

Inputs on gestational surrogacy for the OHCHR Special Rapporteur on the sale and sexual exploitation of children

Written by

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Introduction

“Women's movements and Gestational Surrogacy. Engaging, debating and policy making - WoMoGeS” is a 3-year comparative study on the different positions, frames, strategic alliances, policy making and mobilization of women's movements (WMs) on gestational surrogacy (GS) in 4 countries: USA, Mexico, Italy and India. WoMoGeS is conducted by researcher Dr Daniela Bandelli, under the supervision of sociologist Prof Consuelo Corradi at the LUMSA University in Rome. The project is funded by the European Commission Marie-Sklodowska Curie Actions (2018-2021). Initial findings and reflections elaborated during the first year of the project are summarized in this document in response to the OHCHR Special Rapporteur on the sale and sexual exploitation of children's call for inputs for the elaboration of the **“Safeguards for the protection of the rights of children born from surrogacy arrangements”**. International literature and observations of surrogacy activism in other countries (e.g. France, Spain, Australia) are also embedded in the study.

Although social movements in each country build their actions and arguments with specific references to the national political and social contexts, a few common broader theoretical approaches to the topic occur. In this document it will be suggested that either the **'woman's autonomy discourse'** advanced by pro-surrogacy

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front and the '**exploitation/commodification discourse**' used by abolitionists need to be taken into consideration in policy making. However, authors argue that **woman-centred arguments** do not allow to fully protect the children from harm embedded in GS and recommend that public discourse and policy making acknowledge the specificities of GS as an emerging **social practice to procreate**. The authors wish that policy makers will want to consider the **well-being and protection of the child from risks a non-negotiable principle**, secondary to the woman's freedom to exploit her reproductive capabilities as well as to the desire of adults of having offspring at any costs.

The surrogacy debate in WMs: abolitionists and reformists

WMs are primary actors in public discourses and policy making on human reproduction across the world and GS is more and more **debated through the lens of feminist conceptual categories**, such as commodification of women's bodies and women's autonomy, already applied in other feminist causes such as prostitution and abortion.¹ In recent years in several EU countries WMs have mobilized against GS,² joined the USA-born international campaign StopSurrogacyNow (in which feminists, intellectuals, pro-life groups, politicians, scientists and citizens from different cultural backgrounds and countries participate to call for the universal elimination of GS),³ and established in 2018 the new Coalition Internationale pour l'Abolition de la Maternité de Substitution (CIAMS).⁴ On the other hand there are also feminist groups, and individual feminist voices, in favour of the legalization and regulation of the practice to better protect surrogates as well as intended parents and children.⁵

Although assisted reproduction has been for decades a topic of reflections for feminist scholarship and although earlier opposition to surrogate motherhood took place in the 1980s in the United States,⁶ only in recent years GS is an emerging and **growing issue of mobilization and reproductive politics for Women's groups, especially in Europe** where French, Italian, Spanish and Swedish feminists are leading the way. Advocacy and lobbying actions are taken by WMs either at a transnational level and at a national level.

Two main fronts seem to come forward internationally and at a country level: there is an **abolitionist front**, and a so-called **regulatory or reformist front**.

¹ Roman D (2012) La gestation pour autrui, un débat féministe?, *Travail, Genre et Société* 2, 28, 191-97

² The anti-surrogacy mobilization in France is led by Collectif pour le respect de la personne (CORP), a group born in 2013 with the very purpose of reaffirming the dignity of women and children denied by gestational surrogacy. CORP's main allies are the Coordination pour le Droit à l'Avortement et à la Contraception (CADAC) and the Coordination Lesbienne en France (CLF). The key event of the French mobilization was the first international conference of February 2, 2016, that, with the support of some MPs, launched the Charter of Paris. This document calls on the countries of the European Union to take a stand against surrogacy as a commodification of women and children and to promote the creation of an international convention for the abolition of gestational surrogacy in any form (commercial or "altruistic", as it is called). The Paris event was attended by some Italian feminists who in the previous year had launched a public petition for a blanket ban on surrogacy and who on March 23, 2017, proposed a similar event in Rome, in a room in the Parliament building. The leader of the Italian front is SNOQ-libere that embraces surrogacy as its main theme of mobilization in a wider framework of reflection on women's freedom and motherhood. At the Conference in Rome, the group approved an appeal to the United Nations institutions responsible for compliance with the Convention on the Elimination of Discrimination against Women (CEDAW), the Convention on Human Rights and the conventions on the rights of the child. In addition, the Rome document mentions the following international conventions in conflict with surrogacy: Additional Protocol to the United Nations Convention against Organised Crime, Convention on the International Adoption of The Hague, the Council of Europe Conventions on Adoption, Combating Trafficking in Human Beings and Biomedicine, and finally the Charter of Fundamental Rights of the European Union.

