criminal Law, Special Part, Novoselec, P.(ed.), Faculty of Law, University of Zagreb, Turković, K., pp. 260-265

³⁰ Roksanđić Vidlička, S., Actual issues concerning some criminal offences against the health of people in the light of elaborating draft amendments to the Croatian Criminal Law, Yearbook of the Croatian Academy of Legal Sciences, Vol. 1, No. 1/2010, pp. 122-129

³¹ Article 24 of the Medically-Assisted Reproduction Act: "It is forbidden to use any means of public communication or internal communication or any other means, any means of communication to request or offer women to give birth to a child for another person. It is forbidden to arrange or conduct medical fertilisation that results in the birth of a child that belongs to another person or to turn over a child that was born after medical

ments. So, Article 21 of the Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine³² defines that the human body and its parts cannot be a source for acquiring financial gain. Accordingly, our view is that carrying and giving birth to a child for another person, solely for the purpose of financial gain, is immoral and insults the fundamental values of democratic society, such as the value of protecting women from exploitation and the protection of a child that was born in this way. Practicing the right to autonomy of a single person must not be harmful to others, or harmful to the society as a whole. Placing women and children on the market dehumanises individuals and opens the way for commercialization of human rights.³³ Therefore, we must regulate and allow only the altruistic form of surrogate motherhood and prohibit the commercial form, if surrogate motherhood is to be legalized at all.

Sometimes it is difficult to differentiate between altruistic and commercial surrogacy³⁴, if the surrogate mother receives compensation for medical treatments and for unrealized income during the pregnancy and childbirth. Therefore, it is very important for the legislator to regulate the option of compensating the expenses in detail by determining the limit on the highest amount of compensation that can be legally given.

2.3. Methods of acquiring surrogate motherhood

The reasons couples choose surrogate motherhood are numerous. Those are usually medical reasons that make the woman incapable of carrying a pregnancy to term, due to various medical procedures that she had been subjected to (e.g. hysterectomy) or illnesses that would cause pregnancy or childbirth endanger the life of the woman. In most severe cases the stated methods of assisted reproduction cannot help the couples to have a child and surrogacy is the only way for them to become biological parents. However, surrogacy can be requested as a purely aesthetic method, due to the negative effects pregnancy would have on the career of the mother, or

fertilisation. All contracts or agreements or any other legal affairs on giving birth to a child for another person or turning over a child that was born after fertilisation, with financial compensation or without it, are null and void."

³² *Official Gazette- International Agreements*, No. 13/03.

³³ Capron, A. M. and Radin, M. J., *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, in: Gostin, L., *Surrogate Motherhood, Politics and Privacy*, Indiana University Press, Bloomington and Indianapolis, 1990, pp. 62-64.

³⁴ As it is the example case in this paper.

her physical appearance. There is a large amount of criticism for the mentioned choice, because it prioritises comfort over conception and giving birth.³⁵

Surrogate motherhood appears as one of the methods of medically assisted reproduction, where the surrogate mother can be a biological mother of the child, if the artificial insemination of the woman is done by using the sperm of the man from the commissioning couple. But she does not have to be a "genetic" mother, if in vitro fertilisation will be used to fertilise the reproductive cells of the commissioning couple and then the cells will be implanted in the uterus of the surrogate mother. In that process the surrogate does not provide any genetic material and she is just a 'carrier' of someone else's baby.

The transfer of the embryo to the uterus of the surrogate mother is done within 48-72 hours, to test whether the embryo is suitable for transfer. The testing is often carried out by using pre-implantation genetic diagnosis, but since these tests require a large amount of funds they are not done in all countries, the embryo elimination is rather done on the basis of the visual appearance only.³⁶

Genetic consulting or pre-implantation genetic diagnosis can identify certain genetic defects prior to the conception.³⁷ Removing several cells from the embryo can detect chromosomal or genetic abnormalities with great certainty and can prevent the implant of an embryo and conception that would result in a child with an illness or a handicap. Regardless of a high success rate of this method, it involves a possibility of an error and can lead the parents to a false decision on terminating the pregnancy.³⁸

The procedure of in vitro fertilization requires a larger number of egg cells that will be fertilised outside of the woman's body just because of the elimination of the embryos that are not suitable for transfer. Due to a larger number of embryos, some of them will not be transferred back into the uterus. The transfer is limited by the quality of the embryos and by the number. Because of the complications that may arise from multiple pregnancies, the transfer of a limited number of embryos (usually three) to the uterus of the woman is generally allowed. If some of the embryos

³⁵ This choice is also criticised by prof.dr.sc. Ana Borovečki from the Faculty of Medicine of the University in Zagreb and prof.dr.sc. Hrvoje Vrčić from the Clinic for Gynaecology and Obstetrics in Petrova Street, data collected in an interview conducted by the authors Z.K. and D.H., for the purpose of writing this paper.

³⁶ Alinčić, M., Bakarić-Abramović, A., Hrbar, D., Jakovac-Lozić, D., Korać, A., Family Law, *Official Gazette*, Zagreb, 2001, p. 221.

³⁷ Antenatal screening- pointed out by Dr. Marion Hall in the article Brave new world- nine months away?, *Journal of Medical Ethics*, Vol. 230/1983, No.9.

³⁸ Warned by Prof. Joan Bicknell in the article Brave new world- nine months away?, *Journal of Medical Ethics*, Vol. 230/1983, No. 9.

are not transferred, they are frozen in liquid nitrogen at a temperature of -196°C . Cryopreservation is used in case further pregnancy attempts are required, if the previous one fails to work, to perform pre-implantation genetic diagnosis or for fertile women who are about to undergo chemotherapy that may lead to a genetic disorder of the reproductive cells. Freezing the embryos enables their later use without subjecting a woman to additional hormonal therapies and medical procedures (laparoscopy) with preserving the quality of the embryos. Creating a surplus of embryos opens up a question of their further storage. A couple may decide to freeze the embryos and preserve them for future use, to donate them to another infertile couple, to donate them for use in scientific research, or to destroy them.

However, freezing of the embryos is not allowed in all the countries that conduct IVF procedures, because a suspicion exists whether the quality of the frozen and fresh embryos is the same, also due to the moral issue of when the embryo becomes a person.³⁹ So, in Croatia, the Medically Assisted Reproduction Act allows the freezing of reproductive cells, but not the freezing of embryos, instead, all the fertilised cells (no more than three) are transferred to the uterus of a woman. The decision on the fate of the reproductive cells is made by the donors, that is, the persons who provided the cells. However, if such a decision is not made, after the storage period expires, the cells will be destroyed.⁴⁰

Since surrogate motherhood uses the mentioned fertilization methods, there are also some difficulties that follow all IVF procedures. Hormonal treatments the biological mother undergoes induce ovarian hyperstimulation to retrieve a sufficient number of eggs that can be used for a single treatment, which greatly affects the organism of a woman.

