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The Motif of Sacrifice in Surrogacy

1. Ethical assessment of surrogacy – 2. Discussion in the Council of Europe in October 2016 – 3. Altruistic surrogacy or professionalisation?

Surrogacy is prohibited in most European countries, however, not in all. Under certain circumstances, it is allowed in the UK, Greece, Portugal, Belgium, and in the Netherlands. Ukraine is known for its very liberal legislation in this area and is thus an outlier in Europe. Globally, India undoubtedly stands out with 2 billion USD used for surrogacy in 2018¹. The prices for surrogacy vary between 6,000 USD in India to 50,000 USD in the United States². As in most bioethical questions, there is no consensus regarding the regulation of surrogacy on a global or European level. This issue is regulated differently in each state³. There is an over-arching trend towards greater liberalization and concurrently, regulation of the issue. Undoubtedly, the worst option is having no legal regulation.

The advocates of surrogacy consider it a superior form of solidarity between people and helping people in need. A surrogate mother sacrifices for a couple who

¹ Valeria Piersanti, Francesca Consalvo, Fabrizio Signore, Alessandro Del Rio, Simona Zaami. 2021. “Surrogacy and ‘Procreative Tourism’”. What Does the Future Hold from the Ethical and Legal Perspectives?” *Medicina* 57 (1): 47.

² Christine Schliesser. 2016. “Körperlichkeit und Kommerzialisierung. Zur theologisch-ethischen Problematik der Leihmutterchaft”. *Zeitschrift für medizinische Ethik* 62 (2): 112.

³ For a detailed presentation of the legislation by country, see Stefania Stefanelli. 2021. *Procreazione medicalmente assistita e maternità surrogata. Limiti nazionali e diritti fondamentali*. Milano: Giuffrè Francis Lefebvre, 133–150, and Piersanti et al. 2021. “Surrogacy and ‘Procreative Tourism’”. 47.

cannot conceive a baby naturally and gives birth to their biggest gift – their child. It is believed that a traditional sort of surrogacy was practised from very early in our history, as shown in Babylonian law. In the Bible, it is mentioned in several sections that in the case of infertility, a wife can offer her husband her servant to be impregnated instead⁴. The most famous description of such a situation is probably the biblical story of the infertile couple Abraham and Sarah. Sarah offers her servant Hagar to Abraham, so she could become a surrogate mother for their child, as children conceived in that manner were officially recognized as legitimate children of a married couple. Contemporary medicine enables gestational surrogacy where the couple's own gametes are obtained, in vitro fertilized and later implanted into the uterus of a surrogate mother who hands the child over to his/her genetic parents after birth. There are also other forms of surrogacy, e.g., where embryos are only partially created with genetic material from their intended parents; where both genetic parents differ from a child's later social parents; or where the genetic mother can also be the surrogate mother who will bear the child.

Considering this, a child can have three different mothers: a genetic, a surrogate and a social mother. In most countries, a woman who gives birth is still recognized as a legal mother of the child, although some countries (especially in the US) already changed that concept to the one where “the genetic mother inevitably prevails over the gestational mother as the natural parent of the child”⁵. This change was mostly done due to the legal battles that were a consequence of complicated relationships following the surrogacy process. It is probably not a coincidence that even the biblical story resulted in a fallout between Abraham, Sarah, and Hagar. Therefore, it is not surprising that the first lawsuits for legal rights for children through surrogacy, actually started just a few months after the first surrogate agreements were signed in America in the late 70s and early 80s. One of the most famous cases was *Johnson vs. Calvert* which ended in 1993 in California. In this case, the Calvert couple (Mark and Crispina) signed an agreement with their friend Anna Johnson. She agreed to carry an embryo created by their genetic material, as Crispina had her uterus removed and was unable to become the gestational mother of her own baby. They were also obliged to pay Anna 10,000 USD and insurance costs. However, the two sides faced an unexpected disagreement shortly after the embryo was successfully implanted and Anna was pregnant, as they learned that Anna had hidden information that she had suffered several stillbirths and miscarriages. After

⁴ Silke Schicktanz. 2007. “Why the way we consider the body matters. Reflections on four bioethical perspectives on the human body”. *Philosophy* 2 (1): 30.

⁵ K. Bagan-Kurluta. 2017. “Wombs for Rent, Outsourced Pregnancies, Baby Farms – Ethics and Surrogate Motherhood”. *Progress in Health Sciences* 7 (1): 195.

giving birth to a child, she refused to hand over the baby and fulfil the previously signed agreement, which resulted in the couple filing a lawsuit. The court upheld their parental rights and legally defined the true mother as the woman who, according to the surrogacy agreement, intends to create and raise a child⁶.

Is surrogacy a form of solidarity with a couple in need or the instrumentalization of a woman's body, being contrary to the fundamental dignity of the human person? Is it possible to oppose the altruistic motivation of a woman who wants to bear a child for her friend free of charge if this friend cannot do it for health reasons? Is surrogacy a form of sacrifice chosen by women who want to lend their uteri to unhappy couples?

1. Ethical assessment of surrogacy

This part of the paper aims to show some of the fundamental objections to surrogacy as such. In this process, we consider the vulnerability of the infertile couple, the surrogate mother, and above all, the child. The latter is forgotten in many debates.

1.1. The aspect of intended parents

Couples usually decide on surrogacy after a long time of trying to conceive a child naturally or through IVF. Dealing with the inability to have children goes hand in hand with deep inner pain and distress. Surrogacy enables a couple to get a child with their genetic material. We do not want to be insensitive to the plight of couples who want a child of their own. Their wish is certainly understandable, but it cannot be achieved at any cost. There is no right to a child that the State should guarantee to every individual. We believe that the liberalization of surrogacy is not an adequate response to the wishes of infertile couples. To a large extent, the intended parents are also subject to instrumentalization and abuse, because it is too easy to promise them that their desires will be realized. They are often not sufficiently informed about how difficult this process is, medically, psychologically, socially, and legally. Insufficient and misleading information leads to decisions that cannot be said to be fully autonomous and responsible.