³ <http://www.stopsurrogacynow.com/> is the campaign's website, one of the richest online platforms for informative material (texts and videos) on social implications of surrogacy, stories of surrogates, data, legal frameworks, surrogacy industry, health impact, etc.

⁴ <http://abolition-ms.org/>

⁵ For example in the USA Our Bodies Our Selves (OBOS) and the Center for Genetics and Society (CGS) launched the informative website <https://surrogacy360.org/>; in Mexico Grupo de Informacion en Reproduccion Elegida (GIRE) <http://gestacion-subrogada.gire.org.mx/en/#/> leads the conversation on regulation whereas abolitionist front is led by Feministas Mexicanas contra Vientres de Alquiler (FEMMVA) in alliance with the Coalition Against Trafficking of Women-Latin America and the Caribbean (CATW-LAC), and by Early Institute, a child's rights think tank.

⁶ Klein R (2017) *Surrogacy. A human rights violation*, North Geelong, Spinifex Press.

The position of the abolitionists are clear-cut: they see GS as a **violation of human rights and commodification of women and children**, as well as a **form of patriarchal violence against women (VAW)**, they call for the outlaw of all forms of GS at State level and through International Conventions while they raise awareness on exploitation and sufferance of surrogates, health risks, surrogacy industry, complications, etc. GS is portrayed as a system of exploitation (unethical, profit-driven, unregulated) of vulnerable women, that implies restriction to their freedom during pregnancy as in **slavery** (conveyed often by the image of Indian dormitories); it is also portrayed as a form of VAW and commodification of the female body insofar GS implies the **deprivation of mother-foetal bond**; parallels to **prostitution** (and even to pornography) are made often in feminist opposition to GS; the **inequality** between surrogates and IP and the industry as well as the **hazards for women's and children's health** and the lack of information prior the consent are also topics of concern; GS is read as a practice stemming from liberalism and capitalism applied to life as well as from **gender inequality and patriarchy** and supported by a spreading culture of the 'right to have babies'. Abolitionists celebrate the uniqueness of pregnancy as a phase of a woman's life, a unique moment of psychological, biological and emotional exchange with the foetus, inescapably broken in case of GS. The request for a blanket ban rests also on the defence of the Roman law principle *mater semper certa est* (the mother is always certain, because of the unity of the mother figure, coinciding with the woman physically giving birth). According to abolitionists, defending this principle would prevent the reproductive process from being reduced to a mere mechanism, and reproductive capacities and children from being transformed into goods. Motherhood is considered a key event in women's lives, coinciding with gestation and indivisible from it. Moreover, GS retrogresses the process of women's emancipation, that has included motherhood in the various fields in which women's freedom is expressed and relocates **motherhood**, from **an eminently human act**, the highest expression of the human dignity of women, in the sphere of domination.⁷

In the reformist front there are those who advocate for legalization of surrogacy as a **right for women to fully use their body** and their reproductive capacities as they wish, including the possibility of making them available to third parties and on the market where equal access to reproductive technology and rights to family formation should be granted. GS is defended also because it allows for the manifestation of **sisterhood** and altruism among women, with the establishment of relationships of mutual help and benefit. However, in the reformist front, there are voices who albeit not in full favour of GS yet adopt a **pragmatic approach**, and/or reject any abolitionist provision in matters of women private life (family, sexuality, etc.) and privilege a **liberal approach** that guarantees reproductive rights to infertile and same-sex couples. The followings aspects are discussed within a regulatory approach: the possibility of allowing GS only in a free form or with a mere **reimbursement** of expenses; the possibility for surrogates to reconsider and **refuse to give up the child** (which, however, is not genetically theirs); the co-participation of the surrogate and intended parents in the decision to **terminate the pregnancy** (if the numbers of implanted embryos developing is greater than the number of children that the couple is willing to raise; and in case of malformation of the foetus); the need to lower the risks for **woman's health** (e.g. drugs, multi-embryo implantation) and improve the quality of **information** on health risks and legal rights given to surrogates before they consent and during the pregnancy through legal and medical **counselling**; the need for worldwide **homogeneous regulation** to make the rights of all parties more certain; the fact that women in developing countries are **vulnerable to exploitation** in surrogacy arrangement; the need for stricter requirements for starting surrogacy agencies and for mechanism of **supervision and control** on GS industry.