A surrogate mother usually does not undergo hormonal treatments, so such a pregnancy is not very different from regular pregnancies that are achieved by IVF methods. But the risk still exists, due to the so called toxic pregnancy of the surrogate mother.⁴¹ In gestational surrogacy, the surrogate mother receives an embryo with chromosomes that are completely different from her own chromosomes. The body of the woman recognises the embryo as a foreign element so its rejection occurs earlier, which increases occurrences of foetal death. There are differences in the course of the pregnancy that is initiated in the process of assisted reproduction, when compared to a spontaneous by conceived pregnancy, which is confirmed by conducted

³⁹ This is also an especially important issue for criminal law, considering various felonies, e.g. unlawful termination of a pregnancy (article 97.), infanticide (93.), and so on.

⁴⁰ Article 26 of the Medically Assisted Reproduction Act, *Official Gazette*, No. 88/09 and 137/09.

⁴¹ This is pointed out by Prof. Dr. Sc. Hrvoje Vrčić from the Clinic for Gynaecology and Obstetrics in Petrova Street, based on an interview given to Z.K. and D.H., conducted for the purpose of research for this paper.

research.⁴² Complications and illnesses during pregnancy occur more often, there is a greater risk for the foetus due to a higher ratio of multiple pregnancies as consequence of infertility treatments and there is a higher ratio of premature deliveries by caesarean section. The pregnant women are at a higher risk, and they require increased monitoring.

These medical reasons⁴³ must be considered when choosing a model and a form of surrogate motherhood regulation.

2.4. Difficulties of surrogate motherhood from the medical and legal standpoints

The role of the physician is very important in providing medical assistance to infertile couples when they decide on surrogate motherhood as one of the reproduction methods. Situations where a physician does not know which is the correct way to proceed with counselling, due to a legal and ethical vacuum created by the speed of medical science development, should be prevented.⁴⁴

Law must provide answers to those questions and direct medical science in the right direction. Medical practice must be considered in that process and the questions posed by the advancement of the society must be answered.

If the Croatian society develops the awareness of surrogate motherhood as a "new" method of reproduction, detailed regulation of that process will be required, as well as the determination of the roles of physicians and other medical personnel (actual process of fertilisation, initial stage of the surrogacy agreement, monitoring of the pregnancy and childbirth, procedure after the final medical treatments, when making the decisions on childcare and the legal status of the child in the family, et.). Before the medical treatment itself, the physician is obliged to examine the medical condition of the surrogate mother and the infertile couple. The examination includes physical and psychological evaluation of the persons to determine if they are suitable for the treatment, but also to inform them about all the consequences and responsibilities that are proper to the surrogacy agreement.⁴⁵ The role of the physician is also important in monitoring the pregnancy of the surrogate mother, because

⁴² Smiljan Severinski, N., Mamula, O., Vlašić, H.: "Pregnancy and delivery outcome after assisted reproductive technology", *Medicine*, 43/2007, pp. 267-269

⁴³ Claims that can be stated by the authors, bachelors of law, but are necessary for an interdisciplinary approach to resolving the issue of surrogate motherhood, which is supported by the authors.

⁴⁴ Goldman, B.: "Infertility giving birth to new problems for doctors and lawyers", *Canadian Medical Association Journal*, Vol. 138/1988.

⁴⁵ Rothenberg, K., *Surrogacy and the Health Care Professional*, in: Gostin, L., *Surrogate Motherhood, Politics and Privacy*, Indiana University Press, Bloomington and Indianapolis, 1990, pp. 206-215.

they make the decisions on the care of the mother and the foetus. Conflicts of interest between the commissioning couple and the surrogate mother can occur, so the duty of the health care provider is to remain impartial and not to succumb to the pressure. To avoid such conflicts and help the physician make a health care decision, each side should receive medical care from different physicians.⁴⁶

Medical confidentiality as a basis for physician – patient relationship can result in difficulties when making decisions. Is the physician allowed to reveal information to the commissioning couple about the child that the surrogate mother is carrying for them, and to what extent? Most surrogacy agreements include limitations for the behaviour of the surrogate mother during pregnancy. Those limitations mostly prohibit consumption of cigarettes, alcohol or other narcotics, as well as prescribe regular visits to the physician for pregnancy monitoring. Does the physician's obligation to medical confidentiality apply in this case, or does a more important concern, preserving the life and wellbeing of others, in this case the foetus, justify the violation of the trust relationship? Moreover, the surrogacy agreement does not apply to the physician; it is only relevant for the surrogate mother and the commissioning couple.

The question whether the surrogate mother can have an abortion of someone else's child, in case she changes her mind, or is that decision also regulated by the agreement, causes major doubts. The answer was provided by the United States Supreme Court in its verdict in the case *Roe v Wade*⁴⁷, by pointing out that it is the constitutional right of a woman to make her own decisions about her body. Therefore, a woman cannot be deprived of the right to make decisions about her own body, even if she is carrying someone else's child, nor can she be forced to terminate the pregnancy, unless there are legitimate medical reasons to do so. A provision of the surrogacy agreement that would require the prohibition and/or obligation of terminating the pregnancy, would violate the Law on Health Care Measures for the Exercising of the Right to Free Decision-Making About Giving Birth⁴⁸, as well as the provisions of the Croatian Criminal Code that relate to the unlawful termination of pregnancy.⁴⁹

Regardless of all the ethical issues that may arise in such complicated surrogacy cases, the physician's final decision must be based on the professional principles and rules of medical practice, and on the best interests of the patients, primarily respect-

⁴⁶ Reilly D., Surrogate pregnancy: a guide for Canadian prenatal health care providers, Canadian Medical Association Journal, Vol.176/2007, pp. 483-485.

⁴⁷ 410 U.S. 113(1973).

⁴⁸ Article 18 of the Law on Health Care Measures for the Exercising of the Right to Free Decision-Making About Giving Birth.

⁴⁹ Article 97 of the Criminal Code.

ing the wishes of the patient in their care.⁵⁰ Of course the interest of the child must also be considered, i.e. they must be aware of the legal status of the child.

