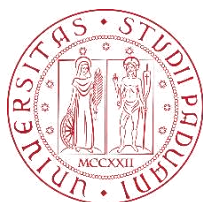


UNIVERSITÀ DEGLI STUDI DI PADOVA

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**Master's degree in**  
**Human Rights and Multi-level Governance**



FROM THE FEMINIST DEBATE ON SURROGATE  
MOTHERHOOD TOWARDS A WOMEN'S HUMAN  
RIGHTS PERSPECTIVE

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*«Ove c'è raziocinio c'è scelta,  
ove c'è scelta c'è libertà»  
-Oriana Fallaci*

*To my parents  
and to all Women*



# **From the feminist debate on surrogate motherhood towards a women’s human rights perspective**

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## **List of abbreviations**

SM - surrogate motherhood

ART - artificial reproduction techniques

IP - intended parents

IVF - in vitro fertilization

FINRRAGE - Feminist International Network of Resistance to Reproductive and Genetic Engineering

WHO - World Health Organization

CEDAW - Convention on the Elimination of All Forms of Discrimination against Women

UN – United Nations

HCCH - The Hague Convention on the Recognition of Parentage

CESCR - Committee on Economic, Social and Cultural Rights

## INTRODUCTION

This work of thesis is born from a fruitful starting point for a conversation: is surrogate motherhood a real choice? Are surrogate women correctly protected? Is there an ideal policy model in which surrogate motherhood are protected as best as possible? And if there is not, what could be the model that best guarantees the protection of surrogate women? My work will try to answer these questions.

Since the origins, surrogacy has always been a controversial matter, practiced since ancient times and witnessed in various documents. In its dimension, it involves many human spheres, ranging from the ethical to the biological, to the sphere of affection, of parenthood, also touching the legal, political and economic one. It is difficult, therefore, to have a common view on the subject. Nevertheless, it is still very practiced today in many countries. Since the 2000s it In Europe and, thanks to the influence of the American echo, it experimented an unprecedented spread. Some researchers argue that surrogacy is part of the fourth-generation rights, those rights that include gender transition, euthanasia, same-sex marriage<sup>1</sup>.

Starting from the historical origins and types of surrogate motherhood, my research will examine the case of Baby M, in 1987, managed by the Supreme Court of New Jersey, which had enormous media coverage. The event clearly divided the American public opinion into two different but very rigid oppositions: liberals and proponents were in favor of the practice, who saw in surrogacy a positive “means” to achieve women's self-determination, empowering and economic emancipation, and opponents who were absolutely against it, which depicted the practice as a means of exploitation of poorest women. Instead, it is in the so-called gray area, the middle one, that I have advanced my work, in which both points of view are explained and where an ideal model could be hypothesized with a regulation aiming to eradicate threats to women's rights and guarantee their protection.

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<sup>1</sup> Dzholos S. V, Koshulko O., *Surrogate motherhood in Ukraine and around the world: legal regulation & management practice*. MEST Journal, Vol. 10 No. 2, July 2022 pp. 46-56.

The first chapter will start talking about surrogacy in ancient times, managed by various populations and their several ways to practice it and the difference between the two types of surrogacy, traditional and gestational.

Then, there will be the analysis of the feminist movements of the last decades of the past century. They have, in some way, given life and shape to today's European debate on surrogacy. Among the fundamental elements questioned in practice, there will be the surrogate choice between self-determination or coercion, the commodification of children, and three different feminist approaches: the caring approach, the social justice approach, and the cyberfeminism approach with their ideologies. I will begin from the Baby M case and from the huge mediatic resonance it gained after the scandal, exploring the thought of many revolutionary women. Voices and ideology of feminist such as Lori Andrews, Christine Overall, Chirstine Sistare, Shulamith Firestone and others will be heard in this chapter.

In chapter 2, I will explain the general framework of policy models on European grounds showing how surrogacy is prohibited, regulated or legalized through different systems, laws, and constitutions of nations. In fact, in a few states practice is allowed and regulated in all its forms, in some only partially and in others completely forbidden or completely unregulated. Some states have much in common; others proceed according to their own rules. In particular, the chapter will study of two very different policy models on European territory: the Ukrainian model, which allows the commercial form of surrogacy and the Belgian model, which instead allows only the altruistic but unregulated form. The two different models have been taken into consideration among others since, in my opinion, they present interesting, almost opposite, differences in the management of surrogacy. For each model, the origins, legal aspects, legal motherhood, the selection of surrogate women and their protection, and the financial aspects will be explained. The purpose is to understand how the existing models differ between them and whether it is possible, by comparing them in their positive aspects, hypothesizing a surrogacy regulation model that is closer to the protection of women's rights.

The third and final chapter will focus on the feminist debate today, how it has evolved since last century and which are the most debated points today, if are they changed or shifted the focus elsewhere. The work will explore the radical ideology and the moral

language used by antisurrogacy groups such as FINRRAGE, their influence, spacing then to the redefinition of concept of motherhood and the relation with the subordination.

I will highlight how feminism has not only been essential for women's emancipation movements but has also contributed to the neoliberal capitalist mechanisms that have pushed women towards a dimension of ambition and climbing to success without considering the starting context of each of them. Then it will be the turn of the feminist Sophie Lewis's proposal and her "gestational communism" as a possible solution for an innovative and collective vision of surrogate motherhood. In the end, I will explore the relationship between surrogacy and reproductive tourism, after a brief explanation of reproductive rights, in a perspective that draws attention to a major problem often underestimated: the protection of surrogate women. In the end, the current situation of India, a major destination for reproductive tourism before 2015, will be considered.

At the end of my work, I will try to answer the initial questions and see if a model where today's surrogate women are best protected through a regulated, non-prohibitionist system is indeed possible. In fact, I am of the view shared by many researchers that prohibition exists only if it is supported by punishment for the law not being observed, and that prohibition, as well as an unregulated system with a legal vacuum on the matter, can incentivize the black market and bring more human rights violations<sup>2</sup>.

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<sup>2</sup> Ibidem.

# Chapter 1

## The debate of SM under feminist background

### Background and motivation of research

Although surrogacy is a very old practice, witnessed in many documented events (also in holy books) it must be said that nowadays, especially in Europe, it is not seen in a very positive way. Commercial surrogacy is in fact forbidden in European Union, according to Article 3(c) of the Charter of Fundamental Rights of the European Union, the Right to Integrity of the person<sup>3</sup>, which states that “In the fields of medicine and biology, the following must be respected in particular: the prohibition on making the human body and its parts as such a source of financial gain”, and by the Oviedo Convention, the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine<sup>4</sup> (1997, ratified by 29 countries) which states in Article 21, Prohibition of financial gain: [...] “The human body and its parts shall not, as such, give rise to financial gain”. In fact, in the European Union it is possible to practice only altruistic surrogate motherhood.

The desire to have children and a family is a natural feeling rooted in humans since the primordial era. Throughout the centuries and millennia, surrogacy in a natural way has been practiced in many cultures and populations to help those who could not have children, or those who wanted one, to have children and build offspring. It cannot be said to have been an entirely straightforward practice: certainly, women have had to adapt to different (sometimes or often coercive) contexts to practice surrogacy. Debora Spar gives us a broad overview of how, in some cultures, newborn children of acquaintances, friends, and neighbors were adopted by infertile women and raised in families as their own children<sup>5</sup>. Similarly in cultures such as Greece and Vietnam, large families would give their last-born or late-conceived children to people who did not have any and who wanted

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<sup>3</sup> *Title I: Dignity*. (n.d.). European Union Agency for Fundamental Rights. <https://fra.europa.eu/en/eu-charter/title/title-i-dignity>

<sup>4</sup> *Full list*. (2023, October 7). Treaty Office. <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=164>

<sup>5</sup> Spar Debora (2005) *For love and money: the political economy of commercial surrogacy*, Review of International Political Economy, 12:2, 287-309, DOI: 10.1080/09692290500105615

them; just as happened in the American colonies where children were sent to other families where they did not have any so that they could help with labor, learn new trades, and be helpful in providing labor where they were needed. In fact, offspring (well before the advent of capitalism) were always seen as wealth because they provided extra labor and manpower to produce more and enrich families. Surrogate women who decided or were “persuaded” to conceive children for others, as well as biological mothers involved adoptive and non-adoptive, received no compensation. There was still no talk of contracts, often informal agreements made between the parties.

As society evolved, the role of surrogate women changed accordingly; in the beginning, maids were employed in the role of surrogates to bear children on behalf of their ladies, as witnessed in the book of Genesis, where Jacob's wife Rachel asks her husband to conceive a child for them with her handmaiden; the same episode is recounted in the same book by Abraham and Sarah, who, being no longer fertile given her advanced age, asks her husband the same request with their handmaid to conceive their future son, Ishmael. In this narrative, much like the current method of in vitro fertilization, the child had a biological bond with only one of the two parents, the father. The children were often raised in the homes of other women who cared for them, recognizing in the surrogate their biological mother who meanwhile had the substitute role of wives. In the Middle Ages, the children of wealthy families were placed in the care of nannies, who were paid to breastfeed and care for the children of wealthy families, remained with them until they reached the age of one, while the biological mother visited the child only occasionally. Debora Spar draws a parallel between the nannies of antiquity, who were poorer than foster families, and today's surrogates<sup>6</sup>.

With the advent of industrialization, women were bound to their role as the “angel of the domestic hearth” within the home, in the private and domestic sphere; the concept of motherhood evolved and took on a sacred dimension within the family unit. In contrast, the public sphere remained dominated by men. Women were to be mothers and wives. As a result, nannies and concubines disappeared, and in the West marriage enshrined a sacred and monogamous bond, protected and sanctioned by God's will that one could be blessed with the coming of a child or not.

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<sup>6</sup> Ibidem.

Illegitimate children conceived outside of marriage were frowned upon because they threatened the sacred marriage union.

With the creation of artificial insemination and in vitro fertilization there was a real turning point in the field of biomedicine, as it gave individuals and couples unable to have children naturally the opportunity to pursue their reproductive goals as well, a phenomenon that radically changed the meaning of the concept of conception and consequently, surrogacy. Often, those who suffered from infertility or were biologically hindered in some way from having children resigned themselves to what was believed to be God's will since there was no solution to the problem. Science in this area has made great strides and has made it possible to continue “beyond” the biological limits of the human body.

However, like any revolutionary invention, the advent of biomedical technologies aroused skepticism and criticism because people saw the use of these means as further exploitation to women's bodies, subordinating them to the patriarchal capitalist system. The role that the feminist movement played during this period is crucial: on the one hand, it empowered women to have a voice over their own bodies, to make choices about their reproductive rights, to be protagonists of their own lives and choices, and to spur them on to economic and social emancipation, freeing them from the role that the patriarchal system had entrusted to them in the domestic sphere. On the other hand, however, feminism brought its own ideologies into movements such as neoliberalism, which pushed women to ambition on the one hand, while on the other hand, it fed the inequalities that were at the basis of the system. The neoliberal logic, in fact, did not take into account the differences in women's backgrounds; the consequence was an enrichment of women who could start from a middle-class base and the impoverishment of marginalized women who lived in a deprived background and were economically more fragile.

From the last decades of the 1900s to the present day, surrogacy has been practiced and is still practiced today through two methods: the traditional method, carried out through artificial insemination, and the gestational method through in vitro fertilization, where the surrogate mother has no biological link with the child she is carrying since her eggs are not used for fertilization. Usually, the eggs used can be the woman's (one of the commissioning parents) or, if she is infertile, the egg is donated by an acquaintance or relative.

It is in this scenario that my thesis work fits.

The rights of surrogate women and their protection are to be considered an issue of utmost importance nowadays, given the enormous diffusion that surrogacy has reached in Europe and around the world, and especially because it is an issue that spans ethics, the social sphere, and the economic sphere. Surrogate women may be exposed to dangers of exploitation, violence, coercion, and it is important that there are safeguards in place to safeguard their physical and psychological health. In addition, there is to be considered that the act of making one's body available for a pregnancy, whether through traditional or gestational surrogacy, can bring complications if not properly informed and followed up in the pre- and post-pregnancy stages. Some surrogate women may also be traumatized by separation (albeit by arrangement) with their child. Therefore, the need for a regulated regulatory framework is a real need because this will reduce the chances that women may choose to initiate surrogacy without the correct information, the correct psychophysical preparation, perhaps only because they are driven by financial compensation. The establishment of a well-regulated regulatory and legislative framework can be a guarantee of an informed choice made with the right support and tools to deal with a pregnancy in full conscious choice and free of coercion, driven by social pressures or highly disadvantaged contexts, where there is the danger of receiving unfair treatment. Surrogate women enjoy both human rights and reproductive rights, and their exploitation is not only about human rights but also about ethics and social justice. That is why it is essential that they are cared for by the hospitals or specialized clinics that allow the procedure, with proper medical support and legal representation being present throughout. Contracts between the parties, between surrogate women and the commissioning parents must be clearly drafted explaining all the duties and obligations enjoyed by the parties involved. Thus, the goal is to envision a regulated system where surrogate women enjoy all rights, where dignity and autonomy are protected, and where they are not threatened by exploitation and commodification of their bodies in a procedure that instead facilitates the so-called “privileged” people because they possess the capital resources necessary to pursue their interests at the expense of the less affluent. This system can only be possible through thorough ethical debate and meticulously curated legislation for the benefit of all parties involved, in which the perspectives and viewpoints of all participants carry equal weight and value.

## **Theoretical framework, literature review and methodology of research**

Actually, surrogate motherhood is not explicitly recognized in any binding standards at the international level, any document in which are share the same principles to respect. In fact, every state chooses how to better manage the practice according to own interests and own laws (in the case in which there are any). The diversity of the various states is reflected in the different and complex legislative framework of each state.

The Hague Convention on the Recognition of Parentage (HCCH or Cairo Population Conference, 1994) was the only event in which reproductive rights were discussed, even though it did not explicitly mention surrogacy. However, if we consider that biomedical reproductive technologies have been a breakthrough in science and society and have changed the idea of conception, and if we consider surrogacy as a practice that allows even those with infertility conditions to be able to have children and pursue their reproductive goals, then the Cairo Conference did not stand toward a prohibitive perspective of the practice. Still today the HCCH is committed to achieving several aims<sup>7</sup>, among them guaranteeing intended parents and children born through transnational surrogacy a clear and structured legal framework. In the Convention, it has been stated that 1) any form of coercion is prohibited within family planning; 2) is necessary to implement new political and economic measures that ensure adequate information, support and services to the commissioning parents and couples who decide to proceed with reproductive technologies, since those made available by governments have proven to be inefficient; 3) the measures to be implemented must ensure that discrimination based on marriage and maternity is eliminated, and that equal access to health services is guaranteed. On the health of pregnant women, the Convention encourages states to create services that protect and care for pregnant women both during pregnancy and in the period post-gestation.

On the topic of reproductive rights, other international documents mention the protection of the rights of pregnant women. The Convention on the Elimination of All Forms of

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<sup>7</sup> e-Vision.nl, The Netherlands. (n.d.). *HCCH | Parentage / Surrogacy Project*.  
<https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>

Discrimination against Women (CEDAW)<sup>8</sup> states in Article 11.2 the duty of states to take measures in order to prevent discrimination based on marriage or motherhood and to guarantee the right to work, Article 12<sup>9</sup> requires States to ensure access to health services, including those related to family planning, as well as adequate care for women during pregnancy and the postnatal period. Article 14<sup>10</sup> reaffirms the same right with focusing on women in rural areas, Article 16(e)<sup>11</sup> women have the rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

The Beijing Platform for Action in section C Women health (96)<sup>12</sup> affirms that: “The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence”,

The Committee on Economic, Social and Cultural Rights (CESCR) states that State must respect and guarantee the right of sexual and reproductive health, which are involved in the right of health (Article 12 and General Recommendation n.22 - The Right to the Highest Attainable Standard of Health)<sup>13</sup> with the creation of affordable and accessible reproductive health services and recommends the abolition of laws, policies and practices that criminalize or hinder access to sexual and reproductive health services.

General Comment No. 14 of the CESCR establishes that the provision of maternal health services is a core obligation of States, which cannot be derogated under any circumstances, requiring the adoption of concrete and targeted measures to guarantee the right to health during pregnancy and childbirth.

At the international level, the Hague Conference on Private International Law, established in 1892 and currently composed of 91 members (one of which is European Union), is studying the legal issues related to transnational surrogate motherhood practice with the purpose of developing an international legal framework that could be guarantee protects

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<sup>8</sup> <https://www.pariopportunita.gov.it/it/politiche-e-attivita/attivita-internazionali-ed-europee/convenzione-per-leliminazione-di-tutte-le-forme-di-discriminazione-contro-le-donne-cedaw/>

<sup>9</sup> Ibidem.

<sup>10</sup> Ibidem.

<sup>11</sup> Ibidem.

<sup>12</sup> *Fourth World Conference on Women, Beijing 1995*. (n.d.).

<https://www.un.org/womenwatch/daw/beijing/platform/health.htm>

<sup>13</sup> Ijrc. (2021, April 8). *CESCR issues guidance on right to sexual and reproductive health*. International Justice Resource Center. <https://ijrcenter.org/2016/03/16/the-cescr-addresses-the-right-to-sexual-and-reproductive-health/>

the rights of all parties involved with a particular focus on the surrogate mothers and children.

In Europe, the legislative framework of surrogate motherhood is very heterogeneous and fragmented; the situation presents different scenarios in which the practice of surrogate motherhood is partially or totally regulated in some countries, in a legal vacuum in other countries, or prohibited in others or with severe restrictions. There are countries in which prohibition is expressly written into the Constitution or is established by the courts; other countries the prohibition is contained in civil law or special laws or can be sanctioned in the Criminal law.

In a general view, some European states decided to adopt a legal prohibitionist perspective, such as France, Germany, Italy, Spain, Portugal and Lithuania.

In France, such agreements are considered null; Article 16-7 of the Civil Code affirms that any surrogacy contract is expressly null and void and according to Art. 227-12 brokering agreements on procreation or gestation on behalf of third parties is a criminal offence.

In Germany the legislation protects the embryo and establishes the principle of unity between the genetic and biological mother, excluding the surrogate from the recognition of legal motherhood.

Italy with the Law 40/2004 considers surrogacy as a crime and some people referred to the practice with the negative expression “uterus for rent”. Spain, Portugal and Lithuania share the same ban, even if the practice in Portugal was previously legal and then revoked according to a sentence of the Constitutional Court.

Belgium and Czech Republic allowed only the altruistic form of surrogate motherhood, there is no regulation expressed in the law, but the commercial form have no legal validity. The same situation is shared in the Netherlands, Denmark, United Kingdom and Greece, where there is possible to practice only the altruistic form, but with rigid law and restrictions. It is interesting to know that in Denmark the surrogate mother can practice surrogacy only through the traditional method, through artificial insemination (and not with the in vitro fertilization). In the United Kingdom, after the birth of the child, the intended parents must obtain the legal recognition of parenthood through a judicial process. In Greece, both heterosexual couples and single women with medical problems could have access to the practice, after the prior authorization by a court.

Russia and Ukraine are the only European countries in which both forms of surrogacy are allowed. This makes them attractive destinations for reproductive tourism, at the risk of becoming a destination for individuals who, in order to circumvent the rigid and binding legislative systems of their own states, travel to these countries to surrogate motherhood. The method used in the first and third part of my thesis work is that of a socio-cultural approach of the Western feminist framework starting from the American feminist currents of thought to the current European ones, in a period of time that goes from the 80s to the present day. In this period the evolution of feminist thought, and the most debated points considered critical, such as the commodification of the female body, the commodification of children and the right of self-determination of women will be explored in a perspective that analyzes both the thought of liberals in favor of surrogacy and those who oppose it and would like the absolute prohibition of the practice. The central chapter instead will briefly describe the general legal framework of the major states on the European territory (both members of the European Union and extra) to then analyze the surrogacy models of Ukraine and Belgium. It will be important see the limits, the positive and negative aspects and the different presented of both models though the prospective of the protection of the rights of surrogate women, in order to hypothesize an ideal model that try to reduce in the best way the exploitation of surrogates.