⁶ Nayana Patel, Yuvraj Jadeja, Harsha Bhadarka, Molina Patel, Niket Patel, Nilofar Sodagar. 2018. "Insight into different aspects of surrogacy practices". *Journal of Human Reproductive Sciences* 11 (3): 212–218.

Although some arguments relating to this aspect will be presented under different sections, we would like to emphasize that couple has an ethical obligation to rethink when subjective expectations and desires cross the boundary that divides means of overcoming health limitations, from mere selfishness, and can cause unnecessary suffering of other parties involved in the process. They are found in a unique position, where they assume becoming parents, is so essential for their life, that the fulfilment of their desire justifies for potential suffering of two more vulnerable and fragile parties– a surrogate mother and a child.

1.2 The aspect of a surrogate mother

When it comes to surrogacy, the instrumentalization of the female body is often cited as the biggest ethical objection. With the term “instrumentalization”, we describe the process in which the human body is used only as a means to achieve an end – in our case the birth of a baby. There are currently no technological or other artificial means to enable an embryo to fully develop into a baby from the earliest stages onwards. Although one could argue that surrogate mothers are in fact appreciated and respected by couples and that they sometimes even remain in a good relationship with the family⁷, it would be fair to ask how many couples would still prefer to use a surrogate woman over a technologically perfect incubator, if available. Several aspects of surrogate mothers, such as their personality, life habits and emotions, are often unwanted in the surrogacy process. Surrogate mothers in many cases, have their personal, health and criminal history checked, they sometimes must live in specially designed hotels, leading a strictly ordered lifestyle. Moreover, they have to learn how to emotionally distance themselves from the baby, and how to eliminate the natural, hormonally caused urge to care for the baby after the birth. If we agree that incubating a couple’s baby in the technological machine would actually be ethically less challenging and more appropriate for the couple (and the woman!), we are confirming that a surrogate mother as a person is basically not wanted in the couple’s process of obtaining a baby, and she merely serves as an instrumentalized means to an end until a better method is discovered.

According to our conviction, surrogacy is against the dignity of the woman in any case. It requires a woman to put her body at the disposal of others. It is highly contentious when the abortion of undesired or supernumerary embryos is performed against

⁷ Jenny Gunnarsson Payne, Elzbieta Korolczuk, Signe Mezinska. 2020. “Surrogacy relationships: a critical interpretative review”. *Uppsala Journal of Medical Sciences* 125 (2): 183–191.

the will of the woman. “The woman is reduced to her body or to be more explicit to one function of her body: the ability to become pregnant”⁸.

Even if women were able to freely and consciously decide for such a step and were not forced into it due to poverty, we could still speak about instrumentalization, however, in this case, the origin of the instrumentalization would be in the woman herself (self-instrumentalization). Indeed, one could argue that some form of self-instrumentalization of our bodies is present constantly in our everyday lives, for example when we, for a limited amount of time, offer the power and skill of our hands and minds, to our employees. In such cases, work done in order to obtain the money is assumed as completely legal and ethical. We can only speak about the instrumentalization of human labour if it is not valued or paid appropriately or if it is forced against the free will of the worker, resulting in slavery and instrumentalization. Similarly, the donation of organs or blood to people in need is also not assumed as self-instrumentalization, if it is done freely and unforcedly.

So, what really makes an act of “lending a womb” to a pair in need, any different from donating a kidney or blood? We believe this question is especially interesting for two reasons: Firstly, because setting a parallel between live donors’ organ donation and surrogacy would additionally complicate the legalization of surrogacy, as organ donations are only legal when a donor is not exposed to a greater health risk than the receiver (which is not true in the case of surrogacy). Moreover, commercial surrogacy would become additionally problematic, as organ donations are non-commercial and it is only legal to pay for donated organs in Iran, and even there it is strictly regulated with many limitations⁹. Secondly, this is interesting, because the uterus can be transplanted. In 2013 in Sweden, the first healthy baby was born to a woman who was born without a uterus and had her uterus transplanted from her mother¹⁰. It should be noted that uterus transplantation imposes a woman an emersed risk, incomparable to normal healthy pregnancy. Therefore, uterus donation is not increasingly supplanting surrogacy in the cases when the health condition of the genetical mother would allow it. However, the fact that such operations are existing, shows how a surrogate mother is only meant as an instrument that helps a couple achieve their goal – having

⁸ Schliesser. 2016. “Körperlichkeit und Kommerzialisierung“, 111.

⁹ Ahad J. Ghods, Mitra Mahdavi. 2007. “Organ transplantation in Iran”. *Saudi journal of kidney diseases and transplantation* 18 (4): 648–655.

¹⁰ John A. Robertson. 2016. “Other women’s wombs: Uterus transplants and gestational surrogacy”. *Journal of Law and the Biosciences* 3 (1): 68–86.

a baby. Surrogacy is still preferred because uterus transplantation is much riskier for the couple¹¹.

Due to high costs, surrogacy is only available to rich people. While supporters of surrogacy claim that these are stereotypical views¹², the facts clearly show that the vast majority of surrogate mothers are from socially weaker backgrounds and the vast majority of intended parents are from wealthier social classes. At this point, it should be stressed that poverty plays an important role in surrogacy because it “forced” many young women in less developed countries to become surrogate mothers. Some warn against too hasty and too general stereotyping of poor surrogate mothers and rich clients, as well as stereotypical beliefs about the exploitation and instrumentalization of women¹³. However, numerous testimonies and publications show that these are not just stereotypes¹⁴. What happens to a child if the intended parents separate? Or if it is found that the child has a particular disease or disability? Due to the many cases of abuse that have taken place in India, the country passed a law in 2016 banning commercial surrogacy.