The birth of a child represents the successful outcome of the assisted reproduction methods. However, in the final stage there arises a problem of accepting the children that were born on the basis of the surrogacy agreement and have been diagnosed with illnesses, genetic malformations, or various handicaps. Does the commissioning couple wish a child to an extent that would make them accept a child that was born with a disability? The cases where such a child was rejected by the commissioning couple as well as the surrogate mother are common. Therefore, it is vital to conduct a psychological evaluation of the parents and inform them about all the possible outcomes of surrogate motherhood.⁵¹

Many medical methods today make it possible to overcome various obstacles in the procreation of the population, which eliminates evolutionary barriers and enables two infertile individuals, despite their inability to procreate, to have biological children of their own. Despite the natural cycle of eliminating the infertility gene, it is still being transferred to future generations that will practice their rights with help of medical science.⁵²

From the above stated, it necessarily follows that medical achievements require an appropriate legal and ethical support. However, before the medical and legal aspects of surrogate motherhood are regulated in detail, it is necessary to solve the controversial ethical issues. Regulating surrogacy must go beyond the medical and technical aspects and it must clearly define the legal nature of the surrogacy agreement, the allowed boundaries of surrogate motherhood as a form of reproduction, the legal family status of a child born on the basis of the agreement, clearly determine the responsibilities of all the parties involved in the surrogacy, and provide the penalties for breaching of the agreement.

⁵⁰ Article 2, Para.1 and 3 of the Code of Medical Ethics and Deontology, *Official Gazette*, 47/04, 55/08: "The physician will respect the right of the patient, making the wellbeing of the patient their first and basic concern." "They will respect the rights of well informed, mentally capable and aware patients to accept or reject an individual physician, or the suggested medical treatment. When a patient is incapable of making such a decision, their representative will make the decision, if the representative is not present and the decision cannot be delayed, the physician will use his/her judgement to apply the best possible treatment."

⁵¹ Such a model, with a thorough preparation of the commissioning couple and the surrogate mother, is in place in the Netherlands. For details see: Dermout S., Van den Wiel H., Heintz P., Jansen K., Ankum W., Non Commercial Surrogacy: an account of patient management in the first Dutch Centre for IVF Surrogacy, from 1997-2004, *Human Reproduction*, Vol.25/2010, pp. 443-449.

⁵² Pointed out by prof. dr. sc. Ana Borovečki, professor at the Faculty of Medicine of the University of Zagreb, based on an interview conducted for the purpose of research for this paper.

3. Surrogate motherhood from the ethical standpoint

Almost incredible progress has been made regarding help provided to couples struggling with infertility; in vitro fertilisation, which only a few decades ago was a mere idea and experiment with mostly unsuccessful outcome, is a routine procedure today, and commonly the only option left for future parents in realizing their desire for descendants.

However, it is important to investigate the other side of medical progress, especially from the ethical standpoint. In this chapter we will analyse in vitro fertilisation from the ethical point of view, bearing in mind that assisted human reproduction is the instrument of surrogacy, but also the very notion of the ethics of surrogacy will be examined as well.

3.1. Nature of in vitro fertilisation from the ethical standpoint

Ethical controversies arising from medically assisted reproduction must be analyzed because the surrogate motherhood is also realized in this way. Especially when dealing with embryo manipulation, clear answers have to be given to questions such as, when does the human life begin, is it possible to freeze the sex cells or the embryos, is their transfer into the mother or into the surrogate mother allowed and until when? Our citizens view medically assisted reproduction as being justified and acceptable way of procreation.⁵³ Catholic ethics, however, views this issue from a different angle and basically does not justify any medical intervention in the human procreation process.⁵⁴ Namely, in the procedure of in vitro fertilisation sexual intercourse is being substituted, which is the result of the notion that "*the birth is the result of a specific marital act of love between spouses.*"⁵⁵

Criticism of in vitro fertilisation methods goes even to the argument that the human life created in the process of medically assisted reproduction is called "the fruit of labo-

⁵³ Results of the research project *Christian Identity and the Quality of Married and Family Life* conducted by Suzana Vuletić (p.232) show that 75.5% of examinees accept medically assisted reproduction in the case of infertility of a partner (sample of 1200 examinees).

⁵⁴ Ibid: "*The church understands the grief of infertile couples and understands their desire to have offspring, but this wish alone cannot justify the 'production' of offspring when 'ordered', through the services of 'almighty reproductive medicine'. This medicine enables the process of human birth to be bureaucratized, thus treating human life as a product or a result of technical operation.*" - p.238.

⁵⁵ Vuletić, S., Moral evaluation of research of the value dimensions of sexuality and related issues of marital and family life, p.239. This view is shared by Antun Lisec (in the article in Croatian Focus, http://www.hrvatski-fokus.hr/index.php?option=com_content&view=article&id=727:crkva-zabranjuje-umjetne-oplodnje&catid=14:drustvo&Itemid=24), Ivan Kešina ("Ethical and moral aspects of human procreation"), pope Pius XII (4th International Congress of Catholic Doctors), pope John XXIII (Encyclical "Mater et Magistra"), pope Paul VI (Encyclical "Humanae Vitae"), and Tonči Matulić ("Human life- Endangered Value").

ratory fabrication"⁵⁶, because apart from the fact that the child born with the help of in vitro fertilisation is not the fruit of sexual intercourse between its parents, its conception and birth involve third parties, primarily in vitro fertilisation specialists.

While we face, on the one hand, the restrictive attitudes of the clergy, on the other hand, there is a medical-ethical group of experts who argue that IVF is justified from a medical point of view. This opinion is shared by Peter Singer, founder of Human Bioethics Centre, the first Australian research centre dedicated to bioethics. Singer and Deana Wells support the view⁵⁷ that the IVF method providing embryo freezing must be ethically justified for purely medical reasons. Namely, due to possible bleeding of the woman subjected to the medically assisted reproduction procedure, implantation of the embryo will not be possible. If embryo freezing is prohibited in a certain state, the patient will have to undergo a further laparoscopy every time, and the later laparoscopies may not produce genetic material as satisfactory as the first. Thus, the question arises: isn't the prohibition of embryo freezing, currently in force in Croatia, completely discouraging for couples who have no other choice apart from medically assisted reproduction if they want to become parents?

3.3. (Un)ethical aspect of surrogate motherhood

In the introduction of the ethical section on surrogate motherhood, its controversy has been pointed out, not only regarding the methods, but also due to its very nature. Views are listed that surrogate motherhood is actually a child purchase which devalues human life. On top of that, the relation between the surrogate mother and her biological child remains unclear, as well as her role in the child's future life. Some scholars argue that the traditional family concept is being lost (marriage is violated, i.e. the relationship between the surrogate mother and her partner, but also the commissioning couple, particularly in the case of the traditional surrogate motherhood, where the child genetically belongs to surrogate mother and commissioning father and has no biological connection with the lawful wife of its biological father). There are also views that it is ethically and naturally unacceptable for a woman to give birth to a child in order to surrender it to other people. These questions, among others, demand answers not only from ethicists, but the society in general.