## **Scope of the study**

Many researchers and academic authors have tried, over the years, (and many still try today) to examine the pros and cons of this practice, from various perspectives: from the legal one, to the social one to that of human rights, in particular the rights of children born though surrogacy. The aim of this thesis is to focus in a dimension that concern women above all, exploring the dimension of surrogacy starting from the American feminist background of the 80s and 90s up to the current one, trying to understand how the feminist debate evolved on this issue (if it did) and whether it can be possible to hypothesize an ideal model of surrogacy where surrogate women are protected, away from the threat of

exploitation and social pressures, and be free to choose whether or not to become surrogates through a well-informed and informed choice. At the heart of the surrogacy debate, one important element should not be forgotten: it is always a matter of women's rights and women's rights are always at risk.

In the analysis of feminism movements through history, importance will be given to the Thought of women who were part of the liberal ideologies or closer to that current of thought (i.e., those more in favor of surrogacy) and the Thought of the opponents who, on the other hand, earmarked against the practice, considered it another instrument of exploitation and commodification of the female body by the patriarchal capitalist system. It will be interesting in the debate to understand the views of both positions to consider their positive and negative aspects. The central part of my paper, however, focuses attention on the current general European landscape in its multifaceted patchwork of different legislations, highly heterogeneous. This introduction will then frame the study of the two legislative models considered, Ukraine and Belgium, with a focus on the rights and protection of surrogate mothers before, during and after the practice.

The risk that surrogate women could be influenced or forced by precarious and fragile financial situations to agree to surrogacy is real. It is known that women coming from developing countries, who lives in a context of marginalization or in a disadvantageous situation, are more at risk of exploitation and manipulation than the others, because they do not possess adequate tools to make informed and informed choices due to inefficient or ineffectual financial and psychological supports.

## 1.1 What is surrogacy: history, types and context

From the Latin word “*subrogare*” which means "to substitute" or "appointed to act in place of another"<sup>14</sup>, the term surrogacy (or surrogate motherhood) is nowadays used to describe the method of conception and gestation in which a woman bears a child for another woman. In fact, contracts or agreements establish that a surrogate mother gives birth on behalf of another woman (who is medically unable to do so) and subsequently have to deliver the child to the “committed” or “intended” parents or parent (IP).

As witnessed by several stories and documents, surrogate motherhood has been practiced since ancient times and for centuries<sup>15</sup> women unable to procreate have resorted to surrogacy to have a descendent. The desire to have children and a family is a natural feeling rooted in humans since the primordial era. It cannot be said to have been an entirely straightforward practice: certainly, women have had to adapt to different (sometimes or often coercive) contexts to practice surrogacy. In some cultures, newborn children of acquaintances, friends, and neighbors were adopted by infertile women and raised in families as their own children<sup>16</sup>. Similarly in Greece and Vietnam, large families would give their last-born or late-conceived children to people who did not have any and who wanted them; just as happened in the American colonies where children were sent to other families without offspring so that they could help with labor, learn new professions, and be helpful in providing labor where they were needed. In fact, offspring were always seen as wealth, since they provided extra labor and manpower to produce more and enrich families. Surrogate women who decided or were “persuaded” to conceive children for others, as well as biological mothers involved adoptive and non-adoptive, received no compensation. There was still no talk of contracts, often informal agreements made between the parties.

The Biblical story of Abraham and his wife Sarah, told in the in the book of Genesi, dates back 2000 BCE and describes one of the earliest recorded examples of traditional surrogacy. In the story Sarah is affected by infertility due to her ancient age and wishes

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<sup>14</sup> Patel NH, Jadeja YD, Bhadarka HK, Patel MN, Patel NH, Sodagar NR. *Insight into different aspects of surrogacy practices*. Journal of Human Reproductive Sciences, volume 11, July-September 2018.

<sup>15</sup> Brinsden Peter. *Surrogacy's Past, Present, and Future*. Handbook of gestational surrogacy: international clinical practice and policy Issues (Cambridge University Press 2016).

<sup>16</sup> Spar Debora, *For love and money*, cit.

to have a child, so she decided to persuade her maidservant Hagar to carry it for her. From this informal agreement of surrogate motherhood, the son of the couple, Ishmael, was conceived, and Hagar fulfilled Sarah's desire to have offspring. In fact, in ancient times maids were employed in the role of surrogates to bear children on behalf of their ladies, as witnessed in another story of the book of Genesis, in which Jacob's wife, Rachel (infertile, too), asks her husband to conceive a child for them with her handmaiden, Bilha. Also in the Hebrew Bible there are episodes of surrogate arrangements made through the levirate marriage (from Latin word *levir*, "brother-in-law"), a practice that occurred in case of death of a man died without offspring, in which his brother had the duty to marry the widow in order to ensure the continuity of the family and protect the inheritance rights of the woman and her children<sup>17</sup>.

Around 1800 BCE, the renowned legal Hammurabi Code of Laws (attributed to King Hammurabi) documented episodes of traditional surrogacy also in Babylonian society<sup>18</sup>. In this set of laws of various genres, there was a provision that affirmed the possibility to have a child through a maidservant in the case in which a couple was within a monogamous relationship and the wife was childless. In this case, the motherhood was recognized to the wife, while the surrogate was left out of the agreement. The same situation was experimented in ancient Greece, Rome and Vietnam<sup>19</sup>. In these societies, large families would give their last-born or late-conceived children to people who did not have any and who wanted them; just as happened in the American colonies where children were sent to other families without offspring so that they could help with labor, learn new professions, and be helpful in providing labor where they were needed. Surrogacy also played a role in Native American traditions<sup>20</sup>: when a couple was unable to conceive, the husband was encouraged to father a child with another woman to ensure the continuation of the family lineage. Unlike modern surrogacy practices, in these cases the child typically remained with the biological mother.

In fact, offspring were always seen as wealth, since they provided extra labor and manpower to produce more and enrich families. Surrogate women who decided or were "persuaded" to conceive children for others, as well as biological mothers involved

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<sup>17</sup> Surrogacy in Canada Online. (2024, April 4). *History of Surrogacy - Surrogacy in Canada online*. <https://surrogacy.ca/sco-article/history-of-surrogacy/>

<sup>18</sup> Ibidem.

<sup>19</sup> Ibidem.

<sup>20</sup> Ibidem.

adoptive and non-adoptive, received no compensation. There was still no talk of contracts, often informal agreements made between the parties. In this narrative, much like the current method of in vitro fertilization, the child had a biological bond with only one of the two parents, the father. The children were often raised in the homes of other women who cared for them, recognizing in the surrogate their biological mother who meanwhile had the substitute role of wives.

In the Middle Ages, the children of wealthy families were placed in the care of nannies, who were paid to breastfeed and care for the children of wealthy families, remained with them until they reached the age of one, while the biological mother visited the child only occasionally<sup>21</sup>.

With the advent of industrialization, women were bound to their role as the “angel of the domestic hearth” within the home, in the private and domestic sphere; the concept of motherhood evolved and took on a sacred dimension within the family unit. In contrast, the public sphere remained dominated by men. Women were to be mothers and wives.

As a result, nannies and concubines disappeared and in the West marriage enshrined a sacred and monogamous bond, protected and sanctioned by God's will that one could be blessed with the coming of a child or not. Illegitimate children conceived outside of marriage were frowned upon because they threatened the sacred marriage union.

Throughout history, this practice was adapted to various civilizations and cultures, each of them has, partially or directly, allowed and endorsed. Surrogacy was practiced in the natural way, by which the surrogate was inseminated with the semen of male partner of since his wife was not fertile. The child born by this method was genetically related both to the surrogate and the man involved, without genetic tie with the committed mother<sup>22</sup>.

Still nowadays, in surrogate agreement the surrogate often does not have maternal rights on the child born. Nevertheless, actually surrogate motherhood consents to conceive through assisted reproductive techniques (ART) in particular through artificial insemination (AI) or in vitro fertilization (IVF). The difference between them with that the former method, known today as “traditional surrogacy”, the surrogate mother uses her own eggs for the conception (in this specific situation the committed mother is unable to give hers) which are artificially inseminated by the semen of the biologic father. This

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<sup>21</sup> Ibidem.

<sup>22</sup> Sambhu Charan Mondal, *Genetic and Gestational Surrogacy: an Overview*, *Walailak J Sci & Tech*, 2012, 9(3): 189-193.

allows the child to have a genetic and biological tie with the surrogate mother and almost one committed parent. Usually, traditional surrogacy is cheaper and has a faster rebound time than in vitro fertilization: this means that, in case of failure of the attempt, another one can be made soon, in a matter of weeks<sup>23</sup>.

The latter method, in vitro fertilization (also called the "test-tube baby method"<sup>24</sup>) is known as "gestational surrogacy". It involves extracting a woman's eggs via laparoscopy, fertilized in vitro with the male's semen and then, the embryo combined in the laboratory is transferred into the uterus of the surrogate mother, which, as a "host", will carry it for nine months<sup>25</sup>. In this case, the woman who provide the genetic material does not have uterus to the gestation but still has ovaries; the baby will share the genetic bonds with the intended parents but not with the surrogate. This method is more expensive than traditional surrogacy and is also preferred, since clearly demarcates the relationship between the three parties involved (the surrogate mother, the committed parents and the child)<sup>26</sup>.

In 1790, John Hunter at St. George's Hospital in London first conceptualized artificial insemination, marking a significant development in the biomedical reproduction. In fact, ART also allowed intended parents to have a child without sexual intercourse with a surrogate, bypassing the natural procedure, and it was deemed more socially acceptable<sup>27</sup>. With the creation of artificial insemination and in vitro fertilization there was a real turning point in the field of biomedicine, as it gave individuals and couples unable to have children naturally, the opportunity to pursue their reproductive goals as well, a phenomenon that radically changed the meaning of conception and consequently, surrogacy. Often, those who suffered from infertility or were biologically hindered in some way from having children resigned themselves to what was believed to be God's will, since there was no solution to the problem. Science in this area has made great strides and has made it possible to go "beyond" the biological limits of the human body.

In 1978, the first baby born through IVF, Louise Brown, witnessed the first successful instance of these new technologies.

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<sup>23</sup> Sambhu Charan Mondal, cit.

<sup>24</sup> Lieber Katerine, Lieber Katherine B., *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, Indiana University School of law, 1992.

<sup>25</sup> Sambhu Charan Mondal, cit.

<sup>26</sup> Ibidem.

<sup>27</sup> Brinsden Peter, cit.

In 1980, instead, the American lawyer Keane was the first one to mediate a legally recognized agreement involving traditional surrogacy<sup>28</sup>. After five years, in 1985, in the United States occurred the first recorded birth through in vitro fertilization<sup>29</sup>.

Surrogate motherhood could also be commercial or altruistic, based on the financial aspect<sup>30</sup>. It is called commercial surrogacy when the surrogate agreement provides monetary compensation for the role of the surrogate mother as carrier of the child. In this case, the practice is perceived as a service. In contrast, altruistic surrogacy provides only monetary compensation for medical and legal expenses related to the pregnancy, including health insurance for the surrogate mother, but no remuneration for the service offered.

According to some research, there has never been in history a method of conception that was like surrogacy, where the client couple purposely made arrangements to carry out a pregnancy on behalf of another woman and plan the delivery of the baby after the gestation. For these reasons, surrogacy is seen by several as a distinctive and "unusual" method of reproduction<sup>31</sup>. In today's world, where diverse family-building methods have become common, families formed through surrogacy are just one among many varied family structures; nonetheless, surrogacy remains "unique" in reproductive terms, as it depicts a highly complex arrangement that separates biological maternity from social motherhood<sup>32</sup>.

Before the phenomenon held a wide appeal in Europe, surrogate motherhood had a great media and legal resonance in the 80s and 90s on the American continent and found here a great social and cultural fertile ground. Toward the end of the twentieth century, shifts in American family structures raised questions about parental rights and responsibilities, (especially about fatherhood, the role of men in familiar practice as childbearing) and raised concerns about the "future of the family"<sup>33</sup>. This was because more and more middle-class women began to work, setting aside the ambition of motherhood. Over the years, the threat of infertility and possible declines in births created a climate of general

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<sup>28</sup> Ibidem.

<sup>29</sup> Ibidem.

<sup>30</sup> Patel NH, Jadeja YD, Bhadarka HK, Patel MN, Patel NH, Sodagar NR, cit.

<sup>31</sup> Markens Susan. *Surrogate motherhood and the politic of reproduction*, University of California Press, 2007.

<sup>32</sup> Ibidem.

<sup>33</sup> Ibidem.

concern in America. These worries took place, in truth, in a racialized context<sup>34</sup>: declining fertility was a matter that concerned only white middle-class women, while out-of-wedlock births and teenage pregnancies continued to exist but were associated with women of color; these contrasting concerns reveal the intersection of gender and racial anxieties in reproductive politics<sup>35</sup>.

In the early 1980s, infertility among married couples became an ever-increasing preoccupation that risked undermining the holy and fundamental concept of family.

The concern of infertility was a product of the growing presence of women in the workforce whose first wish was to establish a career, postponing motherhood. The role of women in society was evolving: by the early 1990s, nearly half of all women returned to paid work after their first child's birth, marking a significant shift in the perception and experience of motherhood. Also, America experienced an increment in divorce and the rise of single-mother families<sup>36</sup>. With the fecundity declines as the years passed, postponing motherhood heightened the risk of infertility among couples that were trying to conceive and which started to seek medical help for infertility, also because the growing acceptance of single motherhood and the legalization of abortion in public opinion also led to a reduction in the number of infants available for adoption<sup>37</sup>. The social anxiety for the impossibility of creating a family and the family institution put into discussion, threw America in a tense and full of uncertainties, in which even the social shifts on matter about race, gender and family dynamics became pressing problems to solve. The traditional American family model was also threatened " by different family formations and gender relations<sup>38</sup>.

In this context already very delicate and debated that takes hold, surrogate motherhood, a new social issue, takes hold. The year 1987 signs a cornerstone for surrogacy: the Supreme Court of New Jersey managed a remarkable custody case, the famous Baby M case, which gained national prominence. The well-known case involved obtaining custody of a child, known as Baby M, who had been born to a surrogate mother by artificial insemination, under a contractual arrangement between her future parents,

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<sup>34</sup> Ibidem.

<sup>35</sup> Ibidem.

<sup>36</sup> Ibidem.

<sup>37</sup> Ibidem.

<sup>38</sup> Ibidem.

William and Elizabeth Stern, and her surrogate mother, Mary Beth Whitehead. The contract established that Mrs Whitehead, after the birth of the baby, would have to give up custody of the child and parental rights to the Sterns, and receive a \$10,000 fee for her gestation. However, at the end of her pregnancy Mrs Withehead gave up the contract and wanted to keep the child.

Given the huge mediatic attention and legislative attention that the Baby M case obtained, the surrogate motherhood was claimed as a real “social problem” even if it was a practice carried out by very few at the time<sup>39</sup>. The case created a turning point in the public view, raised controversy and further concerns, and spread uncertainty about the legal status of surrogacy. National public opinion polls themselves reveal the significant impact that the Baby M case had, reflecting the public's conflicting and ambivalent views on the subject, and when interviewed, their responses showed two completely opposing sides<sup>40</sup>.

## **1.2 The American Feminist debate in 80s and 90s**

Like any revolutionary invention, the advent of biomedical technologies aroused skepticism and criticism because people saw the use of these means as further exploitation to women's bodies, subordinating them to the patriarchal capitalist system. Concerning surrogate motherhood, the American feminist's context were permeated by cultural tensions feeling, on one side, empathy for those who desired to have children, supporting the search for medical assistance, on the other support of reproductive freedom. This last concept was evident in the will of who wanted a regulation or a prohibition of surrogate contracts, making them legally unenforceable. Since there are several points of view on the topic, many were also the feminist perspectives, representing a variety of philosophical and political outlooks<sup>41</sup>.

For a long time, the Supreme Court of New Jersey tried to find a legal acceptable solution on the Baby M case; also the National Organization for Women was convened but it

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<sup>39</sup> Ibidem.

<sup>40</sup> Ibidem.

<sup>41</sup> Parks Jennifer A., *Gestational surrogacy and the feminist perspective*, Handbook of gestational surrogacy: international clinical practice and policy Issues cit., pp 25-32.

initially struggled to reach a consensus on the issue, since it was difficult to find a compromise between two lines of thoughts completely opposite: who wanted to respect women's freedom, following the will of Mrs Whitehead and who wanted an absolute prohibition of surrogate motherhood since it made women "breeding machines"<sup>42</sup>. Feminists' supportive of surrogacy distanced themselves from the radical position of banning, since the prohibition of the practice threads to frustrate every struggle fought in the contexts of abortion, contraception, non-traditional families, and employment<sup>43</sup> made by feminism. Opponents, instead, firmly believed that surrogacy was a form of coercion, oppression and exploitation.

### **1.2.1 Women and the surrogate choice: self-determination or necessity?**

The growing freedoms that women gained in society contributed to shaping the American social context of late 80s and 90s. Among the most significant achievements there are: the normalization of childbearing and parenting by single mothers, access to contraception and abortion, financial independence through employment<sup>44</sup>. Moreover, surrogacy has made a great contribution to the concept of women's autonomy, supporting and enlightening the importance of reproductive freedom. Surrogate motherhood could be a great means to achieve economic emancipations since, for the first time in history, it allows women to demand payment for their service of gestation and reproductive labor, involving significantly unchaining them from male control and traditional societal limitations. In this way, women no longer required to accept marriage or any other form of promised support<sup>45</sup> to give them economic relief; surrogate motherhood, according to

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<sup>42</sup> Andrews Lori B. *Surrogate Motherhood: The Challenge for Feminists*. Law Med Health Care, 1988 Spring-Summer;16(1-2):72-80, doi: 10.1111/j.1748-720x.1988.tb01053.x.

<sup>43</sup> Ibidem.

<sup>44</sup> Sistare Christine T., *Reproductive Freedom and Women's Freedom: Surrogacy and Autonomy*, Living With Contradictions, edited by Alison Jaggar, 1994.

<sup>45</sup> Andrews Lori B., cit.

feminist proponents such as Lori Andrews, was an opportunity for women to become independent and make freely choices that, historically, was usually constrained by societal and patriarchal norms<sup>46</sup>.

The relation biology-destiny is an element strictly related to women, a concept that feminism has long sought to overcome. Gender equality has always been one of the priorities to achieve equal treatment of the sexes. It requires that decisions about men and women be made not only on biological grounds but also taking into consideration social and cultural context. The idea that biological fathers (as well as non-biological parents) can take care of and raise the child and also be good parents, would have allowed men to have a significant role in fatherhood, not only genetically but also emotionally, as equal contributors to the process of bringing children into the world and taking care of them<sup>47</sup>. Traditionally, in Western society the primary task of caring for children has always been attributed to women: they bear the children, and they are also given the primary responsibility for rearing them. Childbearing has significant biological and social importance, that has a tendency to give women more value than they are usually given. The inherent limitations of pregnancy, along with the mystification of conception and maternity (within the “sacred” sphere of marriage), have been instrumental in controlling women<sup>48</sup>, which along time had internalized these limitations. Motherhood becomes both a privilege and a prison.

According to Katherine Lieber, the control over women's bodies and over their reproductive capacities always has been largely under male control<sup>49</sup>, which is considered one of the main factors that incentivizes domination and oppression of women. In fact, they have often been manipulated and oppressed through their reproductive capacities<sup>50</sup>. It is not a case that for centuries women have been considered as a property of their fathers and husbands<sup>51</sup>.

For all these reasons, opponents considered real the risk that women's bodies could have been controlled by men for their own interests. One of the most radical antisurrogacy group, FINRRAGE (Feminist International Network of Resistance to Reproductive and

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<sup>46</sup> Ibidem.

<sup>47</sup> Sistare Christine T., cit.

<sup>48</sup> Ibidem.

<sup>49</sup> Lieber Katherine B., cit.

<sup>50</sup> Sistare Christine T., cit.

<sup>51</sup> Lori Andrews, cit.

Genetic Engineering), believed and supported the thesis according to which both new reproductive technologies and surrogate motherhood was a degrading practice what made women as “empty vessels” and also a male attempt to control women’s body<sup>52</sup>. However, the activities and language used by this radical group will be analyzed later as its anti-surrogacy struggle is still current.

Proponents, instead, believed that once women would have gained full control over their reproductive capacities, they will have made an essential step in taking control over their bodies and thus, their destiny<sup>53</sup>, finally unchained themselves from the social expectation of mothers forced by their biological role and free to choose what they desire. Analyzing surrogate motherhood, is relevant the fact that in 80s and 90s American society was largely patriarchal, since most of the power was in the hands of white men and arguably used to further their own needs and desires<sup>54</sup>.