Quality research on the psychological and well-being aspect of surrogacy done in developed countries is still scarce, however, it usually presents a generally positive picture of surrogacy, where surrogate mothers are mostly driven by altruism, they are coming from a similar social background as intended parents, they do not have a higher risk for developing mental health problems or severe separation crisis after giving a baby away. Moreover, intended parents are usually well-connected with surrogate mothers and highly empathic¹⁵. But on the other hand, research done in less developed countries shows a different face; it emphasises that surrogate mothers have higher levels of depression compared to the comparison group of mothers, during pregnancy and post-birth¹⁶. However, an interesting interpretive review article, done

¹¹ Lisa Guntram, Nicola Jane Williams. 2018. “Positioning uterus transplantation as a ‘more ethical’ alternative to surrogacy: Exploring symmetries between uterus transplantation and surrogacy through analysis of a Swedish government white paper”. *Bioethics* 32 (8): 509–518.

¹² Bagan-Kurluta. 2017. “Wombs for Rent”, 196.

¹³ Bagan-Kurluta. 2017. “Wombs for Rent”, 196.

¹⁴ Daniela Danna. 2017. *Maternità surrogata? Nel bazar della vita: il prezzo di un figlio? Trattabile*. Trieste: Asterios, 217–294.

¹⁵ Robert J. Edelman 2004. “Surrogacy: the psychological issues”. *Journal of Reproductive and Infant Psychology* 22 (2): 123–136; Gunnarsson Payne, Korolczuk, Mezinska. 2020. “Surrogacy relationships”, 186.

¹⁶ Hoda Ahmari Tehran, Shohreh Tashi, Nahid Mehran, Narges Eskandari, Tahmineh Dadkhah Tehrani. 2014. “Emotional experiences in surrogate mothers: A qualitative study”. *Iranian Journal of Reproductive Medicine* 12 (7): 471–480; Nishtha Lamba, Vasanti Jadva, Kaushal Kadam, Susan Golombok. 2018. “The psychological well-being and prenatal bonding of gestational surrogates”. *Human Reproduction (Oxford, England)* 33 (4): 646–653.

by Gunnarsson Payne and colleagues¹⁷, emphasises that there is a clear lack of a holistic view of the problem in many research articles. They agree with Teman's anthropological critical review of psychosocial research on surrogacy¹⁸. Teman believes that researchers should include the surrogates' own narrated experiences as existing reviewed studies approach the issue only from normative ideas about motherhood, family, and women. Gunnarsson Payne and colleagues also describe that narrative in the 'scientific articles' and is in many instances highly emotionally influenced. On one hand, authors can use more or fewer idealist narratives of surrogacy as a mutual 'journey' undertaken by surrogates and intended parents with descriptions of involved parties like 'perfect couple', 'the ones', and 'we clicked'. Gunnarsson Payne and colleagues express their concerns: "A romanticized narrative may also work as an incentive for women to become surrogates, constructing a norm against which their own experience is measured, which can lead to disappointment"¹⁹. On the other hand, they also observe a phenomenon where more precautionary cultural narratives of the surrogacy relationship can be used for legitimate monitoring of surrogate mothers by agencies, as they cause couples to distrust surrogate mothers.

Undoubtedly, many personal stories, some also described in the article, show how vulnerable surrogate women are in their decision of giving a child away. In most cases, they are not even fully aware of what they are going to do and there is a reasonable doubt whether they can give informed consent. Above all, in poor countries, the freedom and autonomy of women are largely infringed upon, and there are real concerns about whether surrogacy opens a jet door where husbands or families could abuse a woman's body.

In the case of pregnancy, we cannot only speak about a physical dimension but also about the holistic integration of the human person into the process of a child's cohabitation with his/her surrogate mother, which also includes a mental and an emotional dimension. It should be emphasized, that pregnancy is a process, which prepares the whole pregnant woman (and not a woman who provided genetic material) for motherhood. It is not only a simple physiological adaptation of a woman's cardiovascular, hormonal, and reproductive state, but it permanently affects a woman's brain and neural connections. Studies in non-human animal models indicate that pregnancy results in dynamic structural and functional changes that modify a set of brain regions that includes reward and social processing areas.

¹⁷ Gunnarsson Payne, Korolczuk, Mezinska. 2020. "Surrogacy relationships", 184.

¹⁸ Elly Teman. 2008. "The social construction of surrogacy research: An anthropological critique of the psychosocial scholarship on surrogate motherhood". *Social science & medicine* 67 (7): 1104–1112.

¹⁹ Gunnarsson Payne, Korolczuk, Mezinska. 2020. "Surrogacy relationships", 186.

Brain changes due to pregnancy are measurable even by screening methods and result in long-lasting or even permanent effects, that can strongly influence the mental well-being of a person²⁰. Pregnancy loss, even when required by a woman in case of abortion, is proven as a high-risk factor for developing mental health problems²¹. During pregnancy, a woman develops a personal relationship with the child she bears, which is often one of the key arguments against surrogacy²². A surrogate mother commits herself to an agreement not to become emotionally attached to the child. As Schliesser reports, research reveals that this influences the healthy development of the child²³.

Experience also shows that women who have not yet given birth find it difficult to imagine in advance what pregnancy means and how strong the bond will be with the baby inside their body. Büchler and Bleisch, therefore, warn: “Since it is debatable whether first-time mothers can anticipate the feeling of pregnancy and the emotional bond with the unborn child, many fertility clinics rightly only admit second-time mothers as surrogate mothers.”²⁴

The too-easy justification of surrogacy stems in many respects from a dualistic view of the human person that distinguishes between the spirit and the body. We need a holistic image of the person that goes beyond this dualistic perception of the spirit and the body. We do not possess a body; we are a body.