⁵⁶ Matulić, T., Human life – Endangered Value, Theological Review, 2001, p. 427; This term is also mentioned by other authors (D. Tettamanzi, P. Ramsey).

⁵⁷ Singer, P. and Wells, D., In vitro fertilisation – the major issues, Journal of Medical Ethics, Vol. 9/1983, pp. 192-195.

The encyclical of Pope John Paul II dedicated to biomedical research and reproductive techniques⁵⁸ contains several sentences on surrogate motherhood which clearly stress the unethical aspect of that practice.⁵⁹ The encyclical states that a child born with the help of medically assisted reproductive method finds its identity much harder, because its birth is beyond the scope of marriage, and its relationship with the parents is unclear.⁶⁰

Ana Borovečki, views surrogate motherhood as "genetic primitivism", because human beings exhibit inherent consciousness of parentage prolongation and a desire for creating offspring, which marginalizes the possibility of adoption since infertile couples use it as a last option, only when IVF and surrogate motherhood have no results.⁶¹

One of the major issues regarding surrogate motherhood is certainly the financial compensation⁶², i.e. the payment of a certain amount of money to the surrogate mother for the service of carrying the child in the womb. It has been pointed out that it is ethically unacceptable that a child becomes the result of market economy mechanism. Child is born not as a wish of the surrogate mother, but to achieve a financial gain. Bhimji⁶³ finds a counter-thesis to this view and points out that it does not matter whether the surrogate mother expects the child with love or not, as long as there is a couple who wants nothing more than to be a parent to this child and loves it from the moment of conception.⁶⁴

Bhimji draws a very interesting comparison between surrogate motherhood and adoption, stating that the effect of close bond between the surrogate mother and her biological child is often being neglected and that we do not discuss possible trauma of the mother giving her child away to the adopters. Bhimji, namely, claims that the emotional bond between the biological mother and the child is extremely strong and that surrogate motherhood is unnatural and immoral because it violently "breaks" that bond. But isn't the situation basically the same, where the mother

⁵⁸ *Donum vitae* – Instruction on respect for human life in its origin and on the dignity of procreation, February 22 1987.

⁵⁹ "Surrogate motherhood is an objective mistake with regard to obligations of motherly love, marital fidelity and responsible motherhood; it insults dignity and the right of a child to be conceived, borne, born and raised by its parents." - pointed out by Ivan Kešina in the article *Ethical and moral aspects of human procreation*, Part 1, Vol.31/1996, No.3, p.142.

⁶⁰ "A child has the right to be conceived, carried in the womb, brought into the world, and brought up within marriage: it is through the secure and recognised relationship to his own parents that the child can discover his own identity and achieve his own proper human development." - *Encyclical Donum vitae*, Pope John Paul II.

⁶¹ Opinion given during the interview by A. Borovečki to the authors D.H. and Z.K.

⁶² Commercial surrogate motherhood.

⁶³ Bhimji, S., *Womb for rent: ethical aspects of surrogate motherhood*, CMAI, Vol. 137/1987.

⁶⁴ *Ibid.* p. 1134- "Why is it wrong if the surrogate mother does not desire a child for its own sake, when a couple is waiting eagerly to be its parents?"

gives a birth to a child, and for whichever reason, does not want the child and gives it for adoption? Is this not the violent "breaking" of the bond as well? Finally, why is only one of these two situations subject to criticism, i.e. surrogate motherhood, while adoption is legally regulated throughout the world?⁶⁵

3.4. Conclusions on bioethics and surrogate motherhood

It should be emphasized that the values of bioethics are indispensable for interdisciplinary study of issues resulting from advances in medicine. However, these values change with time and ask for new answers. Ethics, therefore, is not static, but dynamic and it changes through time, varies, it is not final. Thus something which is controversial and ethically unacceptable today may be justified and accepted in the future. On the other hand, ethics is neither universal nor equal in all parts of the world. We even do not use the exact terms that are identical everywhere, but rather, there are various views and opinions that differ from state to state. In spite of these differences, there is a consensus about certain issues. That is also the case here.

The goal of this chapter is to point to some important bioethical dilemmas, and to try to encourage resolution of these dilemmas, rather than to promote concrete attitudes regarding controversial bioethical elements of surrogate motherhood. Serious, methodical and multidisciplinary approach to the issue is the first and basic step we have to take when approaching the surrogate motherhood analysis, bearing in mind that it is impossible to create perfectly clear and uncontroversial view of the whole issue. The achievement of complete ethical quality and moral acceptability of a phenomenon that occurs in reality is an impossible goal, but one should strive to maintain obscurity and controversy reduced to the lowest possible minimum.

4. Family relations and surrogate motherhood

There is no doubt that the regulation of surrogate motherhood in a state results in changes in the area of family law. Namely, technological changes regarding human reproduction have introduced new forms of medically assisted reproduction, which created a threat to the notion of traditional family. Thus, it is necessary for the child

⁶⁵ " To date, little research has been done of the psychological and emotional bonds that tie a child his "birth-giving" mother and the trauma that could follow separation. If we continue to permit adoption, however, we can hardly ban surrogacy on this ground" - Shamir B., Womb for rent: ethical aspects of surrogate motherhood, CMAI, Vol. 137/1987, p. 1134.

to know its biological origin⁶⁶ and to be provided parental care,⁶⁷ as it is with the adopted child, who is entitled to know its origin by law.⁶⁸ For this particular reason, the standards regulating parentage recognition or denial and its presumptions must be clearly defined, and their change has to be handled with utmost care.

In further text, the issue and the complexity of the relationship between the parties that are directly or indirectly involved in surrogate motherhood will be explained. Also, the views of the European Council on surrogate motherhood are introduced, together with the necessary legislative changes regarding family law in Croatia.