The idea of unchaining the mother from her biological role was also strictly related to the concern of regretting the choice of relinquishing children after the birth; the fear was that the surrogate mother wanted to keep baby with her, exactly as happened in the Baby M case. This idea was real in the thought of opponents, because the concept of giving up a child and separating a mother from her baby was conceived as unnatural.

For this reason, the relinquishment of children in surrogacy was compared by some feminists with the relinquishment in adoption<sup>55</sup>, since the surrogate mother could experience the same feeling as a mother who, forced by conditions of poverty, is constrained to give her child up for adoption. Nevertheless, in the thought of supporters of surrogacy, the logic of adoption was different: the biological mother became pregnant since she is within a personal relationship and, in some cases, she is unable to keep the child due to the reluctance of her partner or the impossibility of affording the expense to raise the child. Thus, the choice of relinquishment is a constraint for her. The argument in favor states that surrogate mothers were seeking the opportunity to carry a child that would not exist, without the committed parents' desire to have a child. The surrogate makes her decision before the pregnancy, following her internal and personal reasons, not because she is forced.

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<sup>52</sup> Markens Susan, cit.

<sup>53</sup> Lieber Katherine B, cit.

<sup>54</sup>Sistare Christine T., cit.

<sup>55</sup> Andrews Lori B., cit.

For feminists, banning surrogacy meant leaving the government to decide on issues that were actually women's problems, and women were entitled to choose how to manage them; establishing a prohibitionist policy meant giving rise to the idea that women were incapable of making choices for themselves, because they were constantly victims of external influences and contexts, of social pressures and of a spirit of sacrifice<sup>56</sup>.

This paternalistic view<sup>57</sup> was hidden behind the rationale of the potential of psychological and physical harm to women, argued in one of the most leading analyses of 1988 made by Lori Andrew, in which three general categories of the rationales antisurrogacy have been found: the symbolic harm to society, the potential risks to the woman, and the potential risks to the potential child<sup>58</sup>. The impossibility to give women free choice in what concern themselves and their body was also against the American general legal policy that allowed individuals to engage in potentially risky behavior, so long as they have given their voluntary, informed consent<sup>59</sup>.

According to this idea, if it is true that the enforcement of surrogacy arrangements may become a risk of exploitation to women, on the other hand could become a powerful means to self-determination. Advocating prohibitive legislation on surrogacy means put in the government's hands the choice that is only women's choice. Feminists had made several struggles to finally achieve the idea that women have a right to reproductive choice on her own body, and the right to control their bodies during pregnancy.

Giving to the state the possibility of intervening, banning surrogate agreements put at risk women's autonomy, since their rights on reproductive choices should not be overridden by possible symbolic harm or speculative risks to potential children.

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<sup>56</sup> Lieber Katherine B., cit.

<sup>57</sup> Macklin Ruth, *Is There anything Wrong with Surrogate Motherhood? An Ethical Analysis*, in *Surrogate motherhood: politics and privacy* 136, 141 (Larry Gostin ed., 1990).

<sup>58</sup> Andrews Lori B., cit.

<sup>59</sup> Ibidem.

### 1.2.2 The caring approach and the informed consent

*“The solution to the making of ideologically coerced choices is not always and necessarily the banning of the choices themselves, but education about that which is chosen.”*

– Christine Overall

One of the concerns of opponent feminists was that surrogate mothers entered into surrogacy agreements without the proper knowledge and correct information of the risks of the practice, or worse, forced to agree the contract due to the need of economic necessity. They were concerned that, in a situation of economic precariousness women, and especially those in dire financial need (often poor black women<sup>60</sup>), would accept to start the practice without awareness of their decision and without thinking about the possible dangers for their mental and physical health and their children.

According to proponents, in those years it seemed quite impossible to be unaware of the potential risks of entering in surrogate motherhood. They cited the length of surrogacy agreements, their extensive riders<sup>61</sup>, which outlined the numerous risks associated with pregnancy, making potential surrogates significantly more informed on the subject than most women who conceive through traditional means. Moreover, there was to be considered the enormous media coverage of the Baby M case, of which it was very unlikely that they had not heard of.

In 1994, among proponents of surrogacy, a feminist approach to surrogacy that answered to the need for a deeper information for women who decided to start this practice (in particular for IVF surrogacy) was the approach proposed by Christine Overall. She proposed a more caring and informing approach, based on women’s experiences, values, and beliefs, that acknowledged the political dimensions of reproductive choices and practices, aiming to minimize harm to women and children and upholding women’s dignity and self-determination<sup>62</sup>.

According to Overall, the caring provision of artificial reproduction services must require: (1) a genuinely informed choice and consent<sup>63</sup>; it was important to ensure that women as

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<sup>60</sup> Callahan, Joan C. and Roberts, Dorothy E., *A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory* (1996). All Faculty Scholarship. 1155.

<sup>61</sup> Andrews Lori B., cit.

<sup>62</sup> Overall Christine, *Access to In Vitro Fertilization: Costs, Care, and Consent*, Living With Contradictions cit., edited by Alison Jaggar 1994., pp. 367-375.

<sup>63</sup> Ibidem.

individuals (and not as part of a couple), made genuinely informed decisions before and during the participation in infertility treatment programs. Counseling should be provided by unbiased third parties and should outline benefits and potential risks of surrogacy, also including alternatives to the practice. Then, there must be (2) an equal and fair access<sup>64</sup>, free from geographic, economic, or social criteria in order to evaluate and dismantle artificial criteria like marital status, sexual orientation, and financial ability that unjustly hinder women's equitable access to reproductive technologies; (3) a proper record-keeping, follow-up, and research<sup>65</sup> to monitor and verify the long-term effects of IVF on women and their offspring, ensuring that women had entered in surrogacy voluntarily and aware about the risks, preventing coercion or exploitation. Finally, it was necessary also a (4) comprehensive support systems for all participants<sup>66</sup>. The offspring born by artificial reproduction must have access to information about their biological origins and the health status of donor parents, along with awareness of potential lifelong health implications of IVF. In this idea, these services could be offered through independent women's reproductive health clinics<sup>67</sup>, operating on feminist principles, where healthcare providers prioritize accountability and responsiveness to their women clients.

Christien Overall distinguished two senses of the right to reproduce: a weak sense and a strong sense<sup>68</sup>. In the former, the right to reproduce is a negative or liberty right, meaning the entitlement not to face interference or prevention in reproductive decisions. This interpretation imposes an obligation on the state to refrain from limiting reproductive freedom through measures such as racist marriage laws, forced abortion, or coercive birth control programs and so on.

In contrast, the strong sense of the right to reproduce is a positive or "welfare" right, encompassing the entitlement to receive all necessary support for reproduction. This would include access to all available reproductive resources, technologies, and labor, such as gametes from others, gestational services, and advanced procreative techniques such as IVF.

In her approach, Overall moved a critique to the strong positive right to reproduce, suggesting it would impose significant obligations on others that could commodify

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<sup>64</sup> Ibidem.

<sup>65</sup> Ibidem.

<sup>66</sup> Ibidem.

<sup>67</sup> Ibidem.

<sup>68</sup> Ibidem.

women's reproductive labor and potentially violate their autonomy, like a modern forms of servitude. A strong right to reproduce could also create pressures to conform to societal expectations regarding parenthood, reinforcing discriminatory norms. Her approach tends to base eligibility in surrogacy on criteria such as marital status, sexual orientation, financial capacity, and geographical location, leading to systemic discrimination. Restrictions often exclude single women, lesbian women, and those from marginalized socioeconomic groups. The inconsistency in how infertility treatments are categorized is highlighted as an injustice.

Opponents of surrogacy argued that IVF perpetuated traditional gender roles by emphasizing biological motherhood was an ideal, often at great physical, emotional, and financial cost to women. They criticized technology's experimental nature for exposing women to significant health risks without guaranteed success. In 1994, the low success rates of IVF were underscored as central concerns, considering that in that year the first baby born through IVF, Louise Brown, was only 14 years old. This opposite perspective in a technological context was fostered by the concern of the unknown side long-term effects and the advantages that a woman could have benefit through the free use of their reproductive powers. Overall underlined broader societal context in which women's desire for motherhood is shaped, a desire that is natural but also in part, a product of social construction and pronatalist ideologies<sup>69</sup>. In her analysis, she emphasized the need for policies that minimize harm and uphold equality by advocating for transparency, support, and ethical oversight. Her approach sought to achieve justice, autonomy, and the well-being of women and their potential offspring, through a deeper informed choice and awareness.

Another debated point among feminists was the requirement of having already experienced a pregnancy before giving the informed consent for the surrogacy agreements. According to proponents, this was an essential point to debate due to the fact that women could never know how they will feel after the birth of the child, since every pregnancy has own features and it is never the same but always different. For this reason, it was unreasonable to expect someone to have prior experience before making an informed decision about whether to engage in that experience. It is impossible to fully understand what someone will feel like before actually doing something, especially when

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<sup>69</sup> Ibidem.

the activity is likely to involve intense emotions<sup>70</sup>. The requirement of an “already experienced pregnancy” for proponents would preclude people from ever giving informed consent to many other medical choices<sup>71</sup> such as abortions, sex change operations, heart surgery, and so on, because if knowing how one will feel is a criterion of informed consent, there can never be such consent to any choice for the future.

According to Andrews, another concern of people was the women’s hormonal changes during pregnancy, since they could cause them to change their mind. In fact, women’s hormonal changes have been utilized too frequently over the centuries to enable male dominated society to make decisions for them, as in the Victorian era, she said, when the conviction of some people that women were so overwhelmed by their feelings at the time of birth that they must be protected from themselves<sup>72</sup>. That was the rationale for so many legal principles oppressing women for so long, such as the laws not allowing women to hold property<sup>73</sup>.

If the theory of hormonal change had been correct, she said, after all what will stop men from using their hormones as an excuse for rape or other harms?

### **1.2.3 Babies as commodities**

For other feminist opponents, the argument against surrogacy was straightforward: the “symbolic” societal harm<sup>74</sup> lied in the fact that surrogate motherhood was a form of baby-selling, a phenomenon that commodified babies and sold them as goods, a practice which demeaned people and society.

This heavy accusation was motivated by the conviction of feminist opponents that the reproductive technologies reinforced the condition of subordination of women, by perpetuating the relation between the value given to women in society and their reproductive capabilities.

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<sup>70</sup> Andrews Lori B., cit.

<sup>71</sup> Ibidem.

<sup>72</sup> Ibidem.

<sup>73</sup> Ibidem.

<sup>74</sup> Callahan, Joan C. and Roberts, Dorothy E., cit.

The idea at the basis of this conviction was that, since ART created advantages for some (individuals who could afford to pay for using reproductive technologies or establishes an agreement) while disadvantaging others, they were inherently harmful, because the system favored certain groups of people and disadvantaged others<sup>75</sup>. Radical feminist Andrea Dworkin argued that reproductive technologies caused the isolation of the womb from the woman, no longer making her a whole and unique person<sup>76</sup>, in a separation that was the same as the commodification of sex; she believed this practice harmed society by reducing people to interchangeable commodities, ignoring their individuality and subjectivity. In this perspective, the exploitation and subordination of women and the sale of children as commodities was strictly related. Feminists worried that the commodification of the womb could lead to value women only for their reproductive roles, with the high risk of exploitation of poorer women, the most vulnerable. This raises fears of surrogate mothers being reduced to a class of breeders, or the creation of a "reproductive brothel"<sup>77</sup>.

Concerning the potential harm to children born by surrogate mothers, supporters of surrogate motherhood argued that, from the moment of birth, there was no reason to believe that the child was in a dangerous condition, since he or she was also under the care of the biological father, which also has a parental merit<sup>78</sup>. There was no psychological stress to that child or to any other existing child that he or she may someday be sold or be put in the hands of a stranger. No matter how much money was paid through the surrogacy arrangement, the child, upon birth, could not be treated like a set of commodities, also due to the laws against child abuse<sup>79</sup>.

There was, then, the potential harm by surrogate mothers to their existing children. Critics discussed that "children may experience unique fears and insecurities in a society where their parents might provide for family needs by giving away newborn siblings"<sup>80</sup>. This could lead the surrogate's children to fear that they too might be "given away". However, Andrews supported the thesis by which communication was the key element in this kind of relation. Explaining to the children that the mother is carrying a baby to help another

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<sup>75</sup> Ibidem.

<sup>76</sup> Gena Corea, *The Reproductive Brothel*, in Man-made women 38, 39, Gena Corea et al. eds., 1987.

<sup>77</sup> Ibidem.

<sup>78</sup> Andrews Lori B., cit.

<sup>79</sup> Ibidem.

<sup>80</sup> Ibidem.

couple, and that the child is not part of their own family, the children would "understand that they themselves are not at risk of being relinquished".

Proponent feminist argued that in the context of surrogacy the term "sale" of children could be contested<sup>81</sup> since the transaction does not involve transferring a child for money to a stranger, who may treat the child as a commodity, but facilitates infertile individuals' opportunity to have a biological child, a scenario that does not have anything to do with the notion of a sale. Language is fundamental, because the same feminist that were against surrogacy, were the same in favor of the right to abortion, because it was not about "killing children", but they were talking about embryo or fetus within the womb<sup>82</sup>.

Another point of view compared baby-selling to the sale of organs. The thesis alleged that since there was a ban on payment for organs (for obvious ethical reasons), there should have been a ban on payment to surrogates too<sup>83</sup>. Others argued that an organ was not meant to be removed from the body; it endangers the life of the donor to live without the organ. In contrast, babies are conceived to leave the body, and the life of the surrogate is not endangered by living without the child. There was also who made a clear distinction, arguing that surrogate mothers were paid for their service, stating that the "services component cannot be isolated from the goods component"<sup>84</sup>, as the surrogate must offer her own body to fulfill the arrangement.

In a capitalist society, social and economic conditions may incentivize women become a surrogate mother due to financial necessity rather than for a genuine choice. Ensuring equal access to the labor market and providing adequate social services and the application of vigilant efforts were crucial so that poorest women did not feel pressured to enter in surrogate agreements.

However, Andrews argued that the majority of women who pursued surrogate agreements did not do so due to financial necessity, because some surrogacy programs excluded women below a certain income threshold to avoid exploitation.

In order to limit the harm of capitalist society over the exploitation of poor women, Sistare suggested establishing minimum standards<sup>85</sup> to ensure surrogacy contracts were legally enforceable. This would have included thorough psychological screening for surrogate

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<sup>81</sup> Ibidem.

<sup>82</sup> Ibidem.

<sup>83</sup> Ibidem.

<sup>84</sup> Lieber Katherine B., cit.

<sup>85</sup> Sistare Christine T., cit.

mothers before pregnancy, setting legally mandated minimum and maximum fees for surrogacy, and imposing legal requirements to protect all parties involved<sup>86</sup>. Ensuring surrogate mothers were well-compensated and treated fairly was, according to her, the key to preventing their exploitation. She proposed limiting the role of lawyers and medical technicians to redirect payments toward surrogate mothers and away from non-essential third parties, who were often privileged white men<sup>87</sup>.

### **1.2.4 The social justice approach**

In 1996, between radical criticism of surrogacy agreements and more progressive theories aimed at regulating them, a new feminist approach, called the social justice approach, was proposed by the school feminists Joan Callahan and Dorothy Roberts. Their research presented a harsh critique of how liberal theory approached ethics and policies of ART. According to them, the liberal approach was not sufficient in addressing the systemic inequities<sup>88</sup>. In their perspective, liberalism was focused on individual autonomy and moral neutrality, putting aside the broader social contexts in which reproductive decisions were made. Liberal saw individuals as isolated agents from the context of origin, without considering the limitations which influenced their reproductive choices. According to Callahan and Roberts, such standpoint failed to recognize how structural inequalities (in particular those based on race, gender, and class) profoundly shaped access to and the use of ART<sup>89</sup>.

According to them, there were privileges and existing hierarchies that were constantly perpetuated by reproductive technologies: one example discussed was the access to surrogacy contracts available only to the richest individuals who sought genetic continuity at the expense of the autonomy of the poorest and most economically disadvantaged women, who decided out of necessity to become surrogate mothers.

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<sup>86</sup> Ibidem.

<sup>87</sup> Ibidem.

<sup>88</sup> Callahan, Joan C. and Roberts, Dorothy E., cit.

<sup>89</sup> Ibidem.

Likewise, they criticize the liberal approach to proportionate access to fertility treatments for wealthy white women compared to women of color or those from low-income backgrounds, an approach based on deeply rooted social prejudices.

This system was based on systemic inequalities that liberal theory did not address because it took into account the freedom of choice without considering the starting context of the individuals. As a result, these systems privileged the freedom of wealthy white women and increased inequalities among marginalized women, whose freedom was severely limited. These same concepts will be taken up again in the critique against feminist neoliberalism. Liberal policies, far from being neutral, favored the reproductive interests of the rich and powerful, reinforcing a status quo at the expense of women, especially those from disadvantaged backgrounds.

The feminist approach to social justice focused on the moral equality of individuals, departing from the liberal vision that indirectly supported the structures that underpinned existing inequalities. Social justice advocates state support for women's right to abortion, as it is seen as a fundamental step in eliminating women's social subordination, ensuring continued accessibility to reproductive rights.

All these principles aimed to dismantle unequal systems of power based on race, economics, and gender, while promoting equal freedom for all individuals in society, disfavoring the possibility of being advantaged in reproductive choices. This approach aimed to build a society free from oppressive hierarchies by promoting a society in which all its individuals are free and equal and all have equal value.

### **1.2.5 The cyberfeminist ideology**

In the 1990s, in a time of great technological and social transformation in which biotechnologies question the boundaries between the natural and the artificial, the cyberfeminist movement positioned itself in the feminist debate on surrogacy with a new approach, which proposed the intersection between technology, gender and power. The critique of traditional representations of the female body advanced by cyberfeminism saw

digital and biotechnological technologies as a double-edged sword, the use of which can on the one hand fuel and on the other also undermine patriarchal control in society and open the doors to new spaces of freedom and self-determination<sup>90</sup>. One of the most influential texts of this period is Donna Haraway's *Cyborg Manifesto* (1985), in which the author suggests that ART (and therefore also gestational surrogacy) could emancipate women from the traditional structures of family and biology, redefining the concept of motherhood, gender roles and kinship. An innovative element was the metaphor used by Haraway of the cyborg, a figure useful for overcoming the traditional dichotomies between man and machine, natural and artificial, feminine and masculine. According to Haraway, femininity must not be based on a biological conception of motherhood: for this reason, she believes in the potential of technology to offer new possibilities for self-determination. However, her thought is imbued with the awareness that there is a risk of incorrect use of biotechnology, which can also be used to increase gender and class inequalities. For this reason, effective use can be dictated by favorable socio-political conditions, as all knowledge is closely linked to the material conditions and power relations that produce it.

A great influence on cyberfeminism is due to the feminist Shulamith Firestone who considered in vitro fertilization and surrogate motherhood as revolutionary tools in the role of redefining gender. In her book *The Dialectic of Sex* (1970), written at the age of 25, her main idea was to dismantle the system of patriarchal society through technology in order to free women from the constraints of biological reproduction<sup>91</sup>. Firestone hypothesized a model of society in which the responsibility for the care and education of children was redistributed thanks to new reproductive technologies that would definitively eliminate biological motherhood. Her approach is in fact much more radical than other feminists<sup>92</sup> who see the body as an element that can merge with technology and change with it; for Firestone, the body is essentially a constraint to overcome, an obstacle to female emancipation. However, cyberfeminism differs from Firestone on

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<sup>90</sup> Donna J. Haraway, *Manifesto Cyborg. Donne, tecnologie e biopolitiche del corpo*, Italian Edition, Feltrinelli, Milan 1995.

<sup>91</sup> Firestone Shulamith, *The Dialectic of Sex: The Case for Feminist Revolution*, Farrar Straus & Giroux, 2003.

<sup>92</sup> Mandy Merck and Stella Sandford, *Further Adventures of The Dialectic of Sex, Critical Essays on Shulamith Firestone*, Mandy Merck and Stella Sandford, 2010.

ethical issues; in fact, many antisurrogacy groups (such as FINRRAGE) attacked her theories because they considered her too radical.