The relationship to our body (*Leib*) is not a relationship of possession like that to the material things of our outer world. The relationship between the self and its body (*Leib*) is between having and being the body (*Leib*) we are not identical to the body (*Körper*) we have²⁵.

²⁰ Magdalena Martínez-García, María Paternina-Die, Manuel Desco, Oscar Vilarroya, Susanna Carmona. 2021. “Characterizing the Brain Structural Adaptations Across the Motherhood Transition”. *Frontiers in Global Women’s Health* 2 (10):742775–742775; Erika Barba-Müller, Sinéad Craddock, Susanna Carmona, Eline Hoekzema. 2018. “Brain plasticity in pregnancy and the postpartum period: links to maternal caregiving and mental health”. *Archives of Women’s Mental Health* 22 (2): 289–299.

²¹ David C. Reardon, Christopher Craver. 2021. “Effects of pregnancy loss on subsequent postpartum mental health: A prospective longitudinal cohort study”. *International journal of environmental research and public health* 18 (4): 1–11.

²² Schliesser. 2016. “Körperlichkeit und Kommerzialisierung“, 110–111.

²³ Schliesser. 2016. “Körperlichkeit und Kommerzialisierung“, 117.

²⁴ Andrea Büchler, Barbara Bleisch. 2014. “Leihmutterschaft – ein respektables Unterfangen?” *Neue Züricher Zeitung* (10.04.2014), 21. „Da strittig ist, ob Erstgebärende das Gefühl einer Schwangerschaft und die emotionale Bindung zum Ungeborenen antizipieren können, lassen viele Fertilitätskliniken richtigerweise ausschliesslich Zweitgebärende als Leihmütter zu“.

²⁵ Eberhard Schockenhoff. 2009. *Ethik des Lebens. Grundlagen und neue Herausforderungen*. Freiburg: Herder, 144.

The ethical conception of the person necessarily includes a physical dimension. The body cannot simply be discarded as if it were not intrinsically connected to the spirit. In a certain sense, the proponents of the acceptability of surrogacy understand corporeality as morally indifferent. We agree with Schliesser, who advocates a holistic view of personal dignity:

A violation against the personal integrity of the woman as a physical/spiritual entity advocates the unacceptability of the instrumentalization and shows that surrogacy is not in line with the dignity of the woman²⁶.

Interestingly, acts that require the involvement of the entire spectrum of human beings, including their body, intimacy, emotions, relationships, and spirituality, are the most linked to a phenomenon assumed as unethical self-instrumentalization. Therefore, it is completely legally and ethically acceptable to offer somebody comfort, and psychological support in exchange for money or gratitude, but is unacceptable to pay somebody for marrying you and becoming your spouse, or even just to offer sexual experience, as sexuality is assumed as a more intimate and complex relationship. Even law traditionally recognizes such acts as different, based mainly on previous cultural experience, but in recent years has also been supported by scientific evidence. Therefore, sexual assault is treated differently than only physical assault, with psychological studies comparing the psychological effect of both assaults confirming, sexual violence has a more profound effect on victims' well-being and self-perception than other types of violence. Even in war survivors, who went through severe traumatic experiences, sexual violence resulted in significantly greater dysfunction in later life²⁷. Studies that compared other types of violence with sexual violence showed that both types of violence resulted in distress, but only sexual violence was associated with self-esteem, self-criticism, and attachment style²⁸. An analogy can also be made to surrogacy where we are operating with one of the most intimate and profound human experiences of motherhood. It would be unwise to assume that pregnancy changes the body and brain of the woman in the same way as any other medical state and compare surrogacy to any other form of organ donation.

²⁶ Schliesser. 2016. "Körperlichkeit und Kommerzialisierung", 112.

²⁷ Philipp Kuwert, Heide Glaesmer, Svenja Eichhorn, Elena Grundke, Robert H. Pietrzak, Harald J. Freyberger, Thomas Klauer. 2014. "Long-Term Effects of Conflict-Related Sexual Violence Compared with Non-Sexual War Trauma in Female World War II Survivors: A Matched Pairs Study". *Archives of sexual behavior* 43 (6): 1059–1064.

²⁸ Jason Schnittker. 2022. "What makes sexual violence different? Comparing the effects of sexual and non-sexual violence on psychological distress". *SSM – Mental Health* 2: 100115.

1.3 The aspect of a child

The voiceless child, whose best interests should surely be central to ethical evaluation, is often forgotten in the debate on surrogacy. The child is the biggest victim of surrogacy. Not only can he/she be exposed to some extreme actions, such as abortion, rejection after birth due to a disease or unfulfilled expectations, but in each case of surrogacy, there is also a fundamental question of the child's identity, because he/she has more than two parents. This certainly has an impact on the formation of his or her identity. Every child has the right to know his or her parents. In 2013, a German court granted the request of a woman who had been conceived by IVF to find out who her genetic father was, who was an anonymous donor in the insemination process. The court ruled that the child's right to know her genetic origins outweighed the doctor's right to protect the anonymity of the donor. According to German law from 2018, every child has a right to know one's roots, therefore, anonymous donations for IVF are not allowed anymore²⁹. In our case, the child has the right to know who his or her surrogate mother was because she played a decisive role at the beginning of his or her life and might influence the child's health and emotions later in life (e.g., by excessive drinking, drugs abuse, or by healthy emotional bond and care).

Several studies suggest that a child gets attached to his/her surrogate mother during pregnancy and is also to recognize her after birth, therefore separation from his/her surrogate mother has negative impacts on the development of his/her identity³⁰. Surrogate mothers usually sign an agreement not to become emotionally attached to their children. According to various psychological studies, respecting this claim has negative impacts on the child.