Surrogate motherhood creates a multitude of complex human relations, which makes it the most complicated way of reproduction. Depending on the type of surrogate motherhood, number of individuals involved in the surrogate agreement can include up to five directly involved persons. This creates a relationship between a surrogate mother and a commissioning couple, a relationship between a surrogate mother and her partner, a relationship between a commissioning man and a woman, as well as their bond with the child born under the agreement. Apart from the individuals directly involved in this process, there are other persons indirectly involved in these newly created relations. These include the children of the surrogate mother, the family of the surrogate mother and the commissioning couple, friends and acquaintances also affected by surrogate motherhood although not directly involved. On top of that, the regulation of surrogate motherhood could have negative consequences on the relationship between the woman and her employer, because the employer could encourage the employees to use surrogate motherhood if they want to keep their job, so that they do not need to use sick leave, maternity leave and/or parental leave. Employers could even give their employees additional health insurance which would cover surrogate motherhood expenses, and these would likely be lower than sick leave or maternity/parental leave expenses, in which the employers certainly see their interest.⁶⁹

⁶⁶ The right to know the truth about biological origin is stressed by Dubravka Hrabar in Legal scope of medical insemination in Croatia, Collected Papers of Zagreb Law Faculty, Vol.60/2010, pp.415-442.

⁶⁷ Article 7, Paragraph 1 of the UN Convention on Child rights (1989): "*The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and, as far as possible, the right to know and be cared for by his or her parents.*"

⁶⁸ Article 124, Paragraphs 1 & 2 of the Family Law Act, *Official Gazette* No. 116/03, 17/04, 136/04, 107/07- "*During the adoption procedure, Centre for Social Welfare will introduce the adopters to the child's right to know it has been adopted. The Centre for Social Welfare advises the parents to tell the child it was adopted by the time it is 7 years old at the latest, and if it is older, immediately after the adoption process.*"

⁶⁹ Field, M., *Surrogate motherhood – the legal and moral issues*, Harvard University Press, Cambridge, Massachusetts, London, England, 1990, pp.30-31.

4.1. Principles of regulating family-law issues regarding surrogate motherhood

The Council of Europe's ad hoc Committee of experts on family law has conceived in 2006 the so-called "White Paper" – a document defining the principles of parental law to be used as guidelines for Member states.⁷⁰

The Committee has stressed that the child's best interests should be of paramount importance for the interpretation of the following principles.⁷¹ The provision states that in the child's best interests is to establish parentage from the moment of the birth, and to give stability over time to the established parentage.

Furthermore, one of the provisions of the White Paper states that the aim of every state is to create a balance between the so-called "biological truth", i.e. genetic or biological parentage, and the "social parenthood", which defines with whom the child is living and who is taking care of him/her.⁷² In our view, the balance, in the case of the child born by the surrogate mother, is created by the commissioning couple, because they are obliged to take care of the child and fulfill the role of "social parents", while being biological parents at the same time (i.e. at least the father).

The Council of Europe's ad hoc Committee of experts on family law acknowledges the existence of surrogate motherhood legislation in some European states⁷³ and suggests concrete models of defining key issues regarding parental rights transfer. The Committee stresses that the main principle of the transfer of legal parentage from the surrogate mother to the commissioning couple must remain in the best interests of the child. The White Book states the following provisions regarding surrogate motherhood which are to be acknowledged by the States, if they decide to regulate it:

- a) Every contract between the surrogate mother and the person or the commissioning couple for whom she carried the child shall be unenforceable.
- b) However, States may, in exceptional cases fixed by their national law, provide, while duly respecting paragraph a) of this principle, that a physician or an establishment may proceed to the fertilisation of a surrogate mother by artificial procreation techniques, provided that:

⁷⁰ Report on principles concerning the establishment and legal consequences of parentage- "The White Paper", Strasbourg, 2006.

⁷¹ Subsection 9 of the EC White Paper: "*For the interpretation and application of the following principles, the best interests of the child should be the paramount consideration. In this respect, it should be underlined that it is in the best interests of the child, first of all, to establish parentage as from the moment of the birth and, secondly, to give stability over time to the established parentage.*" The importance of the child's best interests is stressed in the European Convention on the Exercise of Children's Rights of the Council of Europe and the United Nations Convention on the Rights of the Child

⁷² Subsection 11 of the EC White Paper.

⁷³ e.g. United Kingdom, the Netherlands, Belgium, Finland.

- b.1. the surrogate mother obtains no material benefit from the operation;
- b.2. the surrogate mother has the choice of keeping the child at birth.

In relation to this, the Committee states that any contract involving the birth of the child and the obligation of giving the child to another person does not affect the presumption of motherhood, nor the parental rights of the surrogate mother at the moment of the child's birth.⁷⁴ This provision is needed because it is necessary for the child to have at least one certain parent at the moment of birth.

The provisions allowing altruistic surrogate motherhood (not commercial one), and the possibility of keeping the child by the surrogate mother acknowledge the tendencies of surrogate motherhood legislation in most states. These provisions follow the best interests of the child which will be fulfilled firstly if the child is given to the commissioning couple, and consequently if it is kept by the surrogate mother, because at least one parent is ensured to the child.

4.2. Presumption of motherhood in the context of surrogate motherhood

According to current provisions regulating the presumption of motherhood⁷⁵ in the Family Law Act⁷⁶, the surrogate mother should be considered the legitimate mother of the child, even though she has no biological connection with a child.⁷⁷ Presumption of motherhood should, in our opinion, remain unchanged, but similar to special provisions that regulate parentage of the child conceived with medical help, it should provide for special regulation of the commissioning couple's parentage in the Family Law, when a child's conception and birth are based on the surrogate motherhood agreement. The presumption of fatherhood⁷⁸ should also remain intact in the cases where the surrogate mother is married. Changes to the Family Law Act should foresee, beside adoption, another form of parental right transfer in cases of surrogate motherhood, where the final decision should be made by the court (with consent of the surrogate mother) in order to ensure that such an agreement is in the best interest of the child. Based on this, the law should allow the entry of the commissioning couple as legal parents in the registry of births.

⁷⁴ Subsection 14 of the EC White Paper

⁷⁵ Article 53 of the Family Law Act, *Official Gazette* No.116/03, 17/04, 136/04, 107/07.

⁷⁶ *Official Gazette* No. 116/03, 17/04, 136/04, 107/07.

⁷⁷ Alinčić, M., Bakarić-Abramović, A., Hrabar, D., Jakovac-Lozić, D., Korać, A., Family Law, *Official Gazette*, Zagreb, 2001, p.221

⁷⁸ Article 54 of the Family Law Act, *Official Gazette*, No. 116/03, 17/04, 136/04, 107/07.