In the 1980s and 1990s, surrogate motherhood took place in a complex social and cultural context, in which America was experimenting with the formation of new family models, different from the traditional sacred family that had always characterized the American family. Industrialization led more and more women to postpone motherhood and dedicate themselves to building a career. The fear of a decline in new births and the loss of fertility with advancing age created even more tension and complexity in the United States, pushing many couples to resort to reproductive technologies to conceive a child and start a family. In this scenario full of doubts and uncertainties, the practice of surrogate motherhood took hold, which, after the custody scandal in the Baby M case, received enormous media coverage and created fears and contradictions in public opinion. Feminism also reflects the context of its time and, although there are various points of view, it is mainly divided into two completely opposite fronts: those who see surrogacy as a unique opportunity to go beyond the boundaries of the body and have a child, and those who demonize it by painting it as a dehumanizing practice that commodifies women's bodies (especially the most vulnerable and marginalized), making them slaves to the patriarchal capitalist system and creating a market of children, where they are sold as commodities.

Feminists such as Andrews, Lieber and Overall prefer a much more liberal approach to the matter, as they saw in surrogacy and in the legality of surrogacy contracts a powerful tool capable of freeing women from the role of mother and making them economically autonomous and free to make choices about their own bodies.

Other feminists such as Dworkin, Gena Corea, Callahan and Roberts are instead against the practice of surrogate motherhood because it leads to the exploitation and commodification of women, in a liberal context where the systemic inequalities at the base of society further favor the gap between the privileged and the non-privileged.

## **Chapter 2**

### **Public policy and law models of SM: the cases study of Ukraine and Belgium**

#### **2.1 The European general framework: one practice, different models**

Actually, surrogate motherhood is not explicitly recognized in any binding standards at the international level, or document in which are share the principles to respect or proposition to interpret. In fact, every state chooses how to better manage the practice according to own interests and own laws (in the case in which there are any). The diversity of the various states is reflected in the different and complex legislative framework of each state.

This makes the European legislative framework of surrogate motherhood very heterogeneous and fragmented; the situation presents different scenarios in which the practice of surrogate motherhood is partially or totally regulated in some countries, in a legal vacuum in other countries, or prohibited in others or with severe restrictions.

There are countries in which prohibition is expressly written into the Constitution or is established by the courts; other countries the prohibition is contained in civil law or special laws or can be sanctioned in the Criminal law.

In a general view, some European states decided to adopt a legal prohibitionist perspective, such as France, Germany, Italy, Spain, Portugal and Lithuania.

In France, such agreements are considered null; Article 16-7 of the Civil Code affirms that any surrogacy contract is expressly null and void and according to Art. 227-12 brokering agreements on procreation or gestation on behalf of third parties is a criminal offence.

In Germany the legislation banned surrogate motherhood in all its forms since protects the embryo through the Embryo Protection Act (Embryonenschutzgesetz); the country establishes the principle of unity between the genetic and biological mother, excluding the surrogate from the recognition of legal motherhood. Moreover, the regulation is supported by severe sanctions for doctors who allow the procedure.

Italy, with the Law 40/2004, considers surrogacy as a crime some political language refers to the practice with the negative expression “uterus for rent”. The law punishes anyone who practice surrogacy, organizes, or advertises gestation for others and the trade of gametes or embryos with imprisonment from three months to two years and a fine of 600,000 to one million euros. The amendments of Law 169/2024 added the following wording to co. 6 art 12 L. 40/2004 «If the facts referred to in the previous period, with reference to surrogate motherhood, are committed abroad, the Italian citizen is punished according to Italian law»

Spain, Portugal and Lithuania share the same ban, even if the practice in Portugal was previously legal and then revoked according to a sentence of the Constitutional Court. In Spain, Article 10 of Law 14/2006 considers all surrogate motherhood contracts null and void. However, even if through complex legal procedures, in the country there is the possibility for children born abroad from Spanish intended parents in transnational surrogacy to obtain citizenship.

Belgium and Czech Republic allowed only the altruistic form of surrogate motherhood, there is no regulation expressed in the law, but the commercial form have no legal validity. In Belgium the commercial form is banned but there is no law that explicitly regulate altruistic surrogacy. Courts decide on the validity of surrogacy contracts on a case-by-case basis.

The same situation is shared in the Netherlands, Denmark, United Kingdom and Greece, where there is possible to practice only the altruistic form, but with rigid law and restrictions. It is interesting to know that in Denmark the surrogate mother can practice surrogacy only though the traditional method, through artificial insemination (so only with traditional form of surrogacy). In the United Kingdom, after the birth of the child, the intended parents must obtain the legal recognition of parenthood through a judicial process. In Greece, both heterosexual couples and single women with medical problems could have access to the practice, after the prior authorization by a court.

Russia and Ukraine are the only European countries in which both forms of surrogacy are allowed. This makes them attractive destinations for reproductive tourism, at the risk of becoming a destination for individuals who, in order to circumvent the rigid and binding legislative systems of their own states, travel to these countries to surrogate motherhood.

As for countries outside Europe, the United States has not a unique law that regulates surrogate motherhood at national level, but each federal states chose how to govern it. Actually 14 states consider surrogate motherhood legal; 12 states have strict limitations about the practice and in 3 states surrogacy is banned.

In Australia, commercial surrogacy is considered a criminal offense and only altruistic form of surrogacy is legal in all jurisdictions except the Northern Territory. In the United States, commercial surrogacy is permitted in many states (such as California and Texas), while prohibited in others (such as Michigan and Louisiana).

Argentina, Brazil, China and Japan prohibit or strongly disincentivize surrogacy.

In Brazil, commercial surrogacy is banned but it is possible to practice altruistic form under medical guidelines.

In China, surrogacy has been officially banned since 2001 with the “Administrative Measures on Assisted Human Reproduction Treatments” but the underground market is tolerated by the authorities and has been estimated to involve between 400 and 500 agencies in 2012.

In Canada, Israel and South Africa is allowed only altruistic surrogacy. In Canada, the regulatory framework is heterogeneous and vary for each province, and federal law prohibits any form of payment to the surrogate except reimbursement for medical expenses. Israel adopts a unique model of “state-controlled” surrogacy, following a pronatalist policy that provides public funding for reproductive technologies. Each contract must be approved by a government committee.

India, Nigeria and Thailand allow commercial surrogacy, with different restrictions.

Since 2015 India recently imposed strict limits, allowing access only to married couples residing in the country.

Nigeria does not have clear legislation, but the phenomenon is growing. In Thailand, after the “Baby Gammy” scandal, surrogacy is now restricted to Thai and is allowed only to heterosexual couples.

The following summary tables, which is a product of the excellent and detailed work of Piersanti, Consalvo, Signore, Del Rio, Zaami, in their essay *Surrogacy and “Procreative*

*Tourism*". *What Does the Future Hold from the Ethical and Legal Perspective?*<sup>93</sup>, show the legislation currently in force in fourteen European countries, of which ten are members of the European Union (France, Germany, Italy, Spain, Greece, Netherlands, Belgium, Denmark, Lithuania, Czech Republic and Portugal) three non-EU countries (UK, Ukraine and Russia).

## 2.2 Surrogacy legislative frameworks in European countries<sup>94</sup>

Nation	Status	Legislative framework
France	Banned	According to Article 16-7 of the Civil Code any surrogacy contract is null and void According to Art. 227-12, is considered a criminal offence brokering agreements on gestation on behalf of third parties
Germany	Banned	Embryonenschutzgesetz ("Law for the protection of the embryo"), enacted on 13 December 1990, establishes the bound between genetic, biological and social motherhood
Italy	Banned	Law No. 40 prohibits surrogacy and MAP techniques using gametes from third-party donors. In case of infringement, the gamete donor does not acquire any legal parental relationship with the child and cannot claim any parental rights

<sup>93</sup> **All tables are work of** Piersanti, V.; Consalvo, F.; Signore, F.; Del Rio, A.; Zaami, S. *Surrogacy and "Procreative Tourism". What Does the Future Hold from the Ethical and Legal Perspective?*, *Medicina* 2021, 57, 47. <https://doi.org/10.3390/medicina57010047>

<sup>94</sup> Ibidem.

Spain	Banned	Art. 10 within law 14/2006, passed on 26 May (“Sobre técnicas de reproducción humana asistida”), establishes surrogacy agreements void
Greece	Legal for heterosexual couple and single females; the latter must be no older than 50 years old and have to demonstrate their infertility through medical documentation	Regulated by law 3305/2005 (“Enforcement of Medically Assisted Reproduction”)
Netherlands	Commercial surrogacy is banned, while altruistic form is legally allowed. The practice is less common since there are few hospitals specializing in surrogacy and severe requirements to access	There is no specific legislation on surrogacy; according to Articles 151b and 151c of the Criminal Code, promoting commercial surrogacy is illegal
Belgium	Commercial surrogacy is illegal, Altruistic is allowed. Surrogacy is managed by medical clinics which choose own requirements to access	There is no specific legislation on surrogacy
Denmark	Altruistic surrogacy is legal but not the use of ART (only traditional surrogacy allowed)	There is no specific legislation on surrogacy
Czech Republic	Altruistic surrogacy is legal	There is no specific legislation on surrogacy but commercial surrogacy is considered a criminal offense

Portugal	Illegal in all forms due to Constitutional Court decision	With law 25/2016 surrogacy was legal, but in 2018 the Constitutional Court of Portugal declared it unconstitutional <sup>95</sup>
United Kingdom	Commercial surrogacy is banned, while altruistic surrogacy is legal.	Surrogacy is recognized under section 30 of the Human Fertilisation and Embryology Act 2008 In May 2016, Surrogacy commercial arrangements are prohibited by the 1985 Surrogacy Arrangements Act but there is the possibility to apply to be recognized as the legal parents of a child following a surrogacy arrangement (both single and homosexual, providing that they are UK residents)
Russia	Commercial surrogacy is legal but the surrogate mother cannot have a genetic tie with the child.	Gestational surrogacy, even commercial, is legal; a set of medical requirements must be met
Ukraine	Surrogacy is legal in all its forms	Clause 123 of the Family Code of Ukraine and the order of the Ministry of health of Ukraine allows the use of artificial reproductive technologies
Lithuania	Surrogacy is illegal in all its forms	Article 11 of the Law on Medically Assisted Procreation of the Republic of Lithuania (14 September 2016 No. XII-2608) considers surrogacy agreements null and void <sup>96</sup>

<sup>95</sup> **All tables are work of** Piersanti, V.; Consalvo, F.; Signore, F.; Del Rio, A.; Zaami, S. *Surrogacy and "Procreative Tourism". What Does the Future Hold from the Ethical and Legal Perspective?*, *Medicina* 2021, 57, 47. <https://doi.org/10.3390/medicina57010047>

<sup>96</sup> **All tables are work of** Piersanti, V.; Consalvo, F.; Signore, F.; Del Rio, A.; Zaami, S. *Surrogacy and "Procreative Tourism". What Does the Future Hold from the Ethical and Legal Perspective?*, *Medicina* 2021, 57, 47. <https://doi.org/10.3390/medicina57010047>

## 2.3 Surrogacy legislative frameworks in states outside of Europe<sup>97</sup>

Nation	Status	Legislative framework
United States	There is no federal law but managed state by state	Surrogacy is allowed in most states (in 14 states surrogacy is legal; 12 states have strict limitations in place; only 3 states ban surrogacy (Louisiana, Michigan and Nebraska), From 15 February 2021, New York allows for compensated surrogacy arrangements
Canada	Altruistic surrogacy is legal	The Assisted Human Reproduction Act of 2004 criminalizes commercial surrogacy. Provincial law manages questions about legal parenthood and surrogacy agreement.
Brazil	Commercial surrogacy is banned according to the article 199(4) of the Brazilian Federal Constitution that considers it as a form of human organ trafficking. Altruistic surrogacy is allowed, there is no specific law but there are limitations (medical requirements)	The ban on surrogacy hinges on article 199(4) of the Brazilian Federal Constitution. Altruistic surrogacy is allowed since 2010

<sup>97</sup> All tables are work of Piersanti, V.; Consalvo, F.; Signore, F.; Del Rio, A.; Zaami, S. *Surrogacy and "Procreative Tourism". What Does the Future Hold from the Ethical and Legal Perspective?*, *Medicina* 2021, 57, 47. <https://doi.org/10.3390/medicina57010047>

Argentina	Surrogacy agreements are regulated by Civil Code provisions	The Civil Code of 2014 contains a special chapter dedicated to regulating legal parenthood when a child is born through ART The gestational mother is considered the legal mother
Australia	Commercial surrogacy is considered a criminal offense, only altruistic form of surrogacy is legal except the Northern Territory	Administered at a State level but only altruistic form is legally allowed Transnational commercial surrogacy is illegal for residents in New South Wales (NSW), Queensland (QLD), and Australian Capital Territory (ACT)
Israel	Legal with state approval	Embryo Carrying Agreements Law, 1996, legalized gestational surrogacy . It is the first form of “state-controlled surrogacy” in which each and every contract has to gain the direct approval of the state. Surrogacy arrangements are legal only for Israeli citizens. In
India	Only resident married heterosexual couples with infertility problems are allowed to access altruistic surrogacy agreements; Commercial surrogacy is not legal in India anymore	Surrogacy (Regulation) Bill, 2016 was introduced to amend the previous surrogacy law 2015, aiming to ban foreign

		citizens from using transnational tourism. <sup>98</sup>
People's Republic of China	Illegal, yet widespread and tolerated.	In 2001 “Administrative Measures on Assisted Human Reproduction Treatments” banned any form of trade of gametes and embryos; the ban was reiterated in 2013. The clandestine commercial surrogacy market is tolerated by the authorities
Thailand	Surrogacy contracts allowed only for Thai heterosexual married couples resident	On 2015, the Thai Parliament established a bill that limits surrogacy after the Baby Gammi scandal
Japan	No legislation in place but the practice is discouraged	The state does not recognize the citizenship to children born through surrogacy abroad
Nigeria	No legislation in place, but is tolerated in some regions	Surrogacy contracts are legal in the country <sup>99</sup>

<sup>98</sup> **All tables are work of** Piersanti, V.; Consalvo, F.; Signore, F.; Del Rio, A.; Zaami, S. *Surrogacy and “Procreative Tourism”. What Does the Future Hold from the Ethical and Legal Perspective?*, *Medicina* 2021, 57, 47. [https:// doi.org/10.3390/medicina57010047](https://doi.org/10.3390/medicina57010047)

<sup>99</sup> **All tables are work of** Piersanti, V.; Consalvo, F.; Signore, F.; Del Rio, A.; Zaami, S. *Surrogacy and “Procreative Tourism”. What Does the Future Hold from the Ethical and Legal Perspective?*, *Medicina* 2021, 57, 47. [https:// doi.org/10.3390/medicina57010047](https://doi.org/10.3390/medicina57010047)

South Africa	Only altruistic surrogacy is allowed, (also for singles, homosexual couples but resident in the country)	Section 19 of the Children’s Act of 2010 regulates surrogacy in South Africa One future parents provide the gametes for the procedure at least <sup>100</sup>
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<sup>100</sup> **All tables are work of** Piersanti, V.; Consalvo, F.; Signore, F.; Del Rio, A.; Zaami, S. *Surrogacy and “Procreative Tourism”. What Does the Future Hold from the Ethical and Legal Perspective?*, *Medicina* 2021, 57, 47. [https:// doi.org/10.3390/medicina57010047](https://doi.org/10.3390/medicina57010047)

## 2.4 Introduction of SM models in Ukraine and Belgium

The models that will be analyzed below are respectively the commercial surrogacy model, allowed in Ukraine and the altruistic model, legally practiced in Belgium.

The two different models have been proposed since they both present interesting, almost opposite, differences in the management of surrogacy. For each country legal aspects, legal motherhood, the selection and protection of surrogate women, and the financial aspects will be studied. The purpose of this analysis is to understand how the models taken into consideration work, differ and whether it is possible, by comparing them in their positive aspects, to hypothesize a surrogacy regulation model that is more protective of women's rights.

## 2.5 - First model: commercial SM in Ukraine

When it comes to Ukraine and surrogate motherhood, according to some studies the country is one of the most liberal countries when surrogacy can be practiced<sup>101</sup>.

Ukraine legally allows both forms of surrogate motherhood: altruistic surrogacy, where there is no remuneration but only coverage of medical expenses related to the pregnancy (and medical assurance) and commercial surrogacy, which involves financial compensation for surrogate mothers and her service. Some researchers propose recognizing also a third category: professional surrogacy<sup>102</sup>, in which people with expertise in childcare, education, or social work, are both surrogate mothers and comprehensive post-birth supporters to the intended parents in raising and upbringing the child.

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<sup>101</sup> Emilia Sarnacka, Ivan Demchenko, *Legal Regulation of Surrogacy in Poland and Ukraine: A Comparative Analysis*, <https://czasopisma.kul.pl/index.php/recl/index>, <https://doi.org/10.31743/recl.17247>.

<sup>102</sup> Shchyrska V., Konopelskyi V., Popovych Y., Bilianska N., Lepei O.; *Ethical and legal aspects of surrogacy in ukraine and in the world*, Journal of Legal, Ethical and Regulatory Issues Volume 23, Issue 2, 2020.

It is the Ukrainian Family Code which permits the practice of commercial surrogacy, based on agreements that include monetary compensation for surrogacy services. The Ukrainian model attracts numerous foreign couples since it is known to be cheaper due to its lower costs, which are far more affordable than in countries where surrogacy expenses can exceed \$100,000 (for example the USA), making it inaccessible for many middle-class families<sup>103</sup>. In fact, actually the cost of surrogacy in Ukraine amounts approximately to one-third of what it costs in the United States (\$40,000–\$50,000 per arrangement)<sup>104</sup>, making it an attractive option. These factors combined have positioned Ukraine as a leading affordable global destination for surrogacy.

According to the Rules for the Application of Assisted Reproductive Technology of 09.09.2013, the only legally recognized form of surrogacy in the country is gestational surrogacy (which involves in vitro fertilization), forbidding the traditional practice with artificial insemination. In this way, the surrogate mother has no genetic connection to the child but it is the “host” that carries the embryo created with the genetic material of the intended parents through assisted reproductive technologies.

### **2.5.1 Origins of surrogacy in Ukraine**

In 1983, there was the establishment of the first Ukrainian Clinic for human reproduction in Kharkiv City by Valentin Gryshchenko<sup>105</sup>. In 1992, nearly ten years later, Ukraine started its first surrogacy program, making Kharkiv the first city in the former Soviet Union to implement the practice of surrogacy<sup>106</sup>. The first Ukrainian surrogate mother was a 46-year-old woman who carried a gestation for her daughter, which was affected by infertility since she was born without a uterus but with functioning ovaries<sup>107</sup>.

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<sup>103</sup> Guseva, Alya; *Scandals, morality wars, and the field of reproductive surrogacy in Ukraine, economic sociology\_the european* electronic newsletter, ISSN 1871-3351, Max Planck Institute for the Study of Societies (MPIfG), Cologne, Vol. 21, Issue 3, 2020.

<sup>104</sup> Anika König, *Reproductive Entanglements in Times of War: Transnational Gestational Surrogacy in Ukraine and Beyond*, *Medical Anthropology*, 42:5, 479-492, 2023, DOI: 10.1080/01459740.2023.2201682.

<sup>105</sup> Gryshchenko Mykola and Pravdyuk Alexey, *Gestational Surrogacy in Ukraine.*, Handbook of gestational surrogacy: international clinical practice and policy Issues (Cambridge University Press 2016).

<sup>106</sup> Ibidem.

<sup>107</sup> Ibidem.

In 1993, the first Ukrainian baby girl conceived through in vitro fertilization was born. However, at the time in Ukraine was difficult to obtain birth document for the child and the legal motherhood for the biological mother, since the country lacked legal regulations on surrogate motherhood<sup>108</sup>.

After that numerous surrogacy scandals of surrogate babies abandoned have been recorded in several countries<sup>109</sup> (concerning those born through transnational surrogacy), many nations addressed to the problem by either banning commercial surrogacy or with limitation of the practice to their own citizens under altruistic form of surrogacy<sup>110</sup>, where surrogates are reimbursed for pregnancy expenses and there is no compensation for the practice.