Surrogacy fails to respect the dignity and primacy of the welfare of the child. It ignores the fact that foetal/early infant development is a critical determinant of a child's welfare, whereby the biological and psychological bond between the surrogate and the child is of crucial significance for his development³¹.

²⁹ Oliver Hallich. 2017. "Sperm Donation and the Right to Privacy". *The New Bioethics* 23 (2): 109.

³⁰ Schliesser. 2016. "Körperlichkeit und Kommerzialisierung", 116–117.

³¹ Matthew M. Tieu. 2009. "Altruistic surrogacy. The necessary objectification of surrogate mothers". *Journal of Medical Ethics* 35 (3): 175.

Problems arise as to the legal status of a child born to a surrogate mother abroad if the child has no genetic link to the intended parents³².

In the process of surrogacy, there is a big risk that the children can be treated as objects. A real example of this is the case of Baby Donna from 2005 in Belgium, where the surrogate mother was carrying a baby of a homosexual Belgian couple, where one man was also the genetical father of the baby. But the surrogate mother lied to the Belgian couple that she suffered a miscarriage, meanwhile she was actually selling the unborn baby through the internet, where she found a Dutch couple, who bought baby Donna for 15,000 dollars. The Belgian couple found out that they have been cheated, but the nine-year court battle ended with a ruling that the child should stay with the Dutch couple, as this would be in the best interest of the child³³.

2. Discussion in the Council of Europe in October 2016

On 11th October 2016, the Plenary Session of the Parliamentary Assembly of the Council of Europe (PACE) voted to reject a draft recommendation with the title *European guidelines to safeguard children's rights in relation to surrogacy arrangements* (83 votes against, 77 for, 7 abstentions).

The draft was presented by Belgian Senator Petra De Sutter. She is a member of the Belgian Green party and is well known for her very liberal positions in bioethics. In the case of surrogacy, she was also blamed for the conflict of interest. At that time, she was head of a hospital department that offers surrogacy in Ghent. Her initial proposal was to recognize surrogacy agreements across all 47 Member States of the Council of Europe. After the second rejection of her draft recommendation in the Committee on Social Affairs, Health and Sustainable Development of PACE at the meeting on 21st September 2016, she succeeded to get a weak majority (17 in favour, 14 against and 2 abstentions) for the adoption of the guidelines to safeguard children's rights in relation to surrogacy arrangements. De Sutter supports altruistic forms of surrogacy. She wrote in the report: "I do not believe that altruistic surrogacy should be prohibited (for many reasons), but it should be limited to gestational surrogacy, tightly regulated and legally available only to resident nationals of the jurisdic-

³² Ornella Feraci. 2015. "Maternità surrogata conclusa all'estero e Convenzione europea dei diritti dell'uomo: riflessioni a margine della sentenza Paradiso e Campanelli c. Italia". *Cuadernos de derecho transnacional* 7 (2): 420–439.

³³ Eric Scott Sills (ed.). 2016. *Handbook of Gestational Surrogacy. International Clinical Practice and Policy Issues*. Cambridge: Cambridge University Press, 116.

tion in question”³⁴. Gestational surrogacy is an arrangement in which the surrogate does not provide her own genetic material and thus the child born is not genetically related to the surrogate. Such an arrangement will usually occur following IVF treatment. De Sutter presented an example of gestational surrogacy:

If, as is often the case, for instance, a sister or a good friend of a woman who cannot carry a child to term for health reasons, having been screened herself and having been provided with evidence-based information about known and potential risks, living conditions and outcomes for surrogate mothers, enters into an altruistic gestational surrogacy agreement with the intended parents based on free and informed consent in a jurisdiction where such an agreement is legal, tightly regulated and available only to resident nationals of said jurisdiction, the risk of an adverse outcome for both the surrogate mother and the surrogate-born child is extremely small³⁵.

De Sutter mentions the regulation in the UK where they should not have had any problems in the last 30 years (altruistic surrogacy is allowed, whereas commercial surrogacy is strictly prohibited).

This draft is very controversial. It would somehow validate prohibited surrogacy agreements in all 47 Member States of the Council of Europe. De Sutter wanted to regulate the legal status of surrogate-born children. In her report, she mentioned one of the most famous scandals, the so-called “Baby Gammy” case. An Australian couple paid a Thai surrogate mother to have their children. The surrogate mother gave birth to twins, but the couple only took a girl named Pipah and left behind a boy named Gammy after learning he has Down’s syndrome. The surrogate applied for legal custody of Pipah because she had found out that her father had been jailed previously for child sex offences. On the ground of this example, De Sutter called for a ban on for-profits surrogacy arrangements: “The Committee of Ministers explore the desirability and feasibility of drawing up European guidelines to safeguard children’s rights in relation to for-profit surrogacy arrangements”³⁶.

The latter proposal, to ban commercial surrogacy and allow altruistic surrogacy, was also rejected by PACE. In the end, the parliamentarians of the Council of Eu-

³⁴ Petra De Sutter. 2016. Children’s rights related to surrogacy. Report of the Committee on Social Affairs, Health and Sustainable Development, Council of Europe, 5. <https://pace.coe.int/pdf/a78e4d8b4e90762e7126957315e97dd7d2c62b19306e6092dfecc78570f00bf/doc.%2014140.pdf> (23.09.2016).

³⁵ De Sutter. 2016. Children’s rights related to surrogacy, 5.

³⁶ De Sutter. 2016. Children’s rights related to surrogacy, 11.

rope agreed that the best way to protect women and children from exploitation is a full ban on all forms of surrogacy.