5. Legislation of surrogate motherhood – government models

Surrogate motherhood legislation is a complex issue. Namely, it should take into consideration the current achievements in medicine regarding reproductive techniques and the contemporary practice which is applied in this area, but it should also be coherent with the ethical aspects of the matter in question. In other words, the law should play neither a revolutionary nor a reactionary part, but this area should be cautiously regulated, after carefully examining all aspects of the issue in the scope of socially acceptable behaviour.⁷⁹ The least acceptable solution is to ignore the development of the methods of reproduction, especially if they are allowed in a growing number of states.⁸⁰

5.1. Framework models of surrogate motherhood legislation

a) *The Luxury Model*⁸¹

One of possible approaches to surrogate motherhood legislation is the model by which this form of human reproduction is conducted according to market mechanisms, under the same principles as purchasing and selling of luxury goods. However, due to the moral implications of the commercial form of surrogate motherhood,⁸² as well as the specific requirements of surrogacy agreement, we consider this model to be entirely unacceptable as the starting point for regulation of this method.

b) *The Cocaine Model*⁸³

One of the possibilities for the legislator to choose is the prohibition of surrogate motherhood. But very often, this leads to the transfer of this form of reproduction to the "underground" or black market.⁸⁴ No matter what the legislation of a certain state may be, couples who really want a biological child will go to another state which has legally regulated the surrogate motherhood and do all necessary medical procedures there. Therefore, it remains questionable whether the prohibition of surrogate motherhood would indeed stop this practice. Quite the contrary, it could

⁷⁹ Winslade, W., Surrogate motherhood: private right or public wrong, *Journal of medical ethics*, Vol. 7/1981, p.153

⁸⁰ The public is often influenced by newspaper articles, e.g. It is forbidden in our country: Goran i Ivana Višnjić are first well-known Croats whose child was borne by a surrogate mother. *Morning Newspaper*, July 13, 2011.

⁸¹ The luxury model – the title was used by Spar, D., in the book *The Baby Business: How Money, Science and Politics Drive the Commerce of Conception*, Harvard Business School Press, Boston, Massachusetts, 2006, pp. 217-224.

⁸² See section 5.5.1. Legal nature of surrogate motherhood agreement

⁸³ Ibid.

⁸⁴ Ibid.

lead to the increased human trafficking (i.e. in surrogate mothers), as we have discussed earlier.

c) *The Kidney Model*⁸⁵

The third option would be to subject the surrogate mother reproduction under the organ donor regulations⁸⁶, i.e. organ donation and transplantation are regulated by special acts of law.⁸⁷ Namely, most states prohibit human organ sale.⁸⁸ The same should apply for commercial surrogate motherhood, which would be allowed only if it does not include financial reimbursement.⁸⁹ This model is based primarily on the hierarchy regarding the severity of medical problems, instead of free market mechanism. Advantage would be given to those couples who have major reproductive health issues and who most likely have no other way of getting a biological child but with the help of a surrogate mother.

5.2. Overview of comparative analysis of surrogate motherhood legislation

Legislative regulation of surrogacy differs in countries that consider it legally permitted. Analysis of the basic models of surrogate motherhood legislation with respect to reproductive health is given in order to examine the possible development paths of its legislation in Croatia, of course, should the need for introducing new ways of procreation, i.e. realisation of the procreative liberty rights⁹⁰ due to initiative of public opinion and the general debate arise.

5.2.1. Prohibition of surrogate motherhood

This approach to surrogate motherhood regulation means its complete prohibition, or alternatively the prohibition of only specific form of surrogate motherhood. Most commonly the commercial surrogate motherhood is prohibited due to previously

⁸⁵ The kidney model – the title was used by Spar, D., in the book *The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception*, Harvard Business School Press, Boston, Massachusetts, 2006, pp.217-224.

⁸⁶ Ibid.

⁸⁷ In Croatia, the law in question is the Act of Conditions for Removal and Transplantation of Human Body Parts for Therapeutic Purposes, *Official Gazette*, No. 177/04, 45/09.

⁸⁸ Human organ sale, as well as human trafficking, is forbidden in Croatia, as proscribed in the Articles 242 and 175 of Criminal Law Act, *Official Gazette* No. 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/0.

⁸⁹ For more on acceptable reimbursements for donated organs see in Roksandić, S., *ibid*, pp. 125 - 126

⁹⁰ On the difference between *claim rights* and *liberty rights* see Robertson A. John, *Children of Choice: Freedom and the New Reproductive Technologies*, Princeton University Press, 1994.

mentioned moral dilemmas, as it is in the United Kingdom,⁹¹ Canada⁹² and Australia. The prohibition usually proscribes sanctions should the surrogate motherhood agreement be closed, implemented or enabled.⁹³ Croatian legislator has opted for the prohibitive approach to surrogate motherhood (Medically Assisted Reproduction Act),⁹⁴ ensuring offence provisions⁹⁵ if Article 24 of the Act is not followed. Whether a state opts for regulation of surrogate motherhood with the exclusive banning of this form of reproduction, will depend on the interest that is more predominant in the society.

5.2.2. Non-legislation of surrogate motherhood

Another possible legislative solution in the regulation of surrogate motherhood is not to legislate it. This solution represents a dominant attitude in states, which with non-regulation of surrogacy, give passive resistance to this reproduction method. This view originates from fear that the legislation of surrogate motherhood would give the official encouragement to accept the same. States deny their support to surrogate motherhood by not implementing the agreement on the one hand, and through the absence of specific rules regarding parental responsibility transfer in this context on the other hand.⁹⁶ This method of non-regulation is adopted in certain parts of the USA,⁹⁷ New Zealand and Ireland.⁹⁸

5.2.3. Legislation of surrogate motherhood

Further approach requires a detailed legislation of surrogate motherhood proscribing legal limitations when closing and implementing surrogate motherhood agreements. These limitations mostly include age, marital status, and physical and psychological suitability of the commissioning couple, but certain limitations are imposed to the woman wishing to become a mother as well as the surrogate mother.

⁹¹ Surrogacy Arrangements Act (1985). We can say that this is in fact the legislation of surrogate motherhood in the UK. The amended Human Fertilisation and Embryology Act (1990) also regulates this issue.

⁹² The Assisted Human Reproduction Act (2004)

⁹³ Cook, R., Day Sclater, S., Kaganas, F.: *Surrogate Motherhood: International perspectives*, Hart publishing, Oxford – Portland Oregon, 2003, p.24.

⁹⁴ *Official Gazette* No. 88/09 and 137/09.

⁹⁵ Article 50: " Legal entity shall be fined in the amount from 70.000,00 to 250.000,00 kn if (...) 18. requests or offers women for bearing a child for a third party, or contracts, i.e. performs medical fertilisation for third parties or if the child born after the fertilization is given away (Article 24 Section 1&2)..."