In this scenario, Ukraine gained international attention also for its affordable and high-quality reproductive services and a legal framework favorable to surrogacy<sup>111</sup>; successively, through years the country became known in the global reproductive market as a key provider of Slavic donor eggs<sup>112</sup>. The legalization of surrogate motherhood in Ukraine coincided also with India's limitation of transnational surrogacy, which had previously made the country the cheapest destination for intended parents worldwide<sup>113</sup>. In 2012, India first banned surrogacy for same-sex couples and in 2015 banned the practice for all foreign intended parents<sup>114</sup>. In 2018, it completely banned commercial surrogacy along with Thailand and Nepal<sup>115</sup>. These circumstances have shifted the international focus of surrogacy to Ukraine, increasing the growth of demands in the country.

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<sup>108</sup> Ibidem.

<sup>109</sup> Guseva Alya, cit.

<sup>110</sup> Ibidem.

<sup>111</sup> Ibidem.

<sup>112</sup> Ibidem.

<sup>113</sup> Anika König, cit.

<sup>114</sup> Ibidem.

<sup>115</sup> S. Marinelli, A. Del Rio, M. Straccamore, F. Negro, G. Basile, *The armed conflict in Ukraine and the risks of inter-country surrogacy: the unsolved dilemma*, European Review for Medical and Pharmacological Sciences 2022; 26: 5646-5650.

## 2.5.2 Legal aspects

In Ukraine there are two key provisions which govern surrogate motherhood: Article 123 of the Family Code which establishes surrogacy regulations and Article 6 of the 2013 Order of the Ministry of Health on Assisted Reproductive Technologies which establishes requirements for the committed parents, that is a condition of infertility in a married couples and the choose of a surrogate mother that must be a healthy woman with at least one child of her own<sup>116</sup>. Therefore, in Ukraine there is the possibility of using ART only for married couple (according to Art. 123), while the access to the practice is denied to single individual<sup>117</sup>.

One of the most appealing aspects of surrogacy in Ukraine is the possibility to obtain legal motherhood of the child born through surrogacy thanks to the law which automatically grants it to the committed parents, so they do not have to undergo lengthy legal processes to establish their parental rights<sup>118</sup>. Moreover, in the country advertising of surrogacy services is possible.

Currently, the key aspects of clinical ART in Ukraine are regulated by the right to access ART and surrogacy, an aspect established in Article 281 of the Civil Code of Ukraine, which guarantees that adult people have the right to utilize ART in accordance with the conditions set by the law<sup>119</sup>.

Article 48 of the Fundamentals of Ukrainian Legislation on Health Care establishes that the Ministry of Healthcare of Ukraine has the role to approve the procedure carried out though the reproductive technologies. For the donation of genetic material, there must be the written consent of the couple and it must ensure the donor's anonymity<sup>120</sup>. Therefore, the access to the ART is possible only for clinical reasons and cannot be used for social purposes but under medical and legal approval. Only a married (and officially registered)

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<sup>116</sup> Guseva, Alya, cit.

<sup>117</sup> Nadiia Horobets, Yuliia Yakushchenko, *Different Legal Approaches to the Regulation of Surrogacy in Ukraine and Baltic States* (Journal of International Legal Communication) 4(1), 55-64. JILC, 2022. <https://doi.org/10.32612/uw.27201643.2022.1.pp.55-64>.

<sup>118</sup> Ibidem.

<sup>119</sup> Gryshchenko Mykola and Pravdyuk Alexey, cit.

<sup>120</sup> Shchyrska V., Konopelskyi V., Popovych Y., Bilianska N., Lepei O., cit.

heterosexual couple could to participate in a surrogacy program if the infertility condition is medically confirmed<sup>121</sup>.

According to paragraph 6.4 of the Procedure for the Use of ART in Ukraine, the requirement for being a surrogate mother must be: being an adult woman of legal age (18 years old), who has at least one child of her own, a written statement signed according to the will of the woman and without coercion (according to the appendix No. 17, Order No. 787), and must be in health without medical contraindications<sup>122</sup>.

Moreover, the primary requirements for anyone wanting to enter in surrogacy agreements process are being of legal age, possessing full legal capacity, and having at least one healthy, genetically related child<sup>123</sup>.

As mentioned earlier, in Ukraine only gestational surrogacy is permitted, meaning that the surrogate does not have direct genetic connection with the child to carry, so she cannot also neither be the egg donor. However, Ukrainian law allows close relatives of the intended parents to serve as surrogates mother since they can participate in the process<sup>124</sup>.

### **2.5.3 Legal parenthood and intended parents**

Currently, it is the Ukrainian Civil Code that regulates contractual agreement between citizens because there is no specific legislation on the subject<sup>125</sup>. Before the surrogacy agreement is signed by the involved parties, the surrogate women follow a medical examination according to the Procedure for the Use of ART in Ukraine. Moreover, it is also a right of the intended parents request further genetic and psychiatric evaluations of the surrogate mother before the procedure to attest her good health state<sup>126</sup>.

The contract must mention all the procedures that the surrogate mother must carry out, that is, the pregnancy and birth of a child conceived by the commissioning parents through

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<sup>121</sup> Oleg M. Reznik, Yuliia M. Yakushchenko, *Legal considerations surrounding surrogacy in Ukraine*, *Wiadomości Lekarskie*, Volume Lxxiii, ISSUE 5, Aluna Publishing, 2020, doi: 10.36740/WLek202005139

<sup>122</sup> *Ibidem*.

<sup>123</sup> *Ibidem*.

<sup>124</sup> *Ibidem*.

<sup>125</sup> Gryshchenko Mykola and Pravdyuk Alexey, *cit.*

<sup>126</sup> *Ibidem*.

ART, and, above all, her consent to the transfer of parental rights to the biological parents once after the birth, the surrogate mother's responsibility to follow all medical recommendations during all stages of the IVF process and to maintain a communication channel with the commissioning parents to constantly inform them of her health status and any updates on the pregnancy<sup>127</sup>. The contract must specify the number of planned attempts and their timing and the surrogate mother's additional consent to a caesarean section if necessary due to medical complications during childbirth<sup>128</sup>.

In 2016, there were 38 ART surrogacy clinics in the country as well as several groups on social media and specialized forums, important places where surrogate mothers and commissioning parents can exchange information and post requests or offers (since advertising surrogacy services is legal in the country).

Since surrogate motherhood in Ukraine is only allowed for medical reasons, it is the task of a fertility doctor to assess the suitability of this treatment method and ensure that there are no medical contraindications for IVF, based on the individual's medical history and test results.

#### **2.5.4 The selection of the surrogate**

The selection of a surrogate is a fundamental step, and the process by which this occurs is equally important; it can last from one week to three months.

For the surrogate mother's selection process, a database with all the data of potential surrogates is provided by surrogacy agencies or a detailed questionnaire previously filled out by the surrogate candidate.

The length of the relationship between the surrogate mother and the service provider is important for the completion process, as the agency can adequately assess the reliability, accuracy and diligence of the potential surrogate mother.

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<sup>127</sup> Ibidem.

<sup>128</sup> Ibidem.

There are situations where some agencies may allow commissioning parents to add additional criteria for the surrogate mother selection, such as the women's residence in an ecological area, religious beliefs, knowledge of a foreign language, level of education<sup>129</sup>. In some cases, the surrogate candidate can be presented as a choice directly by the commissioning parents. It is the task of specialized agencies in such cases to check and verify personal and medical information, mental and physical health conditions, possible criminal records and the collection of details about the life context in which the surrogate mother lives in order to best assess her conditions<sup>130</sup>.

The list of documents required in Ukraine for surrogacy includes the voluntary statement of the surrogate mother, a copy of her passport, her marriage certificate, a copy of her child's birth certificate, and, according to Form 19 of the Statute, the consent of the surrogate's husband for her participation in the maternity program<sup>131</sup>.

It is curious, however, that specialized reproductive technology clinics require the consent of the surrogate's husband as part of her authorization to take part in the surrogacy process.

### **2.5.5 Financial aspects**

Surrogate motherhood costs in Ukraine depends on the service provider, and on the marketing strategies involved. In general, here is a list of expenses that usually committed parents should incur<sup>132</sup>:

- Expense for the selection process of the surrogate
- Medical examination costs required (also for in vitro fertilization)
- Living costs for the surrogate
- Financial obligations to the surrogate in case of IVF failure or early pregnancy loss
- Monthly financial support for the surrogate mother

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<sup>129</sup> Ibidem.

<sup>130</sup> Ibidem.

<sup>131</sup> Ibidem.

<sup>132</sup> Ibidem.

- Prenatal care for the surrogate, according to the provision of the Ministry of Healthcare requirements
- Ongoing pregnancy care
- Delivery costs
- Comprehensive legal support
- Financial compensation to the surrogate after delivery
- Additional payment to the surrogate for a multiple pregnancy
- Extra financial costs arising from complications during pregnancy and/or delivery, including cesarean section costs.

Payments for surrogate mothers depends on various factors. In 2016, compensation for surrogacy services ranged from \$7,900 to \$30,000<sup>133</sup>.

The payment of your surrogate mother's compensation is guaranteed by the mediating action of the service providers, who also control the responsibility of the surrogate mother. The surrogate mother is entitled to a monthly allowance and an allowance for lost hours of work<sup>134</sup>.

## **2.5.6 Protection of surrogate women: three questions**

While the legal framework for surrogate motherhood in Ukraine may appear clear and efficient, it contains loopholes and inconsistencies that need to be addressed. These legal gaps present challenges that must be resolved in the near future to ensure better protection for all parties involved in surrogacy agreements, and in the perspective of this thesis, with a particular focus on safeguarding the rights of surrogate mothers.

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<sup>133</sup> Ibidem

<sup>134</sup> Ibidem.

### **2.5.7 The minimum age of the surrogate mother**

The age requirement for a surrogate mother is still today a subject of debate moved by international concern. As mentioned above, the Ukrainian law provides that the surrogate mother must be an adult woman of legal age (i.e. 18 years old), who already has at least one healthy child of her own, has voluntarily signed a written statement giving her consent and is in good health. Among the projects on ART suggested and registered in the Ukrainian Parliament, some of the proposals submitted required that a surrogate mother should be a woman of 18-55<sup>135</sup>, other draft laws suggested setting the age range for surrogate mothers between 21 and 35 years old<sup>136</sup>.

Nevertheless, according to the statistics and the guidelines of the World Health Organization (WHO), the best reproductive age for women is between 20 and 35 years<sup>137</sup>. Fertility clinics typically set a minimum age requirement of 21 or 23 and require that the woman has at least one biological child. However, due to high transnational surrogacy demand and unclear legislation could cause or incentivize conditions of exploitation of surrogate mothers.

A low minimum age could pose several risks, primarily concerning psychological and financial maturity, with the risk that younger women may lack the emotional resilience to cope with the psychological impact of gestation, particularly the separation from the child after birth. In times of economic crisis and war, some women may be pressured by family members or by third parties with own interests into accepting surrogacy agreements.

Moreover, it is crucial to consider the financial vulnerability as key concern, since women in difficult economic situations might turn to surrogacy out of necessity, often without fully understanding its physical and emotional consequences. The absence of strict regulations increases the risk of young women being exploited, potentially without adequate legal protection or access to essential information.

To mitigate these risks, experts recommend raising the minimum legal age for surrogacy in Ukraine to 25, ensuring that candidates have greater life experience and a deeper

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<sup>135</sup> Shchyrska V., Konopelskyi V., Popovych Y., Bilianska N., Lepei O., cit.

<sup>136</sup> Oleg M. Reznik, Yuliia M. Yakushchenko, cit.

<sup>137</sup> Ibidem.

understanding of their decision. Moreover, it could be useful implementing mandatory psychological support during the whole process, before, during and after birth.

### **2.5.8 Risk of exploitation of surrogate women**

There are many concerns about the coercion and exploitation of women who become surrogate mothers. It is essential to not underestimate the possibility in which potential surrogate could choose to enter the practice only due to financial necessity.

According to recent research is possible to see that Ukrainian surrogates are only paid about 13.000€, most of which is paid only after the child is relinquished to the intended parents<sup>138</sup>. Before the war in Ukraine and the COVID-19 pandemic, numerous reports pointed to mistreatment of surrogates in Ukraine and elsewhere<sup>139</sup>.

Other research indicates that Ukrainian women choose to become surrogate mothers due to the national condition of economic hardship and social instability<sup>140</sup>. The current situation of widespread poverty, unemployment, low wages, and inadequate social security have forced many Ukrainian women to seek employment abroad over the past decade, where they typically earn between 600 and 800€ per month<sup>141</sup>. In contrast, commercial surrogacy agreements in Ukraine offers a substantial financial reward of 16.000 to 21.000 EUR per pregnancy, that is 1.800-2.300 EUR per month<sup>142</sup> during the gestation, more than twice the amount they are used to earning. This stark economic disparity could also be a key factor behind the rapid expansion of commercial surrogacy in the country.

According to the same research, another crucial point at the basis of this increment is domestic violence, which remains a critical issue in many Ukrainian households<sup>143</sup>. Women facing abuse in domestic life and economic dependent on their husbands, could

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<sup>138</sup> S. Marinelli, A. Del Rio, M. Straccamore, F. Negro, G. Basile, cit.

<sup>139</sup> Ibidem

<sup>140</sup> S. V. Dzholos, O. Koshulko, *Surrogate motherhood in Ukraine and around the world: legal regulation & management practice*. MEST Journal, Vol. 10 No. 2, July 2022 pp. 46-56.

<sup>141</sup> Ibidem.

<sup>142</sup> Ibidem.

<sup>143</sup> Ibidem.

see surrogate motherhood as an opportunity of economic emancipation and as an escape route<sup>144</sup>, so that they can choose a better life and future, especially if they have dependent children. Moreover, the context of origins and personal motivations could be another factor of influence in the choice. It is no wonder that all these factors make the surrogate motherhood in Ukraine an attractive choice for women<sup>145</sup>.

An important step towards protecting the rights of surrogate women in Ukraine would be to ensure that they have adequate support from independent legal representation throughout the process. This would reduce exploitation possibilities and, if any, the right to legal defence. There are not few testimonies in Ukraine of people who have suffered unethical treatment, forced abortions, restrictive and abusive living conditions in homes of compulsory hospitalization, Inadequate medical care and financial support for long-term health complications resulting from surrogacy<sup>146</sup>. Often potential surrogates from low-income backgrounds do not have the financial resources for legal support to counter the conditions of abuse and malnutrition.<sup>147</sup>. An adequate support system of legal protections and access to independent legal advisors would help safeguard their rights and welfare<sup>148</sup>.

### **2.5.9 Absence of legal maternity for the surrogate**

As regards legal parenthood, in articles 123 and 139 of the Family Code of Ukraine addresses it is established that the legal parents of the child are donors of genetic material ie if an embryo conceived by the parents (married and officially registered heterosexual couple) is transferred to another woman's body by assisted reproduction technologies, the parents donors of biological material are recognized as legal parents<sup>149</sup>.

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<sup>144</sup> Ibidem.

<sup>145</sup> Ibidem.

<sup>146</sup> Emma Lamberton, *Lessons from Ukraine: Shifting International Surrogacy Policy to Protect Women and Children*. (n.d.). Journal of Public and International Affairs. <https://jpia.princeton.edu/news/lessons-ukraine-shifting-international-surrogacy-policy-protect-women-and-children#:text=lessons%20from%20ukraine%3A%20shifting%20international%20surrogacy%20policy%20to%20protect%20women%20and%20children>

<sup>147</sup> Ibidem.

<sup>148</sup> Ibidem.

<sup>149</sup> Oleg M. Reznik, Yuliia M. Yakushchenko, cit.

Furthermore, Article 139 explicitly prohibits challenging maternity in such cases. The surrogate mother cannot therefore claim legal maternity, even through recourse to the courts.<sup>150</sup> From a legal point of view, the surrogate woman who carries the child has no formal recognition or any possibility of obtaining maternity over the unborn child.

In most countries, the legal framework does not guarantee adequate social protection for surrogate mothers after childbirth, considering that many times in the agreements it is stipulated that the surrogate mother must take care of the child for a period even after the birth. Social protections for surrogate mothers should be legally introduced, which support and help them during pregnancy, childbirth and a pre-determined post-natal period<sup>151</sup>.

As mentioned above, the outbreak of the war in Ukraine has exacerbated an already fragile social situation in the country, especially with regard to surrogacy. The war has created bureaucratic constraints and obstacles for many foreign intended parents, who have been unable to enter the country to claim their children born through surrogacy arrangements. Many surrogate mothers have found themselves in circumstances where they cannot legally claim the children they have given birth to, and often lack the means to care for the child in the long term, with no support from either intended parents or the state. Some newborns have been stranded in hospitals or temporary facilities, in a legal limbo where there is uncertainty about the legality of parenthood.

Surrogates have had to care for these children for long periods, a situation that has triggered serious ethical and legal dilemmas: can a woman who has carried and given birth to a child be completely excluded from legal recognition, especially in extraordinary circumstances such as war? What happens if the intended parents, in financial difficulty or due to crises such as armed conflict or pandemics, decide to renounce their claim to the child?

These unanswered questions highlight the urgent need for clearer legal protections and contingency plans in surrogacy arrangements.

The existing legal basis in Ukraine in this above area cannot be considered sufficient, mainly due to the lack of integrated legislation necessary to provide adequate regulation

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<sup>150</sup> Ibidem.

<sup>151</sup> Shchyrska V., Konopelskyi V., Popovych Y., Bilianska N., Lepei O., cit.

of the complex legal relations associated with artificial reproduction<sup>152</sup> and, in particular, about surrogacy.

It is noteworthy that the terms “surrogate motherhood” and “surrogate mother” are not formally defined or consolidated in any legislative act in Ukraine<sup>153</sup>. No regulatory framework explicitly provides a definition for surrogacy.

The term “surrogate motherhood” first appeared in the 2008 Order of the Ministry of Health of Ukraine regarding assisted reproductive technologies<sup>154</sup>. Although Chapter 7 of this order addressed surrogacy as a method of infertility treatment, it did not establish a clear legal definition. However, this regulation was later repealed by a 2013 order, further contributing to the absence of a standardized legal framework<sup>155</sup>.

As a result, Ukraine lacks a comprehensive law defining surrogacy-related terms such as “surrogate motherhood,” “surrogate mother,” or “surrogacy agreement”, leaving the practice governed only by general references within the broader framework of assisted reproductive technologies. The term “surrogate mother” was first introduced in a Council of Europe report<sup>156</sup>, where it was defined as a woman who carries a child for another person and agrees before pregnancy to relinquish the child after birth. In contrast, the WHO uses the term “gestational carrier” notably omitting the word “mother”, a choice which has been interpreted as a relationship between genetic parents and the surrogate primarily contractual rather than maternal<sup>157</sup>.

Overall, it can be said that the Ukrainian legal system is much more flexible than in other countries, but even though surrogacy is experiencing a rapid diffusion in the country, the legislative system lacks clear definitions and regulations for surrogacy agreements, creating significant legal uncertainties.

Key issues such as what happens in case of refusing to accept the child by the intended parents, complications arise during pregnancy, or disputes emerging over contract

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<sup>152</sup> Svetlana M Sylkina<sup>1</sup>, Nurlaiym K Mynbatyrova<sup>2</sup>, Zhuldyz B Umbetbayeva<sup>1</sup>, Gulmira K Shulanbekova<sup>3</sup> and Dana U Baitukayeva, *Surrogacy: An international comparative analysis of the fundamental legislative principles of Ukraine*, *Medicine, Science and the Law* 0(0) 1–8, 2019, [sagepub.com/journals-permissions](https://sagepub.com/journals-permissions) DOI: 10.1177/0025802419884417.

<sup>153</sup> Oleg M. Reznik, Yuliia M. Yakushchenko, cit.

<sup>154</sup> Ibidem.

<sup>155</sup> Nadiia Horobets, Yuliia Yakushchenko, *Different Legal Approaches to the Regulation of Surrogacy in Ukraine and Baltic States* (*Journal of International Legal Communication*) 4(1), 55-64. JILC, 2022. <https://doi.org/10.32612/uw.27201643.2022.1.pp.55-64>.

<sup>156</sup> Oleg M. Reznik, Yuliia M. Yakushchenko, cit.

<sup>157</sup> Ibidem.

fulfilment remain unaddressed due to the absence of a standardized legal framework. Establishing clear legislation is crucial to defining the rights, responsibilities, and liabilities of all parties, ensuring legal compliance and preventing potential exploitation. Currently, no formal requirements exist regarding the legal recognition of surrogacy contracts in Ukraine. To resolve this, experts recommend that these agreements be written and officially registered, ensuring that all parties enter into them voluntarily and with full awareness of their obligations. Implementing a standardized legal framework for surrogacy agreements would offer greater protection to surrogate mothers, intended parents, and to the child, reducing risks and reinforcing ethical practices in surrogacy arrangements.