Lorcán Price, legal counsel for ADF (Alliance Defending Freedom) International based in Strasbourg, made the following statement after the vote:

Today, by rejecting De Sutter's proposals, the Parliamentary Assembly has voted to affirm the rights and dignity of women and children. Ultimately, surrogacy exploits women and treats children as commodities. We have to move away from an unrealistic view of so-called altruistic surrogacy that De Sutter tried to convey in the reports. There are few material differences between altruistic and commercial surrogacy. Whether we talk about a favour or a business transaction, the same consequences apply to surrogate children³⁷.

Surrogacy was also condemned in a 2011 resolution of the European Parliament as an "exploitation of the female body and her reproductive organs". The EU Parliament

emphasizes that women and children are subject to the same forms of exploitation, and both can be regarded as commodities on the international reproductive market and that these new reproductive arrangements, such as surrogacy, augment the trafficking of women and children and illegal adoption across national borders³⁸.

Despite legal restrictions, surrogacy is present in all European countries. If a couple, or even a single person, are unable to have a child with the help of a surrogate mother in their own country, they opt for this procedure in a country where it is legally allowed or not explicitly forbidden by law. It is used by heterosexual couples who are unable to have children naturally and, increasingly, by homosexual couples who wish to have a child of "their own". In the case of homosexual couples, it is usually the case that one of the couples contributes his/her own gametes to the artificial insemination procedures. The couple concludes an agreement with the surrogate mother to bear the child, which the surrogate mother delivers to the intended parents after birth.

³⁷ Zenit. 2016. Parliamentary Assembly of the Council of Europe Rejects Plan to Legalize, Regulate Surrogacy. <https://zenit.org/2016/10/12/parliamentary-assembly-of-the-council-of-europe-rejects-plan-to-legalize-regulate-surrogacy/> (12.10.2016).

³⁸ European Parliament. 2011. New EU policy framework to fight violence against women, art. 21. https://www.europarl.europa.eu/doceo/document/TA-7-2011-0127_EN.html (05.04.2011).

Basically, there is a distinction between traditional surrogacy, which uses the gametes of the surrogate mother, who is also the genetic mother of the child, and gestational surrogacy, where an embryo is conceived *in vitro* (either with the genetic material of the intended parents or with genetic material from donors) and implanted into the surrogate mother's uterus. In addition, there is a distinction between altruistic surrogacy, where the surrogate is not paid for her services, and commercial surrogacy, where there is payment for the act.

Some believe that altruistic surrogacy is more ethically acceptable, while others believe that it is the professionalisation of surrogacy (to consider surrogate motherhood as a kind of profession) that would bring greater transparency and fairness in this area.

3. Altruistic surrogacy or professionalisation?

The basis for altruistic surrogacy is a relationship of giving, where love and gratuitousness are the foundation. Very often, a close friend or relative is disposed to bear a child for an infertile couple. However, such a contract can also occur among strangers. After the birth, the couple adopts the child and can determine the future relationship between the surrogate and the child. This way of altruistic surrogacy is allowed and encouraged as an act of solidarity in different countries such as the UK, Belgium, Greece, Australia.

Enrica Perucchietti, in her work *Utero in affitto (Womb for Rent)*, speaks of “the mysticism of the sacrifice”³⁹ of the surrogate mother. In a critical way, she describes how the media present idealised stories of happy biological and surrogate mothers, who are models of sacrifice, of the selfless love with which these women help unhappy couples. The author warns: “This kind of article and glorification of the (dis) values of surrogacy is read by millions of women worldwide, in an obvious attempt at manipulation”⁴⁰. It is about a “new anthropology of gift”. On social networks and in the media, it is highlighted how surrogacy is not a business, but an act of love, where a woman is willing to sacrifice her life to give life to others. Many feminist thinkers criticise this view, pointing out that surrogacy is in any case an instrumentalization of the woman and the child⁴¹.

³⁹ Enrica Perucchietti. 2016. *Utero in affitto. La fabbricazione di bambini, la nuova forma di schiavismo. I retroscena della maternità surrogata delle derive dell'eugenetica agli interessi delle lobby*. Marene: Rivoluzione, 76.

⁴⁰ Perucchietti. 2016. *Utero in affitto*, 76.

⁴¹ Perucchietti. 2016. *Utero in affitto*, 76–86.

Even advocates of surrogacy see the weaknesses of the altruistic model. Liezl van Zyl and Ruth Walker distinguish between reciprocal and non-reciprocal altruism. “‘Reciprocal altruism’ refers to instances where one person performs a service or makes a sacrifice for another, who then reciprocates in a way that balances the service or sacrifice of the provider”⁴². The aim is not to achieve distributive justice, but to express one’s gratitude. Non-reciprocal altruism refers to instances where the benefactor does not receive a material reward from the beneficiary. Generally, in most societies, the appropriate way to express gratitude to benefactors is determined and this gratitude should be in some proportion to the original gift. We should consider acts of non-reciprocal altruism as praiseworthy because they help those who are in the most need. The act of surrogacy closely resembles donations of organs and blood by living individuals, as in the organ donation act, the benefactor receives nothing (or nothing but gratitude) from the beneficiary. But it should be emphasised, such organ donations are always made to more fragile individuals who suffer from major health problems and where the donor is never put in a disadvantageous position compared to the receiver. In most cases, the surrogate mother is not better off than the couple. “She experiences a significant amount of pain and discomfort associated with (either *in vitro* or artificial) fertilization, pregnancy, and childbirth, for their benefit”⁴³. Therefore, van Zyl and Walker claim substantial recompense for her gift and continue:

If her giving remains unreciprocated, then her act becomes one of self-sacrifice and morally unacceptable for the same reasons that selfish acts are. (...) Acts of self-sacrifice enhance the position of beneficiaries to the detriment of benefactors and are to this extent exploitive and thus morally unacceptable⁴⁴.

Van Zyl and Walker prefer reciprocal altruism, but in their opinion, there are significant objections also to this form of contract mothering.