⁹⁶ Cook, R., Day Sclater, S., Kaganas, F.: *Surrogate Motherhood: International perspectives*, Hart publishing, Oxford – Portland Oregon, 2003, p.23.

⁹⁷ e.g. New Jersey, Arizona, New York, Michigan.

⁹⁸ Scott Skills, E., Healy, C., *Building Irish Families Through Surrogacy: Medical and Judicial Issues for the Advanced Reproductive Technologies*, *Reproductive health*, Vol.5/2008.

Laws allowing surrogate motherhood create model legislative forms which are formally similar to adoption. Similar solutions are adopted by the United Kingdom, states of Virginia, Florida, New Hampshire, and Israel.

5.2.4. Freedom of contracting surrogate motherhood

The final approach permits the parties to freely determine rights and obligations resulting from the surrogate motherhood agreement. These regulations do not require the licence issued by the competent authorities regarding surrogate motherhood application, but certain guidelines are provided containing requirements to be met by both contracting parties. However, certain systems, which most liberally prescribe surrogate motherhood, predict legal limitations in order to protect the rights of those involved in these agreements. Apparently, this approach significantly reduces the authorities of the state to interfere in private relationships of individuals, but almost unconditionally encourages the implementation of agreements made under the rules of free market mechanism.

5.3. Legislative suggestions for surrogate motherhood in the Republic of Croatia

In case the attitude of the Croatian legislator would change by accepting surrogate motherhood as a new way to create a family, we consider that the prohibitive approach in the regulation of surrogate motherhood should be replaced with the acceptance of the detailed legislative regulation model. Based on the comparative analysis of the various systems that legislatively regulate surrogate motherhood, we consider that the Dutch model of non-commercial surrogate motherhood⁹⁹ should be accepted and adjusted to fit the Croatian legal system.

5.3.1. The Dutch model of surrogate motherhood

The Dutch model of surrogate motherhood was created as a result of a pilot project that was conducted in the first Dutch Centre for IVF Surrogacy in the period from 1997 to 2004 under strictly determined parameters.¹⁰⁰ A successfully conducted research led to the conclusion that accepting altruistic surrogate motherhood¹⁰¹ under strictly defined conditions can result in very satisfactory outcomes for the commis-

⁹⁹ Dermout, S., Van den Wiel, H., Heintz, P., Jansen, K., Ankum, W., Non-commercial surrogacy: an account of patient management in the first Dutch Centre for IVF Surrogacy, from 1997-2004, *Human Reproduction*, Vol. 25/2010, pp. 443-449

¹⁰⁰ IVF *Regulation Statement* was promoted in 1997. It enables altruistic surrogate motherhood in the Netherlands; however, a specific regulation for transfer of parental rights in cases of surrogacy was not introduced as part of the Dutch family law.

¹⁰¹ Commercial surrogacy was introduced as a violation, Article 151b, *Dutch Criminal Code*

sioning couple, as well as for the surrogate mother. The key element of success was extensive screening of the parties in all aspects of surrogate motherhood – medical, psychological and legal.

Strict guidelines for implementing surrogate motherhood are provided by the Dutch Society of Obstetrics and Gynaecology¹⁰² under which the IVF clinics determine protocols for approaching surrogate motherhood. The conditions that must be met are as follows: there must be a medical reason for surrogate motherhood (a woman will be considered a suitable candidate if she cannot carry a pregnancy to term on her own due to an absence of functional uterus, or pregnancy would represent a life-threatening risk or a health risk for the woman), a woman that wishes to be accepted as a surrogate mother must be healthy, without complicated obstetric history, it is required that the woman had already given birth to at least one child, that she had normal pregnancies and all the participants must be adequately informed about the procedure.

5.3.2. The successful outcome of the surrogate motherhood project in the Netherlands

Out of the five hundred candidates that applied for surrogate motherhood, after all the tests were completed, 24 couples eventually went through a surrogate motherhood procedure, and as a result 16 children were born, 7 boys and 9 girls, and 11 women who completed IVF programme did not conceive a child. All the children were born healthy, except for one girl who was born with severe congenital malformations. It is important to point out that all the children were adopted according to the designed legal procedure and there were no problems with accepting the child that was born with malformations. The reason for such a successful outcome of the Dutch project is the thorough and intensive screening programme which prepared the parents for the possibility that the children that will be born may have certain handicaps.

Based on the above, we conclude that approving altruistic surrogate motherhood can fulfill the wishes of the commissioning couple in many ways, but it can also help the surrogate mother, who realises her altruistic impulse in this way. If surrogate motherhood is to be enabled in the altruistic form, in centres specifically designed for such a purpose, as the last instance of the infertility treatments, it will prevent couples from going to other countries to become parents, or down illegal paths.

The Dutch model demonstrated that detailed regulation of the surrogacy process and its adequate implementation in practice can satisfy the needs of individuals and

¹⁰² VONK, M., *Maternity for Another: A Double Dutch Approach*, *Electronic Journal of Comparative Law*, Vol. 14.3/2010.

preserve the public interest. Because of this reasons we consider that precise regulation of surrogate motherhood in Croatia, primarily by changing Medically Assisted Reproduction Act and the Family Law Act, would be a satisfactory solution for further and more comprehensive infertility treatment.

5.4. Surrogacy agreement

Even though the transfer of parental rights, unless the surrogate mother changes her mind and decides to keep the child, should be based on a court decision, an agreement between the surrogate mother and the commissioning couple would be necessary. This agreement would thoroughly arrange the details of the surrogate mother's pregnancy, the necessary expenses that would be compensated to the surrogate mother and similar. The purpose of these agreements is to determine the obligations of the parties, i.e. of the surrogate mother and the commissioning couple.