## **2.6 - Second model: altruistic SM in Belgium**

The second model took into consideration is the case of Belgium, which unlike Ukraine only allows the altruistic form and does not currently have a legal framework regulating the practice. For this reason, it can be said that the practice is less widespread and less practiced.

The responsibility for surrogacy lies with some hospitals and specialized clinics that independently decide the specific conditions of access and procedures, although only in proven medical situations. Furthermore, these centers share a common belief, namely that any commercial initiative, including the possible existence or interference of intermediary agencies, must be prohibited.

It is interesting to understand when the state does not act as guarantor, how is surrogacy carried out? And what happens to surrogate women?

### 2.6.1 Origins of surrogacy in Belgium

In Belgium, there are no specific law that regulate surrogate motherhood. It is the case in which the practice of surrogacy operates within a legal vacuum. In the country, it is allowed only the altruistic form of surrogacy<sup>158</sup>.

In 2004, the Belgian Advisory Committee on Bioethics affirmed unanimously that surrogacy was ethically acceptable<sup>159</sup>, even if still today there is no statute regulating the practice. Many bills have been introduced through the years, but none of them became law<sup>160</sup>. This shows how very complex and ethically challenging topic surrogacy is, which involves different points of view; it is not simple to obtain a unique consensus between the different political parties<sup>161</sup>.

The majority of European nations lack comprehensive legislation on surrogacy, that can adequately protect all parties involved. Also, there is no widespread consensus among European countries regarding surrogacy, which is generally viewed negatively by European institutions<sup>162</sup> and the commercial form is banned in European Union. Moreover, paragraph 82 of the European Parliament's resolution of 13 December 2016 on the situation of fundamental rights in the European Union in 2015 (2016/2009(INI)) condemns all forms of commercial surrogacy<sup>163</sup>.

For these reasons, European states try to manage surrogate motherhood following own interests and own (if they have any on the subject) according to each state's discretion, building a various scenario different for each country.

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<sup>158</sup> Brussels IVF. (2023, November 16). *Surrogacy - Brussels IVF*. <https://www.brusselsivf.be/en/treatment/draagmoederschap/>

<sup>159</sup> Liesbet Pluym and Guido Pennings, *Surrogate Motherhood in Belgium*, Handbook of gestational surrogacy: international clinical practice and policy Issues (Cambridge University Press 2016).

<sup>160</sup> Ibidem.

<sup>161</sup> Ibidem.

<sup>162</sup> Spanò, G., *Again on Surrogacy. The violation of Article 8 of the Convention: an analysis of the C. v. Italy judgment*. EUWONDER, 2023. <https://euwonder.jus.unipi.it/2023/09/07/again-on-surrogacy-the-violation-of-article-8-of-the-convention-an-analysis-of-the-c-v-italy-judgment/>

<sup>163</sup> *Texts adopted - Situation of fundamental rights in the European Union in 2015 - Tuesday, 13 December 2016*. (n.d.). © European Union, 2016 - Source: European Parliament. [https://www.europarl.europa.eu/doceo/document/TA-8-2016-0485\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2016-0485_EN.html)

In Belgium commercial surrogacy is currently prohibited under general Civil and Criminal law principles that forbid the “commercialization of the human body”<sup>164</sup>.

It is possible to practice surrogacy in specialized clinics and hospitals, and each of them has their own guidelines to regulate the whole process.

## 2.6.2 Legal aspects

In general, Belgium is regarded as an "open state" for assisted reproduction and surrogate motherhood in Europe, especially by those who travel from abroad, given its flexible legal framework<sup>165</sup>. However, on 6th of July of 2007 the current law established general conditions for access to ART techniques and the use of embryos and gametes but surrogacy is not addressed<sup>166</sup>. Since the several attempts to introduce a regulation did not produce any concrete results, ART has opened access to the public<sup>167</sup>.

The law defines the committed parent as "any person who has decided to become a parent through an assisted reproduction procedure, regardless of whether their own gametes or embryos are used"<sup>168</sup>; as a result, ART in Belgium are accessible to anyone, regardless of marital status. Moreover, it is not necessary for intended parents demonstrate the stability of their relationship to have access to the practice.

This legislative flexibility, or gap, allows a degree of flexibility also in the financial aspects of surrogacy (of course, those allowed by the law in the altruistic form of surrogacy, since the commercial form is prohibited). The parties involved in surrogacy agreements make private arrangements regarding financial responsibilities<sup>169</sup>.

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<sup>164</sup> Jehanne Sosson, *ART and Surrogacy in Belgium: No Borders for Access – Few Borders for Kinship*, Access to Assisted Reproductive Technologies, Berghahn Books, 2019, <https://doi.org/10.1515/9781789204322>.

<sup>165</sup> Ibidem.

<sup>166</sup> Brunet, Laurence, King, Derek, Davaki, Konstantina, McCandless, Julie, Marzo, Claire and Carruthers, Janeen, *Comparative study on the regime of surrogacy in the EU member states*. European Parliament, Brussels, Belgium, 2012.

<sup>167</sup> Jehanne Sosson, cit.

<sup>168</sup> Brunet, Laurence, King, Derek, Davaki, Konstantina, McCandless, Julie, Marzo, Claire and Carruthers, Janeen, cit.

<sup>169</sup> Ibidem.

In Belgium, specialized hospitals and clinics accepting surrogacy applications only allow altruistic and gestational surrogacy and assess requests on a case-by-case basis. In most cases, these facilities prefer that both parents share a genetic connection with the child. In case the future mother cannot provide the oocyte, we can resort to egg donation<sup>170</sup>. Three legal proposals explicitly prohibit any financial compensation for the surrogate mother<sup>171</sup>, though it is possible to cover expenses related to pregnancy and legally required medical examinations of surrogate mother by the committed parents.

### **2.6.3 Medical clinics and guidelines**

There is neither an institution dedicated to surrogacy nor an association that supervises the process as there is no specific law on the matter; it is the role of specialized hospitals in Belgium and medical clinics to offer surrogacy services.

Since the specific requirements for accessing assisted reproduction techniques are very few and allow for a wide range of users, it is the clinics that decide whether or not to accept requests for assisted reproduction and, in case of refusal, where they must provide medical reasons to justify their decision. Among their duties, they must verify that the access requirements for altruistic motherhood, i.e. the medical conditions of infertility of the woman or the couple, are proven by scientific and documented evidence.

In the country, the legal framework regulating surrogacy is based on two key principles: freedom and transparency<sup>172</sup>. No medical professional may be forced to perform a procedure that conflicts with their ethical beliefs. If the application is approved, prospective parents must be provided with detailed information and adequate counseling<sup>173</sup>. A contract is drawn up with the clinic that clearly outlines all the terms of the procedure<sup>174</sup>.

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<sup>170</sup> Ibidem.

<sup>171</sup> Ibidem.

<sup>172</sup> Jehanne Sosson, cit.

<sup>173</sup> Ibidem.

<sup>174</sup> Ibidem.

Moreover, Belgian law regulates the number of embryos that may be implanted, according to limitations and restrictions varying based on the age of the woman undergoing treatment<sup>175</sup>.

#### **2.6.4 The selection of the surrogate**

The current legislative framework does not impose any requirements to access surrogacy in Belgium, but intended parents must comply with the ART conditions established by the law of 6 April 2007, as they are an essential part of the surrogacy process.

Hospitals and clinics that allow surrogacy may have specific requirements for accepting an application, including the marital status of the parents, the status of the surrogate mother, the need to provide genetic material and the relationship between the surrogate mother and the parents<sup>176</sup>. This may be the case where a clinic may require that the surrogate mother be a relative or close friend of the intended parents, or that the surrogate mother must have already experienced at least one pregnancy<sup>177</sup>. Other requirements may involve the residency or nationality of the parties involved.

Access to ART is widely available, with no legal requirements regarding the duration or stability of a couple's relationship. The specialized medical team is responsible for providing the intended parents with accurate information and psychological support before and throughout the process. Furthermore, sexual orientation is not important for access to ART. Belgian law is very flexible on this point and does not impose any nationality or residency requirements to access ART, which is why a significant number of foreign applicants resort to surrogacy in Belgium.

The only legal restrictions on ART concern the age of women undergoing treatment: women must be 48 years old or younger at the time of embryo implantation<sup>178</sup>.

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<sup>175</sup> Ibidem.

<sup>176</sup> Ibidem.

<sup>177</sup> Ibidem.

<sup>178</sup> Ibidem.

Moreover, egg retrieval and embryo or gamete implantation for insemination are only available to women aged 46 or younger<sup>179</sup>.

It is curious to note that, instead, there are no age restrictions for sperm donation or for men participating in a parenting project.

### **2.6.5 Legal parenthood and intended parents**

When surrogacy is performed in Belgium and the surrogate gives birth in the country, she is automatically recognized as the child's legal mother according to the principle of law *mater semper certa est*; the rules determining the establishment of maternal parentage follow the traditional principle by establishing that the legal mother is the mother giving birth<sup>180</sup>.

The surrogate mother is legally recognized as the child's mother, regardless of any genetic connection, whereas the intended mother has no legal parental status, even if she is the child's biological mother. In order to transfer the child's parental rights, the intended mother must undergo an adoption process, which can be carried out through individual adoption if she is single or through joint adoption if she is a cohabiting (and the partner has legally recognized the child) or if she is married<sup>181</sup>. In order to establish his legal parenthood, the name of the intentional mother must be written on the birth certificate<sup>182</sup>. Belgium allows adoption by both single individuals and same-sex couples and does not require that adoptive parents be married, as cohabitation is sufficient. According to article 343 of the Civil Code, applicants for the adoption process may qualify if they have made a formal declaration of legal cohabitation or have lived together in a stable and loving relationship for at least three years before submitting the application for adoption.<sup>183</sup>

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<sup>179</sup> Ibidem.

<sup>180</sup> Brunet, Laurence, King, Derek, Davaki, Konstantina, McCandless, Julie, Marzo, Claire and Carruthers, Janeen, cit.

<sup>181</sup> Ibidem.

<sup>182</sup> Ibidem.

<sup>183</sup> Ibidem.

The intended father can legally acknowledge the child only with the surrogate mother's consent, provided the child is still a minor<sup>184</sup>. In case of the surrogate married, her husband is considered as the legal father of the child, in compliance to the rule relating to the presumption of paternity<sup>185</sup>. To establish legal parentage, the intended father must either initiate an adoption procedure or contest the paternity of the surrogate mother's husband to assert his own parental rights<sup>186</sup>.

If the surrogate mother is not married, the intended father can legally acknowledge the child always with her prior consent, allowing him to establish parentage without undergoing adoption.

In this case, the court attempts to mediate between the parties; if no agreement is reached between the intended parent and the surrogate mother, the court may reject the intended father's claim<sup>187</sup>, provided it is proven that he is not the biological father. The court may also deny paternity acknowledgment if the child is one year or older and if the recognition is deemed clearly against the child's best interests<sup>188</sup>.

However, if the surrogate mother refuses to consent to the recognition of the child or to the adoption process for the intended parents, the contract is considered void, and she cannot be compelled to relinquish parental rights.

### **2.6.6 Protection of surrogate women**

Legal uncertainties of Belgian law limit the spread of surrogacy practice, since there no well-structured market in the country. Furthermore, the possibility that the practice can be carried out between acquaintances and family members makes it less known and less widespread.

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<sup>184</sup> Ibidem.

<sup>185</sup> Ibidem.

<sup>186</sup> Ibidem.

<sup>187</sup> Ibidem.

<sup>188</sup> Ibidem.

Concerning the protection of surrogate mothers, there is both a good deal of medical protection and legal uncertainty resulting from the legislative gap. The protection of surrogates depends mainly on the management that clinics and hospitals have of surrogacy, and on the contracts, internal policies they choose to implement and which may differ from clinic to clinic, given the flexibility of the law.

Since the only form of surrogacy allowed is altruistic, there is no compensation for the service but only reimbursement for medical expenses incurred during pregnancy. Currently, Belgium also lacks a series of postnatal support measures and a regulatory framework regulating parental leave and long-term psychological support.

However, the lack of uniformity in the treatment of surrogate mothers according to the different provisions and access requirements may create situations of discrimination or limited access to the practice.

A plus for surrogate mothers in the Belgian model is (unlike Ukraine) the recognition of the legal motherhood of the child, according to the principle of *law mater semper certa est*, that is, that the mother who gives birth is the legal mother of the child. This condition implies the initiation of an adoption procedure by the intended parents to obtain parenthood over the born child. As a legal mother, the surrogate mother has great autonomy in deciding on adoption and is legally protected by law in case she changes her mind about keeping the child.

### **2.6.7 A short analysis between the Ukrainian and Belgian model**

The two models analyzed, the Ukrainian and the Belgian one, present substantial differences. In Belgium, surrogacy is not regulated by a specific law but some hospitals and specialized medical clinics are responsible for managing the practice, which establish their own criteria and conditions of access; generally, they require that one of the aspiring parents provides genetic material and that the surrogate mother has no genetic ties to the child (therefore only gestational surrogacy).

In most cases, the clinics offer medical and psychological evaluations of the surrogate mother, of her living conditions and ensure that she is in good health. From the surrogate

mother's point of view, this system guarantees her greater protection, since at birth she is directly recognized as the legal mother of the child at birth according to the principle of *law mater semper certa est*, which guarantees her greater autonomy and protects her from conditions of exploitation.

The consent of the surrogate mother as well as the legal mother of the child is necessary for the transfer of parental rights to the commissioning parents. This system is to the disadvantage of the intended parents, who must undertake an adoption process to obtain legal parenthood of the child.

The ban on commercial surrogacy in Belgium limits the availability of surrogate mothers, since there is no financial compensation, other than the reimbursement of medical expenses. This makes the practice less known and less widespread.

### **2.6.8 An ideal model?**

Drawing on the advantages and shortcomings of the Belgian and Ukrainian models, a well-structured system to protect the rights of surrogates should first of all include a clear and efficient legislative landscape, transparent in its regulations and capable of protecting all parties involved in the practice of surrogacy, so as to limit as much as possible the emergence of conditions that are harmful to all parties to the contract.

The ideal system should include a meticulous selection process for both the surrogate mother and the intended parents, carrying out a thorough investigation of their social and economic circumstances. This is essential to ensure that all parties enter into the agreement with full awareness, full free will and a clear understanding of their rights and responsibilities.

In particular, for the surrogate mother, the selection process should involve thorough medical and psychological assessments to ensure that she is aware of all the psychophysical implications of surrogacy and should be managed by a specialized public authority responsible for establishing clear and fair eligibility criteria.

There should be the possibility to withdraw consent to the transfer of parental rights within a specific period of time after the birth to avoid situations where the surrogate

mother may feel forced to give up the child against her will. In order to best protect the commissioning parents as well, the transfer of parental legality could be established as definitive and safe in a certain period after the birth of the child. In this way, both parties would have more certainty of legal support.

By establishing measures in a structured and fair system, cases of ethical deprivation, abuse, coercion and exploitation can be prevented and limited to the maximum, as the purpose of the ideal system must have in mind the objective of protecting all parties involved and ensuring that surrogacy remains a responsible and well-regulated reproductive option.

Through regulation, in fact, all parties involved would enjoy benefits and greater protection of their person, not only the surrogate mothers and intended parents, but also future unborn children. In fact, the objective would be to provide the child with a healthy environment and protect him according to what is for his best interest.

From the point of view of remuneration, minimum and maximum standards should be established based on the different conditions of the assisted reproduction procedure, which also varies based on the degree of risk that the parties involved may incur through the practice. The conditions of compensation must be fair and regulated for the surrogate mother, who, if in a precarious financial situation, should have access to extra compensation to best guarantee the gestation (obviously, under verification and monitoring of the financial conditions to verify their veracity). The compensation should be determined by a public authority to prevent private negotiations that could create disparities or unfair treatment.

The health of the surrogate mother should also be carefully monitored before, during pregnancy and the post-partum period, with guaranteed access to continuous medical and psychological support. For the intended parents, legal certainty should be provided by simplifying the long bureaucratic procedures for obtaining parental rights.

A public regulatory body should also be dedicated to oversee and monitor the entire process, which is responsible for the application of the eligibility requirements for both surrogate mothers and intended parents, ensuring transparency, fairness and adherence to ethical standards.

In this way, the rights and well-being of surrogate mothers would be protected through efficient psychological and economic support, but also the intended parents would have

their own legal certainty on the acquisition of parental rights, avoiding long bureaucratic procedures. It would also be necessary to establish a regulation in the case in which the intended parents are a foreign couple from abroad, in order to avoid legal and juridical limbo in situations of martial law within the nation.

In Ukraine, however, there is a legislative system that regulates ART and their access through specific requirements and in the country commercial surrogacy is legally practicable. The requirements allow access to heterosexual couples who are married with a regular certificate and who have had infertility problems that prevent procreation. The altruistic form of surrogacy is only allowed in the gestational model through in vitro fertilization, in which the surrogate mother has no genetic ties to the child.

The system of parental legality guarantees the intended parents immediate recognition of their parenthood upon the birth of the child. From the point of view of the protection of the surrogate mother, however, she does not enjoy parental rights over the child and cannot revoke her consent, not even if she changes her mind about the custody of the child. This system makes her more vulnerable than the Belgian one, where the consent of the surrogate mother is an essential part of proceeding.

The compensation provided by the possibility of practicing commercial surrogacy in Ukraine is a factor that pushes many women to become surrogates. Here too, the legislative system should thoroughly monitor the starting economic condition of potential surrogates in order to avoid situations of exploitation.

Ukraine currently does not have a clear and efficient law that explains in detail the terms relating to surrogacy, leaving the practice regulated only by general references within the regulatory framework of ART.

The comparison between these two models therefore highlights a fundamental difference: Belgium, despite an incomplete legislative framework, favors the protection of the surrogate mother more and leaves greater autonomy to hospitals and specialized clinics, while Ukraine guarantees greater legal security to intended parents, but with fewer protections for women who carry the pregnancy to term.

# Chapter 3

## Feminist debate today

### Introduction

It is no mystery that surrogacy and reproductive technologies have transformed the feminist debate on reproduction and emancipation. Traditionally, the narrative of women's emancipation has focused on redefining roles and creating new spaces for women, challenging the division between public and private spheres imposed by patriarchy. In this scheme, men have historically been associated with the public sphere (politics, work, economy, culture), while women have been relegated to the private sphere (home, family, childcare). This separation, the result of patriarchal structures that imposed and legitimized it as “natural” or “necessary” for the functioning of society, has long been the subject of feminist debate.

The advent of ART has seen feminists take two sharp positions: pro-surrogacy, which sees the practice as an opportunity for economic and bodily self-determination, and anti-surrogacy, which interprets it as an extension of the commodification of the female body. Within this chapter, the different views of today's feminism regarding the practice of surrogacy will be analyzed. It will move from European anti-surrogacy feminism to its connection to the neoliberal movement and the role feminism has played in the rise of capitalism and how women have been affected by it. The analysis will consider the redefinition of the concept of motherhood and gender roles and the model of gestational communism hypothesized by feminist Sophie Lewis. Finally, the relationship between surrogacy, reproductive rights and reproductive tourism will be discussed, with a mention of the Indian situation.

### 3.1 Antisurrogacy feminism

Antisurrogacy feminism in the 1970s and 1980s as an offshoot of radical feminism, in response to the commercialization of the female body and the ever-increasing spread of surrogacy.

One of the first fundamental texts in this perspective is *Of Woman Born: Woman as experience and institutions* (1976) written by Adrienne Rich, which analyzes motherhood as an ambivalent experience and denounces the forms of patriarchal oppression linked to the control of reproduction. In the same years, radical feminists such as Andrea Dworkin and Catharine MacKinnon began to develop a critique of the commodification of the female body, including surrogacy in the broader discourse on the exploitation of women. In 1985, philosopher Gena Corea published *The Mother Machine*, a key work that denounces assisted reproduction as an industry that exploits women's bodies and threatens their self-determination<sup>189</sup>. Corea and other radical feminists see surrogacy as a form of exploitation that reduces women to a means of procreation, reinforcing patriarchal control over motherhood.