Indeed, encouraging self-sacrifice in an ethical discussion can have consequences in legal practice, and should always be done with extreme caution, and always with an intention to protect the most vulnerable groups. Encouraging workers to self-sacrifice for employers’ benefit would indeed lead to further injustice and abuse. Even when self-sacrifice is legally encouraged, for example in the case of organ donations, legalisation is straightforward: harm done to the donor should not exceed

⁴² Liezl van Zyl, Ruth Walker. 2013. “Beyond Altruistic and Commercial Contract Motherhood. The Professional Model”. *Bioethics* 27 (7): 374.

⁴³ Van Zyl, Walker. 2013. “Beyond Altruistic and Commercial Contract Motherhood”, 375.

⁴⁴ Van Zyl, Walker. 2013. “Beyond Altruistic and Commercial Contract Motherhood”, 375.

the benefit of a receiver. Major procedures done on the donor's body are only justified if the life of the benefiter is endangered or severely limited.

If we treated all parties involved in surrogacy equally, it would be fair to assume, the intended parents too can sacrifice and abandon their desire for the child, so they would spare a surrogate mother unnecessary risks and suffering.

The further problem is also the unexpressed expectations of surrogate mothers. They expect to receive a future favour for their altruistic actions, even if they do not express it explicitly. Within different social contexts, certain habits have developed about how you can repay someone who has done you a favour. The norms that govern gift relationships are after van Zyl and Walker vague and flexible: "Someone who takes them too seriously and applies them too rigidly can rightly be accused of 'missing the point', the point being that an act of giving is an expression of love or care"⁴⁵. A gift loses its symbolic value when it should be rewarded. On the other hand, it is also true that gift relationships break down when one partner does not feel that her generosity is properly acknowledged.

Should a contract mother be allowed to express her wishes regarding maintaining contact with the child, and receiving updates about the child's development? Is it appropriate to make her expectations explicit? Van Zyl and Walker comment:

She may find it inappropriate – even insulting – to explain to the intending parents that she expects them to support her throughout the pregnancy, for example, or that she would like to be included in their family as a special friend or 'second mother'⁴⁶.

There are many surrogate mothers that are left disappointed because their expectations are not fulfilled. They end up feeling exploited. Those women that had a previous relationship with the couple are more disappointed. They expected to be more closely involved in the life of the child. The intending parents tend to view the contract mother as a threat because of the intimate nature of her relationship with "their" child. That is why they prefer to avoid contact with her.

Van Zyl and Walker criticise the altruistic model of surrogacy because it does not guarantee real reciprocity. It can only be partially interpreted as a gift relationship. In fact, the intended parents hold the main decision-making levers. The surrogate mother is in many respects subordinate to the wishes and decisions of the couple who want a child. "Although a woman may be free to decide to act as a contract mother, once she is pregnant her freedom is restricted by the fact

⁴⁵ Van Zyl, Walker. 2013. "Beyond Altruistic and Commercial Contract Motherhood", 375.

⁴⁶ Van Zyl, Walker. 2013. "Beyond Altruistic and Commercial Contract Motherhood", 375.

that she incurs a strong moral responsibility towards the intending parents and the foetus⁴⁷. The contract mother has a number of obligations to fulfil, regardless of how the intended parents will react to her altruistic attitude. In a sense, she is at the mercy of the intended parents. That is why van Zyl and Walker propose the so-called “professional model” of contract motherhood, where the rights, obligations and legitimate expectations of each party are made explicit. Their idea is to organize a contract of motherhood according “to the norms of vocational professions, such as nursing, teaching and social work”⁴⁸. All these professions require altruistic and committed people who do not do their work primarily for the money. But no one denies them the right to be properly remunerated for their humanitarian work. Van Zyl and Walker conclude: “Altruism and remuneration are not mutually exclusive for the standard professions so there is no reason to think that they would be for contract mothers”⁴⁹.

We can agree that getting paid is not in itself against altruistic motivation; however, this does not, in our view, lead to the conclusion that the professionalisation of surrogacy would provide an ethical answer to this sensitive issue. It would immediately raise questions about financial compensation for other altruistic acts in medicine, such as blood donation and organ transplantation. In any case, the debate so far has clearly shown that even altruistic surrogacy raises a lot of ethical questions, and it does not seem to be the right way for resolving the problems of infertile couples. Mere selfless intentions to help couples in need are not sufficient for such an act to be considered ethically acceptable, as the main problem is not at all in selfless intentions, resembling in many ways the organ donations, but the act, that results in the birth of a new child. Such a child will be born to the unpredictable and complicated relationship between a woman (who will enable its prenatal life and will take on the health risks of pregnancy and will allow her body, including her brain, to change and adapt to its new maternal role), and a couple (who intended this baby and genetically and financially invested in the creation of the new life). Indeed, life can bring different challenging situations that are far from ideal for children’s upbringing, to every couple with children. There are also cases when the mother deliberately abandons the baby after birth. However, we believe legalization should help to sort out and not to produce problematic situations.

⁴⁷ Van Zyl, Walker. 2013. “Beyond Altruistic and Commercial Contract Motherhood”, 376.

⁴⁸ Van Zyl, Walker. 2013. “Beyond Altruistic and Commercial Contract Motherhood”, 379.

⁴⁹ Van Zyl, Walker. 2013. “Beyond Altruistic and Commercial Contract Motherhood”, 380.