5.5. Conclusion on the legal aspect of surrogate mother

The legislative regulation of surrogate motherhood, as we have seen in this chapter, is not an easy task for a legislator. The complexity of social relations and inability of the law to be pragmatic in such situations are the main reasons that discourage a country from taking such an initiative. Experts from the Association Roda¹⁰³ (Stork) are of the same opinion; they believe that there is no significant ethical controversy in altruistic surrogate motherhood, but the only problem is how to legally cover all the situations that could escalate when it comes to surrogate motherhood. The Association considers surrogate motherhood to be "of equal value and of equal ethical standing as all other medical infertility treatments that are widely used, if it is not abused. But the risk of abuse should be acceptable, with adequate legislative regulation." The experts add that "any assistance to the citizens in realising their reproductive rights is necessary and it is an obligation of the state to provide it."¹⁰⁴

The Association Roda also points out that there is a need for such a method of reproduction in the Republic of Croatia, however, as long as our country does not allow standard medical procedures in the field of human reproduction (such as freezing of the embryos and the fertilisation of more than three egg cells), a discussion on the possibility of regulating this method of procreation would put a stop to the entire, already overly restrictive regulation of other medically assisted reproduction procedures.¹⁰⁵

¹⁰³ Opinions of the experts from the NGO Roda (Parents in Action) were collected in an interview conducted by the authors D.H. and Z.K. as part of the research for this paper.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

6. Conclusion

In contemporary times there are various methods of reproduction accessible to couples struggling with infertility. A very complex and often inaccessible way of becoming a parent is with the help of a surrogate mother, although this method has been used since ancient times. We can say that one of the first recorded cases of surrogate motherhood was mentioned in the Bible,¹⁰⁶ e.g. the maid of Sarah and Abraham gave birth to their child. The mentioned case represents an example of a partial surrogate motherhood, where only the father of the commissioning couple is genetically bound to the child and the surrogate mother is also the biological mother of the child. However, the fast development of medical techniques enabled a different kind of surrogacy, which is called full surrogacy, where both a woman and a man of the commissioning couple are the biological parents of a child and the surrogate mother is only a mediator in obtaining the child. Due to the complexity and the unexplored areas of this matter, it is necessary to examine every aspect of surrogate motherhood, primarily, medical, ethical and legal aspect.

The bioethical dilemmas that accompany the surrogate motherhood are, on the one hand, those regarding the technique used to realize it, namely, medically assisted reproduction methods, and on the other hand, those related to the very essence of surrogacy. The assisted reproduction techniques violate the natural course of obtaining offspring because they exclude the act of love, i.e. of (extra)marital union. The whole process is of mechanical nature since it comes down to the involvement of the physician in the reproduction of married couples. Above that, surrogacy is, according to the opinion of some ethicists, in its essence controversial, because the goal of carrying a child is only to surrender it to the commissioning couple. Besides, the "genetic primitivism" of couples is criticised, because they insist on having a child with whom they are genetically related. Our opinion is that these ethical controversies could be clarified in a public discussion, which would precede a possible regulation of surrogate motherhood, but only of its altruistic form, whereas the commercial surrogate motherhood, i.e. paying the surrogate mother for carrying the child, should be prohibited, or in the case of the Republic of Croatia, remain prohibited.

Surrogate motherhood leads to the complexity of relationships of the people involved in it; therefore it is important, before concluding an agreement on surrogate motherhood, to explain the possible complications of the procedure to all who are involved, to inform them of the positive and negative sides of it, to let them know what their rights and responsibilities are, to prepare them for possible outcomes of

¹⁰⁶ The Bible, Old Testament, The Pentateuch, The Book of Genesis, The Beginning of God's Chosen People: The Birth of Ishmael (16,1-16,15) and Jacob's Wife (30,1-30,13).

the process, even for undesired ones. In order to achieve this, everyone involved is subjected to tests and psychological evaluations, which should be necessarily introduced in the regulation of surrogacy. In the centre of these complex relationships is a child. Since it is unable to care about its own rights, it is important even before the conception to protect the child's best interests. The best interests of the child include the care of physical and mental health, the right of the child to know its biological origin, and to ensure its future by providing the necessary parental care. If there should be a conflict between the surrogate mother and the commissioning couple, in case the surrogate mother wants to keep the child, the court should decide in the child's best interest. Therefore, the legislative regulation of surrogate motherhood has to anticipate the emergence of such conflicts, taking into account the recommendations of the Council of Europe, whose postulate is always the best interest of the child.

Some countries which have regulated surrogate motherhood within their legislation are the United Kingdom, Israel, the Ukraine, some of the federal states in the USA (e.g. Virginia, New Hampshire and Florida), Australia, India, the Netherlands, etc. However, the legislative solutions are different in many ways. Based on the comparative analysis of various systems we have come to the conclusion that the Dutch model of surrogate motherhood would be the most appropriate one for regulation in the Republic of Croatia. Related to this, the normative changes that should take place in the Croatian legislation should first and foremost involve the Medically Assisted Reproduction Act and the Family Law Act. The Medically Assisted Reproduction Act currently prohibits any kind of surrogate motherhood; therefore, its amendments should focus on allowing an altruistic form, with a strict prohibition of the commercial form of surrogate motherhood. The regulation should include the whole process of surrogacy, including the time before and after the child birth. On the other hand, the amendments to the Family Law Act would not change the presumption of motherhood, i.e. the woman who gives birth to a child (surrogate mother) would still be the legal mother of the child. Nevertheless, the Family Law Act should introduce another possibility of parental rights transfer, other than adoption, in the case when the commissioning couple receives a child with the help of surrogate mother. Such a legal provision would represent the basis of transferring parental rights from the surrogate mother to the commissioning couple based on the court decision, which should be aimed at, because of the inevitable control and protection of the child's rights.

The Family Law Act should also foresee the possibility of concluding an agreement on surrogacy between the surrogate mother and the commissioning couple. The aim of an agreement would not be the transfer of parental rights, since that should oc-

cur, as we said, on the ground of a court decision. Its purpose should be to enable the agreeing parties to pass through the entire process successfully, with as little difficulties and obstacles as possible. Therefore, the agreement should regulate the details of the conception, the pregnancy and the delivery of the child.

This paper shows that it is possible to regulate surrogate motherhood in the Republic of Croatia if the need for it occurs over the course of time. The paper provides only the framework proposals for the changes that should take place; namely, it determines the principal direction in which the legislator should go. If it comes to the regulation, it should be as precise and accurate as possible, with the aim to minimize the misuse of this procedure. We emphasize that the goal of a normative surrogate motherhood regulation should be, in our opinion, the introduction of a possibility of having their own biological descendant only for those couples who represent a medical case when no other option exists for them to receive their own descendant. Furthermore, we emphasize that only the altruistic form should be allowed and not the commercial one, which is pursuant to legislative solutions in other countries and to recommendations of international organizations. A complete, precise, professional and interdisciplinary discussion should definitely precede a possible regulation, where, with a lot of precaution, all the integral parts of surrogate motherhood should be critically discussed.

Avoidance of legislative regulation of this topic, if it becomes widely accepted in other countries, leads to legal insecurity and causes misuse of surrogate mothers,¹⁰⁷ as well as of the commissioning couple that is vulnerable and subject to influences, which in the end is not in the best interests of the child to be born.

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¹⁰⁷ In extreme cases even to human trafficking to use them as surrogate mothers.

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