Examples of today's anti-surrogacy groups:

- In France, in 2013, CORP (Collective for the Respect of the Person) was born, an anti-surrogacy group that continues its fight against gestational surrogacy, accused of depriving women and children of their dignity<sup>190</sup>. Its goal is to persuade countries within the European Union to stand against surrogacy because it is considered a vile tool that commodifies the bodies of women and children and to create an international document that abolishes in a binding manner gestational surrogacy in any form, whether commercial or altruistic.

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<sup>189</sup> Corea Gena, *Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs*, the Women's Press Ltd, 1988.

<sup>190</sup> Daniela Bandelli, cit.

- In Italy, an anti-surrogacy group was founded in 2011 to speak out against sexism within institutions and politics, ranking first in the campaign against “femicide.” In 2013, this group branched out and formed SNOQ-free, which fights for the abolition of surrogacy within a framework of reflection on the link of women's freedom and motherhood.

At the Rome Conference, the group called on the United Nations institutions responsible for compliance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on Human Rights (ECHR) and the Conventions on the Rights of the Child (CRC) to abolish surrogacy.

However, the Rome document mentions the following international conventions in conflict with surrogacy: the Hague Convention on Intercountry Adoption, the Charter of Fundamental Rights of the European Union, the Additional Protocol to the United Nations Convention against Organized Crime, and the Council of Europe Conventions on Adoption, Combating Trafficking in Human Beings, and Biomedicine<sup>191</sup>.

### **3.2 FINRRAGE and the language of abolitionist rhetoric**

FINRRAGE was born between the 80s and 90s as an active international network of women, present in 37 countries on different continents and composed of academics with PhDs, whose aim was to produce and disseminate knowledge. It mainly focuses its activity on the criticism of ARTs such as surrogacy and in vitro fertilization. The five founding members, Janice Raymond, Robyn Rowland, Jalna Hanmer, Robyn Rowland, Gena Corea and Renate Klein, women scholars of Euro-American origin, founded the group in 1984 in Groningen initially with the name of FINRRET (Feminist International

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<sup>191</sup> Ibidem.

Network on New Reproductive Technologies) taking a stand against reproductive technology.

In their criticism, ART in general were accused of being instruments of commodification of the female body, considered an attack on women's freedom. In particular, the feminist sociologist and founder Renate Klein (and promoter of the Stop Surrogacy Now movement, 1985) argued that the medicalization of reproduction was for her both an invasion of the female body, and a way to take away women's control over their reproductive capacity, a distinctive trait of the female gender. The loss of this privilege would have led to social subordination, a concept encapsulated in the expression "death of the feminine".

In her latest book *Surrogacy: A human rights violation* (2017), Klein argues that any attempt to regulate the practice fails to protect women. No law can make surrogacy ethical or "fair" because the practice involves a forced and planned separation of the child from the mother (for Klein, the one who carries her in her womb). Gestational surrogacy also implies a form of reproductive slavery, the result of the intertwining of the patriarchal and neoliberal mentality and extends the concept of work to any human activity<sup>192</sup>. The choice to become a surrogate for Klein is never a choice, but driven by economic necessity; this vision ignores the possibility that there are surrogates who consciously choose to participate, and that their choice is based not only on economic necessity, but also on personal or solidarity motivations. Janice Raymond, one of the most influential leaders, considered surrogacy to be on a par with modern slavery and prostitution, a practice that should be absolutely prohibited because not even regulation would in any way prevent the exploitation of women. For contemporary activists like Sophie Lewis, this comparison is problematic because, although it is undoubtedly true that MS is inserted into a capitalist system that very often harms the most fragile women, the comparison does not take into account the difference between coercion and choice<sup>193</sup>. Slavery is in fact characterized by the total absence of freedom; many surrogates, on the other hand, consciously arbitrarily to become such, although it is not excluded that it often happens for economic reasons. Secondly, the comparison excludes the possibility that an ethical version of this practice can be built, through the creation of cooperative or state models of surrogacy, which are

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<sup>192</sup> Bandelli, Daniela, cit.

<sup>193</sup> Sophie Lewis, *Defending Intimacy against What? Limits of Antisurrogacy Feminisms*, The University of Chicago press, Volume 43, Number 1, 2017.

above all regulated. This ignores the economic and classist aspect at the base of the issue: surrogacy is at the mercy of global inequalities, where the poorest women become surrogates for the richest. By oversimplifying the reality of global surrogacy, abolitionist feminist movements do not consider the economic and social context in which it occurs. The radical language used by the group was full of expressions such as "war against women" in reference to biotechnology. It was extremely emotional and propagandistic, with terms such as "pimping", "womb trafficking", "reproductive slavery", "incubator women" or even "rented wombs" to describe surrogacy. It was proposed to use the expression "women used in surrogacy systems" to definitively replace the term "surrogate", eliminating any recognition of the subjectivity of surrogates. Expressions such as "exploited biological mothers" "bodies rented for reproduction", have a more evocative meaning of morality, eliminate any recognition of the surrogate as an autonomous and conscious subject and suppress the voice of the surrogates themselves. This type of rhetoric ignored the experiences and voices of the surrogates, whose testimony, especially those who said they had found in surrogacy an autonomous choice, was questioned and accused of having been manipulated by the patriarchal capitalist system (although the group was never considered anti-capitalist). In a clear position to this, other feminists of the 20th century, such as Shulamith Firestone, who saw in technology an opportunity for women's emancipation.

Within the group, however, there was no lack of tensions and ideological divergences. Members such as Patricia Spallone and Deborah Steinberg were against the dominant approach, emphasizing that reproduction should be discussed not only as a tool of technological control, but also as social stratification and neocolonialism, in a vision in which the clear division between "valuable" women in industrialized countries (who could afford to have children), and women in exploited countries, who were denied this possibility, was a matter of great relevance. Other voices within the movement argued that the problem was not the technology itself, but the class and racial inequalities that regulated access to reproduction.

In the 1990s, many exponents distanced themselves from the group and from the radical abolitionist position, criticizing the group for not being truly "at the forefront" in the fight for women's rights and without truly representing the diversity of their experiences, especially those of the most marginalized women. Furthermore, their technophobic vision

was heavily criticized as unrealistic and counterproductive also from a political point of view.

FINRRAGE's activity managed to influence the international debate on ART, opposing large corporations and contributing to the regulation of practices, but its rigid line of thought led to its isolation, both within the feminist movement and in the broader political debate. Rather, FINRRAGE was seen as an ideological movement that spoke for women without truly representing the diversity and complexity of their experiences, especially those of the most marginalized women. Over the years, FINRRAGE's legacy has often been questioned, with many scholars criticizing its apocalyptic rhetoric and failure to formulate effective political strategies. Despite this, a small group in Australia continued to publish a newsletter until 2000, with content focused on critiquing pornography and abortion.

### **3.3 Redefining the concept of Motherhood**

If for anti-surrogacy feminists' pregnancy is the symbol of a natural and "sacred" function of women, almost a moral duty that reflects the biological and indissoluble bond with the child, for others it is, instead, an element that subordinates them to the system, no longer a biological reality but rather an ideological construct created by men. Western society has built an idea of motherhood based on concepts of nature, sacrifice and unconditional love, which trap women in this role and isolate mothers within the nuclear family, hiding the exploitation of care work in a vision in which patriarchy, capitalism and private property become the masters of women's bodies.

Historically, women have long been excluded from decisions about their bodies, through practices such as the ban on abortion and the criminalization of contraception. Some current pronatalist policies push women to reproduce in the name of "national interest". Surrogacy is attacked because it challenges the tradition of motherhood, because if a woman can carry a pregnancy for someone else, the biological bond between mother and child is called into question and loses its sacred and indissoluble element. This

undermines the idea that motherhood must necessarily be an act of sacrifice and gift, paving the way for more fluid and collective conceptions of parenthood<sup>194</sup>.

Surrogacy represents a radical change in the very concept of motherhood, because it has historically been seen as an inseparable experience, and today it is fragmented into different distinct phases, including egg donation, gestation, birth and parenthood. These elements today, thanks to ART, can be assigned to different subjects in which the process does not represent a simple evolution, but a true redefinition of the meaning of being a mother<sup>195</sup>.

### **3.4 “Gestational communism” of Sophie Lewis: a possible solution?**

The position of feminist Sophie Lewis is clearly distinct from other reformist perspectives because it does not limit itself to asking for fairer treatment for surrogates, but aims at a radical transformation of the very concept of pregnancy and reproduction.

Her proposal is to completely de-commodify gestation, imagining an alternative model that she calls "gestational communism", making surrogacy a non-capitalist and collective process. In this model, gestation and childcare would no longer be delegated to an economic contract between individuals, but would become a shared responsibility of a network of people who take care of the pregnant woman and the child in a reciprocal way. The concept of "gestational communism" represents a radical vision of reproduction and care. It imagines a world in which pregnancy is no longer an individual and commodified activity, but a collective and mutualistic process. In this conception, motherhood does not necessarily have to be linked to biology and family; instead, there should be a conception of reproduction based on cooperation and shared responsibility, thus recognizing it as a social practice to be transformed and improved, making it more equitable and accessible to all, outside the logic of the market and exploitation.

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<sup>194</sup>Sophie Lewis, *Full surrogacy now: Feminism Against Family*, Verso, London 2019.

<sup>195</sup> Consuelo Corradi, *Motherhood and the contradictions of feminism: Appraising claims towards emancipation in the perspective of surrogacy*, *Current Sociology Monograph* 2021, Vol. 69(2) 158–175.

Since in the capitalist system pregnancy is treated as an unrecognized and unpaid job, often imposed on women as part of their biological and social identity, it is reduced to a private duty of the biological mother; the same current forms of surrogacy transform it into a work activity regulated by the market. Both forms, according to the author, keep pregnancy within a logic of ownership and control that limits women's freedom and reinforces economic and social inequalities. Gestational communism, on the other hand, proposes to de-commodify pregnancy and to overcome the traditional family as the fundamental unit of society. Gestational communism and childcare must be shared practices between multiple people, outside the logic of possession and exclusive responsibility of the biological mother. This model aims to create new forms of queer and non-hierarchical kinship, in which care is no longer delegated exclusively to the mother and father, but becomes a collective commitment based on mutual solidarity. Gestational communism would thus become a social and political activity, in which reproduction is no longer tied to the market and patriarchal institutions, but becomes a shared experience freed from economic and state control. The idea of gestational communism is not limited to a critique of commercial surrogacy, but extends the discussion to a comprehensive redefinition of the way in which society conceives reproduction and motherhood. Indeed, banning surrogacy without transforming the entire reproductive system means for Lewis maintaining the status quo, in which women are forced to manage reproduction individually and under the control of patriarchal structures. Regulating the practice, however, does not eliminate the fundamental problem at its root, that is, the transformation of pregnancy into paid work within a capitalist system. While some pro-surrogacy feminisms suggest improving the conditions of surrogates through fair contracts, legal protections and economic guarantees, she argues that in addition to being inefficient, these conditions would contribute to normalizing and consolidating the exploitation of gestation as work.

### 3.5 Surrogacy and neoliberal feminism

The neoliberal approach that presents surrogate motherhood as an individual choice is still highly criticized by some contemporary feminists. As analyzed in the previous chapters, in the 80s and 90s the most supported argument by anti-surrogacy critics was that this practice was one of the most degrading forms of exploitation of women. Over the years, this narrative has evolved; today, surrogacy is also described as an opportunity that expands women's freedom<sup>196</sup>, allowing them to work in the reproductive sector and manage their fertility as they see fit.

This transformation and change in ideology have occurred thanks to the rise of neoliberal feminism, a movement that, on the one hand, is seen as positive for promoting women's economic independence, but on the other hand, is criticized for ignoring systemic inequalities and fueling social inequalities<sup>197</sup>.

One of the most important texts on the relationship between neoliberalism and feminism is Nancy Fraser's essay *Feminism, Capitalism and the Cunning of History* (2009). In this essay she argues that, although feminism was born as a radical critique of patriarchal oppression, some of its demands have become part of neoliberalism over time, so that the tools of collective emancipation were transformed into functional mechanisms for contemporary capitalism<sup>198</sup>.

In the 1970s and 1980s, feminism criticized women's economic dependence on the traditional family model and the patriarchal welfare state. The period was marked by a strong struggle for women's economic independence; women fought to try to overcome traditional family models that isolated them solely to the private sphere. Feminism was essential in the fight for the recognition of the importance of women's contribution outside the traditional domestic context. Years later, however, many of these demands were adapted by neoliberalism to justify economic policies that have, in fact, increased job insecurity. It is with liberal feminism that the neoliberal logic is embraced, focusing on representation in political and corporate elites rather than on the material conditions of the most vulnerable women. On the one hand, neoliberalism has helped promote the idea

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<sup>196</sup> Alexandra Holmstrom-Smith: *Free Market Feminism: Re-Reconsidering Surrogacy*, University Of Pennsylvania, Journal of Law and Social Change, Volume 24, Number 3.

<sup>197</sup> Lewis, *Full Surrogacy Now*, cit.

<sup>198</sup> Nancy Fraser *"Feminism, Capitalism and the Cunning of History"*, 2012. ffhalshs-00725055f

of women's independence as a positive value, but at the same time it has transformed feminism's struggle for economic emancipation into an individualist narrative of success and "self-empowerment"<sup>199</sup>, without taking into account the starting conditions of each woman, favoring those who came from an already wealthy background and thus ending up disadvantaging those in more precarious conditions. Even welfare protections were gradually dismantled to favor a flexible labor market, in which women (especially those of the working classes) were often underpaid and without social security. This made feminism compatible with a selective and elitist system that does not break down the structures of oppression, which has bent the values of feminism to the market by promoting an apparent equality that in reality leaves intact the inequalities at the basis<sup>200</sup>. So how has surrogacy been affected?

Arlie Russell Hochschild in his recent works (and on the same wavelength as Fraser), explains that neoliberalism has pushed surrogacy into the logic of the market, transforming it into a work activity and service<sup>201</sup>. Neoliberalism has fueled an entrepreneurial conception of the self, in which even activities that are not directly profitable, such as motherhood, which were initially considered intimate and personal, can be outsourced<sup>202</sup> and transformed into work performances or services that can be sold on the market. Fraser speaks of this as the capitalism of care<sup>203</sup>, or how neoliberalism shifts care work (historically free and domestic) as a product into the global market. Surrogacy is part of this dynamic: rich women delegate reproduction to poor women, becoming an economic opportunity and exacerbating social inequalities.

Similarly, Hester Eisenstein in "*A Dangerous Liaison? Feminism and Corporate Globalization*" (2005) exposes how global capitalism has exploited women's struggle for economic independence to transform their work and bodies into resources to be monetized. In this vicious circle, women who become surrogate mothers often belong to disadvantaged social classes, especially in developing countries<sup>204</sup>; the idea of "free

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<sup>199</sup> Ibidem.

<sup>200</sup> Catherine Rottenberg. *The Rise of Neoliberal Feminism*, Cultural Studies, 28:3, 418-437, 2014. DOI: 10.1080/09502386.2013.857361

<sup>201</sup> Alexandra Holmstrom-Smith, *Free market feminism*, University Of Pennsylvania Journal Of Law And Social Change, Volume 24, Number 3, 2021.

<sup>202</sup> Hochschild, Arlie Russell. 2015. „The Surrogate’s Womb.“ Gender, rovné příležitosti, výzkum, Vol. 16, No. 2: 42–52, DOI: <http://dx.doi.org/10.13060/12130028.2015.16.2.219>

<sup>203</sup> Nancy Fraser, cit.

<sup>204</sup> Hester Eisenstein, *A Dangerous Liaison? Feminism and Corporate Globalization*, Science & Society ,Jul., 2005, Vol. 69, No. 3, The Deep Structure of the Present Moment (Jul., 2005), pp. 487-518..

choice" would actually hide economic constraints. It cannot be ruled out that many women are forced to work in exploitative conditions because they have no alternatives, like those who decide to become surrogates coming from poorer countries.

According to Holmstrom-Smith, commercial surrogacy is irreconcilable with an authentically feminist policy, as well as altruistic surrogacy, which in many countries is seen as an acceptable compromise: behind the rhetoric of altruism there is still a form of exploitation of women. Even if there is no direct payment, the dynamics of power and social pressure can make this "choice" equally constrained. In a system that continues to exploit women's work without guaranteeing them economic and social security, the concept of freedom of choice should be reconsidered in light of the real material conditions that determine the options available to those who decide to become a surrogate. The author therefore invites a more critical reflection on how capitalism shapes reproduction and what alternatives are needed to ensure true freedom for all women, regardless of their social class or ethnic background. Her proposal is a policy based on reproductive justice, a concept developed by black feminists and intersectional feminist theorists in the United States in the 1990s, to go beyond the simple defense of the right to choose and address the structural inequalities that affect reproductive freedom. In her idea, reproductive justice is not limited to defending the right to choose, but takes into account the material conditions in which choices are made. In the context of surrogacy, reproductive justice invites us to question who benefits from these practices and who suffers the consequences, highlighting the risk that the most vulnerable women are exploited in a globalized market of reproduction. In this sense, reproductive justice calls for policies that guarantee equity in access to reproduction and in the protection of the rights of the women involved. For example, ensuring adequate incomes, extended maternity leave, and access to free health care could reduce the economic need that drives many women to become surrogates. Only with a system that eliminates economic precariousness and gives women real alternatives could real freedom of choice be guaranteed.

### 3.6 Surrogacy and reproductive rights

Surrogacy is part of the broader debate on reproductive rights, raising complex issues of self-determination, access to reproductive technologies and social justice.

Reproductive rights, recognized internationally as part of human rights, include the ability for each individual to decide whether, when and how to have children. Although relatively new to international law, these rights play a very important role because they influence the policy-making process of each state on the issue of surrogate motherhood and how to manage it.

The concept of reproductive rights was first introduced in the outcome document of the Tehran Conference on Human Rights in 1968, which recognized the right to decide freely and responsibly on the number and spacing of children, as well as access to information, education and the means necessary to exercise this right. They were then defined by the Cairo Conference, the World Conference on Population in 1994. Participants stressed that family planning programs should not involve coercion of any kind; given the inefficiency of incentives and economic disincentives promoted by governments, public policies were asked to commit to meeting unmet needs for information and services, in such a way as to help couples and individuals to make their own reproductive choices, guaranteeing them the possibility of having children in an informed and autonomous way<sup>205</sup>.

Reproductive rights focus on women's ability to make the best choices for their lives, including the number of children they have, if any, and the spacing between their children's births<sup>206</sup>. This definition reflects the diversity of approaches among participating States and the persistent gap in the implementation of these rights. Over time, they have become increasingly recognized in international law, including access to contraception and education on family planning, which are now widely guaranteed in many countries. Some States, for example, offer contraceptives as part of public health services.

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<sup>205</sup> Kumar A., *Concept of surrogacy and Rights of women in the Global Era*. Legal Desire Media and Insights, 2016. <https://legaldesire.com/concept-of-surrogacy-and-rights-of-women-in-the-global-era/>

<sup>206</sup> <https://www.amnesty.org/en/what-we-do/sexual-and-reproductive-rights/>

Although SM was not explicitly addressed at the Cairo Conference, it could be argued that it implicitly supported the practice, because SM enables people who are unable to have children naturally to achieve their reproductive goals<sup>207</sup>.

On women's reproductive rights and the protection of pregnant women, Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>208</sup> states:

- the recognition of motherhood as a "social function". Insofar as CEDAW focuses on the health of the pregnant woman, it is not incompatible with gestational surrogacy but confirms the guarantees that, by protecting the health of the surrogate mother. However, if CEDAW focuses on motherhood as a "social function", it is difficult to reconcile it with commercial surrogacy and those forms of commercial surrogacy in which the intended parents and the surrogate mother remain strangers.
- Article 11.2 requires States to take measures to prevent discrimination based on marriage or motherhood and to guarantee the right to work.
- Article 12 requires States to ensure access to health services, including those related to family planning, as well as adequate care for women during pregnancy and the postnatal period. Article 14 reaffirms this right, focusing on women in rural areas.
- Article 16 women have the right to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

Women's sexual and reproductive health is closely linked to several fundamental human rights, including the right to life, health, privacy, education and non-discrimination. Both the Committee on Economic, Social and Cultural Rights (CESCR) and CEDAW have reaffirmed that women's right to health also includes their sexual and reproductive health.