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The debate on surrogacy shakes fundamental ethical and legal concepts. Is motherhood a right? Can it be exercised in every way? Is everything that is technically possible also ethically acceptable and legally permissible? Is a good intention sufficient to make an act ethically acceptable? Concepts such as motherhood, fatherhood, parenthood, family, infertility, the right of children to know their parents, the right to the child, the identity of the individual person, the nature of the human person, the dignity of the human person, etc., are being redefined. We are aware that infertility is a great pain for a couple who wants to have a child. Such a couple is particularly vulnerable in their desire, and we believe that they should not be offered a solution in surrogacy, which raises many new problems. Ethical discussions, especially when resulting in changes of legalisation, should consider all parties involved and should aim to solve and not produce problematic relationships and situations. We believe it is unethical to put a surrogate woman in a position where she is legally always expected to exhibit non-reciprocal altruism toward the couple. If we treated all parties involved in surrogacy equally, it would be fair to assume, the intended parents too can sacrifice and abandon their desire for the child, so they would spare a surrogate mother unnecessary risks and suffering.

As we have shown in this article, altruistic surrogacy, which presents itself as an expression of sacrifice for others, is also ethically unacceptable, as it does not overcome the problem of instrumentalization of the woman and the child. Many aspects of the surrogate mother's core personal and emotional traits (her care for a baby, emotional bond, and her personal habits) are unwanted side effects of the surrogacy process. Uterus transplantation could also be an appropriate solution for some couples, but they usually avoid this option, because it is connected with additional health risks. We suggest that solutions should be sought in the more ethically acceptable direction of child adoption.

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Abstract: The regulation of surrogacy varies between different countries. There is a trend towards greater liberalization on the global level. Ethical evaluation creates a basic dilemma: Is surrogacy a superior form of solidarity between people or the instrumentalization of a woman's body, being contrary to the fundamental dignity of every human person?

How does surrogacy affect people involved in the process and what do decades of experience with surrogacy tell us about its effect on human beings? Is there an ideal form of surrogacy where reproductive parties themselves describe the relationship as satisfactory, fair, and just, and where the well-being of all involved parties is equally considered?

In this article, we will look at the unsuccessful initiative to regulate at least the issue of altruistic surrogacy in the Council of Europe countries in 2016. The aspect of sacrifice of the surrogate mother for the well-being of the couple who wants a child is often raised. However, the mere altruistic intention to help another does not make an act ethically acceptable. The paper also draws attention to several ethical reservations regarding surrogacy. The most controversial issue is the instrumentalization of a woman's body. Especially in poor countries, the victims of surrogacy are very badly informed about the procedure, while their freedom and autonomy are significantly infringed. A child born to a surrogate mother can also be a victim of various interests of intended parents, different corporations and the woman who gave birth to him/her. The paper outlines the vulnerability of the intended parents, the surrogate mother, and above all the child, who is often forgotten in the debates. Additionally, it also touches upon the frequently neglected ethical perspective of personal desire, sacrifice, and victimization. When is it ethically acceptable, from the point of the altruistic action recipient, to expect and accept altruistic actions? When do subjective expectations and desires cross the boundary that divides means of overcoming health limitations from mere selfishness? Last but not least, it also questions when the intent of helping others transforms from an ethically acceptable sacrifice to ethically unacceptable victimization.

Keywords: surrogacy, altruism, sacrifice, human dignity, instrumentalization.

Streszczenie: Motyw poświęcenia w macierzyństwie zastępczym. Regulacja macierzyństwa zastępczego jest różna w różnych krajach. W wymiarze globalnym występuje trend w kierunku większej liberalizacji. Ocena etyczna rodzi zasadniczy dylemat: Czy macierzyństwo zastępcze jest wyższą formą solidarności między ludźmi, czy jest instrumentalizacją ciała kobiety, będąc zaprzeczeniem fundamentalnej godności każdej istoty ludzkiej? Jak macierzyństwo zastępcze wpływa na ludzi zaangażowanych w jej procesy i co dekady jej praktykowania mówią nam o jej skutkach na istotę ludzką? Czy jest jakaś idealna forma macierzyństwa zastępczego, której strony reproduktywne jednocześnie opisują relację jako satysfakcjonującą, sprawiedliwą i gdzie dobrostan wszystkich stron zaangażowanych jest w równym stopniu uwzględniany?

W niniejszym artykule jest mowa o nieudanej próbie uregulowania przynajmniej kwestii altruistycznego macierzyństwa zastępczego w krajach, będących członkami Rady Europy w 2016 r. Często podnoszony jest aspekt poświęcenia matki zastępczej na rzecz dobrostanu pary pragnącej mieć dziecko. Jednakże altruistyczna intencja pomocy innym nie czyni tego aktu etycznie akceptowalnym. Artykuł zwraca uwagę na kilka wątpliwości etycznych

w odniesieniu do macierzyństwa zastępczego. Kwestią najbardziej kontrowersyjną jest instrumentalizacja ciała kobiety. Szczególnie w biednych krajach ofiary macierzyństwa zastępczego są źle informowane o procedurze, w ramach której zostaje znacznie naruszona ich wolność i autonomia. Urodzone dziecko w ramach macierzyństwa zastępczego może być ofiarą różnych interesów zamierzonych rodziców, różnych korporacji oraz kobiety, która je urodziła. Artykuł dokonuje zarysowania wrażliwości zamierzonych rodziców, matki-surogatki i przede wszystkim dziecka, o którym często zapomina się w debatach. Ponadto tekst dotyczy często lekceważonej perspektywy etycznej osobistych życzeń, poświęcenia i represji. Kiedy z punktu widzenia altruistycznego aktu obdarowania jest etycznie akceptowalne to, aby oczekiwać i akceptować działania altruistyczne? Kiedy subiektywne oczekiwania i życzenia przekraczają granicę między środkami służącymi zdrowiu i egoizmem? Ostatnia, lecz niemniej ważna kwestia dotyczy tego, kiedy zamiar pomocy innym z etycznie akceptowalnego poświęcenia zostaje przekształcony w etycznie nieakceptowalną represję?

Słowa kluczowe: macierzyństwo zastępcze, altruizm, poświęcenie, godność ludzka, instrumentalizacja.