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<sup>207</sup> Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, Maurice A. Deane School of Law at Hofstra University, 2011.

<sup>208</sup><https://www.pariopportunita.gov.it/it/politiche-e-attivita/attivita-internazionali-ed-europee/convenzione-per-leliminazione-di-tutte-le-forme-di-discriminazione-contro-le-donne-cedaw/>

Consequently, States have the duty to respect, protect and guarantee these rights, ensuring women's access to reproductive health care services, as well as to goods and facilities that are physically and economically accessible, free from discrimination and of adequate quality<sup>209</sup>.

The Beijing Platform for Action in section C Women health (96)<sup>210</sup> affirms that: “The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence”,

The Committee on Economic, Social and Cultural Rights (CESCR) states that State must respect and guarantee the right of sexual and reproductive health, which are involved in the right of health (Article 12 and General Recommendation n.22 - The Right to the Highest Attainable Standard of Health)<sup>211</sup> with the creation of affordable and accessible reproductive health services and recommends the abolition of laws, policies and practices that criminalize or hinder access to sexual and reproductive health services.

General Comment No. 14 of the CESCR establishes that the provision of maternal health services is a core obligation of States, which cannot be derogated under any circumstances, requiring the adoption of concrete and targeted measures to guarantee the right to health during pregnancy and childbirth.

At the international level, the Hague Conference on Private International Law, established in 1892 and currently composed of 91 members (one of which is European Union), is studying the legal issues related to transnational surrogate motherhood practice with the purpose of developing an international legal framework that could be guarantee protects the rights of all parties involved with a particular focus on the surrogate mothers and children.

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<sup>209</sup> <https://www.ohchr.org/en/women/sexual-and-reproductive-health-and-rights>

<sup>210</sup> *Fourth World Conference on Women, Beijing 1995*. (n.d.).

<https://www.un.org/womenwatch/daw/beijing/platform/health.htm>

<sup>211</sup> Ijrc. (2021, April 8). *CESCR issues guidance on right to sexual and reproductive health*. International Justice Resource Center. <https://ijrcenter.org/2016/03/16/the-cescr-addresses-the-right-to-sexual-and-reproductive-health/>

### 3.7 Surrogacy and reproductive tourism

Recent academic research focuses heavily on the relationship between the phenomenon of reproductive tourism and surrogacy, in an attempt to analyze how surrogacy clinics operate in a global context of inequality. Reproductive tourism is a phenomenon whereby couples and individuals travel abroad to access surrogacy services, fueled both by legal restrictions in their countries of origin and by the availability of cheaper and more accessible services in other nations. It is much discussed nowadays because it shows global inequalities in access to assisted reproduction, fueling the debate on the commodification of the body and the protection of rights, since the surrogate women involved are often from economically disadvantaged backgrounds. According to some ethnographic studies, surrogacy is part of a system of biocapitalism, where the capitalist economic system applies to human life in its biological, mental, social and affective aspects, and in which differences of class, gender and race play a crucial role<sup>212</sup>.

Cross-border reproduction was initially a little-known and little-spread phenomenon and was included in the definition of "medical tourism" (as defined by Bartha Knopper in 1991), which includes cross-border travel for any type of medical treatment<sup>213</sup>. As mentioned above, in the 1990s abolitionist feminists had already condemned this type of reproductive journey, but ART was relatively rudimentary and its commercial marketing was not yet widespread<sup>214</sup>, especially at a global level. Over time, the pace of globalization has significantly accelerated the evolution of assisted reproduction, to the point of becoming a transnational industry. As also argued by feminist critiques of neoliberalism, the phenomenon of reproductive tourism is, therefore, part of a broader process of globalization<sup>215</sup>.

The logic of reproductive tourism threatens to transform female reproductive capacity into an economic resource, fueling inequalities between rich and poor countries. In surrogacy, women from wealthier countries circumvent the legal restrictions and high costs of fertility treatments in their home states, turning instead to clinics located in more

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<sup>212</sup> Sophie Lewis, *Defending Intimacy against What? Limits of Antisurrogacy Feminisms*, cit.

<sup>213</sup> Anne Donchin, *Reproductive tourism and the quest for global gender justice*, *Bioethics* ISSN 0269-9702 (print); 1467-8519 (online), Volume 24 Number 7 2010 pp 323–332

<sup>214</sup> *Ibidem*.

<sup>215</sup> *Ibidem*.

economically fragile regions<sup>216</sup>. It is not excluded that many surrogate women who are recruited to carry a pregnancy on behalf of foreign couples find themselves in conditions of strong social and economic vulnerability. According to some scholars, reproductive tourism has a link with surrogate motherhood based on a model of systemic exploitation, in which the possibility of becoming a mother for some women is made possible by the sacrifice of the body and health of others; this is called "adaptive preference"<sup>217</sup>, a term that explains how women in poverty accept situations of exploitation without recognizing them as such, as they have internalized the idea that what they choose is their best possible option because there are no other economically viable alternatives.

Women-to-be from rich countries have the power to negotiate the best conditions for their child, choosing the clinic, the surrogate mother and even the genetic characteristics of the unborn child<sup>218</sup>. Women who offer their wombs, on the other hand, often find themselves in a subordinate position, bound by contracts that regulate every aspect of their pregnancy, from the type of food allowed to the possibility of maintaining contact with the child after birth. In this perspective, some scholars have spoken of positive and negative reproductive rights<sup>219</sup>: the first concerns the commissioning couples (the right to a family and to have a child) and the second concerns the surrogates (not to be subjected to coercion or restrictions on their bodies). Surrogacy contracts often impose rigid conditions, limiting the personal freedom of surrogates during pregnancy, for example through dietary restrictions, medical obligations or restrictions on their travel.

Policies that favor fertility tourism contribute to the creation of a market in which women, encouraged by compensations that may seem modest but have a high economic value in their countries, make themselves available to sell their eggs<sup>220</sup>. The phenomenon is even more marked in communities where women suffer gender discrimination, receive a minimal share of family income and face the risk of violence on a daily basis<sup>221</sup>.

One of the most critical aspects of reproductive tourism concerns the regulation of health and safety conditions for surrogate mothers. In Western countries, surrogates can count

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<sup>216</sup> Ibidem.

<sup>217</sup> Vida Panitch, *Surrogate Tourism and Reproductive Rights*, Cambridge University press, Vol. 28, No. 2, SPECIAL ISSUE: Crossing Borders Special Issue (SPRING 2013), pp. 274-289.

<sup>218</sup> Ibidem.

<sup>219</sup> Anne Donchin, cit.

<sup>220</sup> Naomi Pfeffer, *Eggs-ploiting women: a critical feminist analysis of the different principles in transplant and fertility tourism*, Reproductive BioMedicine Online (2011) 23, 634– 641.

<sup>221</sup> Ibidem.

on a series of legal guarantees, medical and psychological support, and often also adequate information on the risks of the procedure. In developing countries, however, the system protects them much less. In some cases, surrogates are recruited by private clinics that host them in isolated facilities for the duration of the pregnancy, separated from their families and with limited possibilities to make decisions about their own bodies; after giving birth, health care often ends abruptly, leaving women to deal with any physical or psychological consequences on their own<sup>222</sup>.

Reproductive tourism, therefore, is not only the result of fragmented regulation at a global level, but it is also the symptom of a system that reproduces and amplifies gender and class inequalities. Women from poor countries become a resource for those from rich countries, whose right to motherhood is placed before the protection of health and the rights of surrogates. The lack of international regulation allows these dynamics to develop without effective control, exposing the most vulnerable women to the risk of practices that, while presenting themselves as opportunities, conceal deeply rooted forms of exploitation. Addressing the relationship between reproductive tourism and surrogacy requires a structural change that goes beyond the legislative sphere, also involving the social and economic spheres. The right to parenthood cannot be guaranteed by sacrificing the rights of other women, nor can it be left exclusively to the logic of the market. Without proper regulation, surrogacy risks becoming yet another mechanism of exploitation, reinforcing a system in which some women exercise a conscious choice, while others are forced to accept conditions imposed by a market that treats them as tools rather than individuals with rights of their own.

Following Iris Marion Young's model of "social connection", the responsibility for these structural injustices does not fall on a single actor, but must be shared by all those who participate in the system<sup>223</sup>: doctors, clinics, governments, pharmaceutical companies, intermediary agencies and the women themselves who turn to reproductive services abroad. Individual choices cannot be considered independent of the social and economic structures that influence them, making a collective approach necessary to address and mitigate the inequalities inherent in this phenomenon<sup>224</sup>.

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<sup>222</sup> Anne Donchin, cit.

<sup>223</sup> Ibidem.

<sup>224</sup> Ibidem.

Policies that promote fertility tourism contribute to the creation of a market in which women, encouraged by compensations that may seem modest but have a high economic value in their countries, make themselves available to sell their eggs<sup>225</sup>.

Fertility tourism has created a new contradiction: women without children can become mothers thanks to the sacrifice of other women who, driven by economic difficulties, sell their eggs. The recognition of women's work as a productive activity becomes a fundamental element for their emancipation<sup>226</sup>: selling eggs does not represent a decent source of income, but rather a survival strategy dictated by the lack of better opportunities. Women could free themselves from this condition if there were stable and adequately paid jobs for them, which ensure their economic and social autonomy<sup>227</sup>.

The lack of clear regulation has led to international controversy and scandals:

- The Baby Gammy case in Thailand in 2014 was a scandal of international importance that had a major impact on the debate in India.

The case involved Mr and Mrs Farnell, an Australian couple who had hired a Thai surrogate, Mrs Janbua, to give birth to twins.

One of the twins, Gammi, had Down syndrome at birth and was not accepted by the couple and left with the surrogate because, according to them, they had not been properly informed of the baby's condition during the surrogate's pregnancy. Internationally, the couple received a lot of criticism and accusations as they were accused of treating the baby as a commodity deprived of dignity, considered valuable based on its health. It was later discovered that Mr Farnell had a history of child molestation and had already served a sentence for child abuse. The case shed light on the ethics and eligibility requirements for international surrogacy and the need for stricter vetting of intended parents.

After the Baby Gammy scandal, Thailand has banned commercial surrogacy for foreigners since 2015 and has also influenced the legislation in India on

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<sup>225</sup> Naomi Pfeffer, cit.

<sup>226</sup> Ibidem.

<sup>227</sup> Ibidem.

the matter, which has adopted even more restrictive measures on transnational surrogacy.

- The Baby Manjhi case was a landmark case for the regulation of surrogacy in India, as it exposed all the inefficiencies and loopholes of the Indian legal system. The case, which took place in 2008, was about a couple of Japanese intending parents who entered into a gestational surrogacy contract with an Indian surrogate mother and shortly before the birth of the child, they had to go through a divorce, starting a complex legal situation. The Japanese intended mother refused to recognize the child, leaving the legal responsibility to the intended father. However, the child was not entitled to direct acquisition of Japanese citizenship as the state does not recognize the practice of surrogacy. India, in 2008, did not allow individuals to access the adoption process. The child was thus stuck in legal limbo for weeks, without a nationality and without an officially recognized parent. The situation was resolved only with the intervention of the Indian government, which granted a special visa to the paternal grandmother so that she could take the child to Japan. This case caused such a stir internationally that it was clear that there was a need for more structured and protective regulation of the practice. India has since introduced many strict restrictions on the practice within the country.

### **3.8 The Indian outcome after scandals**

India has long been a major destination for commercial surrogacy internationally. Low costs and a lax regulatory framework are the reasons why the country has become a hub for reproductive tourism, attracting couples from all over the world looking for surrogate mothers<sup>228</sup>. Until 2015, the practice was regulated by medical guidelines, which allowed

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<sup>228</sup> Raywat Deonandan (2015) *Recent trends in reproductive tourism and international surrogacy: ethical considerations and challenges for policy*, Risk Management and Healthcare Policy, , 111-119, DOI: 10.2147/RMHP.S63862

the growth of an industry that generated hundreds of millions of dollars a year, with the industry worth between \$500 million and \$2.3 billion.<sup>229</sup>.

Surrogates in India often came from economically disadvantaged backgrounds and saw surrogate motherhood as an opportunity to improve their financial situation. The system raised numerous ethical questions, as many of these women accepted the role of surrogate more out of economic necessity than conscious choice. There were also issues with the lack of adequate protection for their health and well-being, with some clinics imposing questionable practices, such as separating surrogates from their families during pregnancy and pressuring them to undergo unnecessary caesarean sections to facilitate birth management.

The Indian government introduced a bill to amend the previous Surrogacy Act in October 2015, with the aim of banning foreign nationals from using surrogacy services in the country and stemming the massive influx of “fertility tourists”. The bill was passed on 21 November 2016 as the Surrogacy (Regulation) Bill, which has radically transformed the industry. The new law banned commercial surrogacy for foreigners and imposed severe restrictions, allowing only heterosexual Indian couples, with infertility problems, married for at least five years and residents are allowed to access altruistic surrogacy contracts. Previously, surrogate mothers could only be close relatives of the clients and could not receive compensation, other than for medical expenses. The aim of the law was to protect women from exploitation and prevent the country from becoming a “maternity market”. While the regulation has closed the doors to reproductive tourism, it has also raised new issues. Many fertility clinics have had to close or move their activities to more permissive countries such as Georgia. At the same time, the ban on financial compensation for surrogates has raised the risk of a black market in surrogacy, where the practice takes place in even more precarious and less safe conditions.

The evolution of the law in India reflects the difficult balance between protecting the rights of surrogate women and the desire to regulate an industry that, without adequate safeguards, risks turning into a form of exploitation. Even as the country has closed the doors to commercial surrogacy, the debate remains on how to ensure a fair system that

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<sup>229</sup> Raywat Deonandan, Samantha Green, Amanda van Beinum, *Ethical concerns for maternal surrogacy and reproductive tourism*, *Journal of Medical Ethics*, Vol. 38, No. 12 (December 2012), pp. 742-745.

protects both the women involved and the couples seeking to have a child through this practice.

## CONCLUSIONS

From the American feminist debate of the late twentieth century to today, many things have changed. Many, however, have remained the same. Even today, the two largest schools of thought regarding the topic of surrogacy are divided into those who support the practice as a tool for female emancipation, autonomy and self-determination, also an opportunity for infertile couples to realize their dream of having a child, and, on the other hand, critics raised ethical and social concerns, highlighting the risk of exploitation of economically vulnerable women, who could be forced to choose surrogacy out of necessity rather than real will. In the 1980s and 1990s, surrogate motherhood took place in a complex social and cultural context, in which America was experimenting with the formation of new family models, different from the traditional sacred family that had always characterized the American family. Industrialization led more and more women to postpone motherhood and dedicate themselves to building a career. The fear of a decline in new births and the loss of fertility with advancing age created even more tension and complexity in the United States, pushing many couples to resort to reproductive technologies to conceive a child and start a family. In this scenario full of doubts and uncertainties, the practice of surrogate motherhood took hold, which, after the custody scandal in the Baby M case, received enormous media coverage and created fears and contradictions in public opinion. Feminism also reflects the context of its time and, although there are various points of view, it is mainly divided into two completely opposite fronts: those who see surrogacy as a unique opportunity to go beyond the boundaries of the body and have a child, and those who demonize it by painting it as a dehumanizing practice that commodifies women's bodies (especially the most vulnerable and marginalized), making them slaves to the patriarchal capitalist system and creating a market of children, where they are sold as commodities.

Feminists such as Andrews, Lieber and Overall preferred a much more liberal approach to the matter, as they saw in surrogacy and in the legality of surrogacy contracts a powerful tool capable of freeing women from the role of mother and making them economically autonomous and free to make choices about their own bodies.

Other feminists such as Dworkin, Gena Corea, Callahan and Roberts were instead against the practice of surrogate motherhood because it leads to the exploitation and

commodification of women, in a liberal context where the systemic inequalities at the base of society further favor the gap between the privileged and the non-privileged.

Among the elements that have remained among the most important and most debated is the protection of surrogate women. Marginalized women, coming from contexts of exploitation, violence and economic precariousness are more likely to be manipulated and forced to choose to be surrogates. These women see the economic compensation of surrogacy as a solution to their condition.

Drawing on the advantages and shortcomings of the Belgian and Ukrainian models, a well-structured system to protect the rights of surrogates should first of all include a clear and efficient legislative landscape, transparent in its regulations and capable of protecting all parties involved in the practice of surrogacy, so as to limit as much as possible the emergence of conditions that are harmful to all parties to the contract.

In Ukraine, however, there is a legislative system that regulates ART and their access through specific requirements and in the country commercial surrogacy is legally practicable. The requirements allow access to heterosexual couples who are married with a regular certificate and who have had infertility problems that prevent procreation. The altruistic form of surrogacy is only allowed in the gestational model through in vitro fertilization, in which the surrogate mother has no genetic ties to the child.

The system of parental legality guarantees the intended parents immediate recognition of their parenthood upon the birth of the child. From the point of view of the protection of the surrogate mother, however, she does not enjoy parental rights over the child and cannot revoke her consent, not even if she changes her mind about the custody of the child. This system makes her more vulnerable than the Belgian one, where the consent of the surrogate mother is an essential part of proceeding.

The compensation provided by the possibility of practicing commercial surrogacy in Ukraine is a factor that pushes many women to become surrogates. Here too, the legislative system should thoroughly monitor the starting economic condition of potential surrogates in order to avoid situations of exploitation.

Ukraine currently does not have a clear and efficient law that explains in detail the terms relating to surrogacy, leaving the practice regulated only by general references within the regulatory framework of ART.

The comparison between these two models therefore highlights a fundamental difference: Belgium, despite an incomplete legislative framework, favors the protection of the surrogate mother more and leaves greater autonomy to hospitals and specialized clinics, while Ukraine guarantees greater legal security to intended parents, but with fewer protections for women who carry the pregnancy to term.

The ideal system should include a meticulous selection process for both the surrogate mother and the intended parents, carrying out a thorough investigation of their social and economic circumstances. This is essential to ensure that all parties enter into the agreement with full awareness, full free will and a clear understanding of their rights and responsibilities.

In particular, for the surrogate mother, the selection process should involve thorough medical and psychological assessments to ensure that she is aware of all the psychophysical implications of surrogacy and should be managed by a specialized public authority responsible for establishing clear and fair eligibility criteria.

There should be the possibility to withdraw consent to the transfer of parental rights within a specific period of time after birth to avoid situations where the surrogate mother may feel forced to give up the child against her will. In order to best protect the commissioning parents as well, the transfer of parental legality could be established as definitive and safe in a certain period after the birth of the child. In this way, both parties would have more certainty of legal support.

By establishing measures in a structured and fair system, cases of ethical deprivation, abuse, coercion and exploitation can be prevented and limited to the maximum, as the purpose of the ideal system must have in mind the objective of protecting all parties involved and ensuring that surrogacy remains a responsible and well-regulated reproductive option.

Through regulation, in fact, all parties involved would enjoy benefits and greater protection of their person, not only the surrogate mothers and intended parents, but also future unborn children. In fact, the objective would be to provide the child with a healthy environment and protect him according to what is for his best interest.

From the point of view of remuneration, minimum and maximum standards should be established based on the different conditions of the assisted reproduction procedure, which also varies based on the degree of risk that the parties involved may incur through

the practice. The conditions of compensation must be fair and regulated for the surrogate mother, who, if in a precarious financial situation, should have access to extra compensation to best guarantee the gestation (obviously, under verification and monitoring of the financial conditions to verify their veracity). The compensation should be determined by a public authority to prevent private negotiations that could create disparities or unfair treatment.

The health of the surrogate mother should also be carefully monitored before, during pregnancy and the post-partum period, with guaranteed access to continuous medical and psychological support. For the intended parents, legal certainty should be provided by simplifying the long bureaucratic procedures for obtaining parental rights.

A public regulatory body should also be dedicated to oversee and monitor the entire process, which is responsible for the application of the eligibility requirements for both surrogate mothers and intended parents, ensuring transparency, fairness and adherence to ethical standards.

In this way, the rights and well-being of surrogate mothers would be protected through efficient psychological and economic support, but also the intended parents would have their own legal certainty on the acquisition of parental rights, avoiding long bureaucratic procedures. It would also be necessary to establish a regulation in the case in which the intended parents are a foreign couple from abroad, in order to avoid legal and juridical limbo in situations of martial law within the nation.

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**ЗА ЖИЗНЬ!**