The fundamental difference between the abolitionist and reformist fronts is that whilst the former looks at surrogacy as unethical and harmful per se, primarily because the woman is exploited as an incubator and the deprivation of the maternal-fetus bond harms both, no matter how well GS is regulated, the reformist front aims to prevent unethical practices in the way GS is performed. However, there are **common areas** of concerns such as: women's and children's health risks, the need for long-term **research and monitoring on women's and children's health**, the need for better regulation of **medical procedures** and more transparent process for **consent** to avoid coercion and manipulation of vulnerable women, as well as enhanced public **information and awareness** on details of the practices.

⁷ Izzo F (2017) *Maternità e libertà*, Roma, Castelvecchi.

Comments: the limits of a woman-centred debate

Although it is undeniable that GS rests on the use of a female-exclusive capability (pregnancy) and that GS is a practice in which the **female-gender is more at risks** of health/psychological hazard as well as exploitation, and thus women perspectives are paramount in the understanding of the phenomenon, on the other hand the adoption of feminist categories, such as that of women's autonomy and commodification/exploitation, contributes to **polarize the debate** over incompatible positions on the 'meanings' of GS (work, patriarchal exploitation, sisterhood, etc.) and on representations of women as victims whose actions result from a situation of domination, social disadvantage and lack of knowledge/awareness, or as contractual subjects capable of self-determining a path of empowerment. It is important to acknowledge that working as a surrogate may ease woman's and family's **projects of social mobility and emancipation**,⁸ and also that the spread **culture of utilitarianism in a neoliberal system** in which every aspect of life is given monetary value may render acceptable for women themselves to exploit on the reproductive market their capability to give birth; also **poverty and lack of opportunities** make women more open to engage in unhealthy, dangerous and unethical activities.

However, what is overshadowed in the debate is the very fundamental characteristic that makes GS different from other social practices debated as woman's issue (namely, VAW, prostitution and pornography): **GS is a reproductive practice and its intentional goal/purpose is generating a third subject**, the child, for other 'beneficiaries' who are women and men living in a society influenced by the culture of "parents at any cost". In the procreation market, these desires meet necessities of the surrogates and the suppliers of gametes. While the **feminist debate short-circuits** (commodification versus autonomy) on whether women should be free to choose to engage in self-degrading practices (allegedly maintained by patriarchy and functional to keep male power in place), which temporarily limits their bodily ownership (insofar the fetus genetically 'belongs' to IP) and whether they are 'really' free in making that choice, GS offers a way forward: women, by engaging in the practice freely or under pressures, end up **causing involuntarily an inevitable harm not only to themselves but also to children**, who do not have any choice.

Therefore, there is a need to rethink woman's freedom as limited when she takes responsibility for protecting a subject with less power than her, *i.e.* the child, and in broader terms, chooses not to be instrumental in damaging the well-being of future generations. Whilst in neoliberal culture the **commodification frame is easily defeated by personal autonomy imperative**, including the freedom of self-harm, what in fact still receives socially condemnation, at least on a theoretical, juridical and discursive levels, is the expression of personal freedom at the expenses of children. This is not to say that children are not harmed as a result of adults social relations, they are, but the **protection of children from harm is still a guiding principle in policy making and a recognized fundamental for civilized societies**. Thus, discussions on GS have more opportunities for reaching a common ground if the health of the child acquires central stage and if competing frames of woman's autonomy versus woman's commodification are integrated with non-negotiable 'do not harm children' imperative.

Why surrogacy is problematic for the child and future generations

Although more studies and monitoring of babies born through surrogacy and their surrogates are needed, available literature⁹ already shows that GS (insofar it implies IVF, the implant of embryos with different

⁸ Jacobson H (2016) *Labor of love*, New Brunswick, Rutgers University Press.

Rudrappa S (2015) *Discounted life*, New York, New York University Press.

⁹ Allen A (2018) Surrogacy and limitations to freedom of contract: Toward being more fully human, *Harvard Journal of Law & Public Policy* 27, 17, 3514-3531.

Gordon M. (2018) Do IVF And Other Infertility Tech Lead To Health Risks For The Baby? Maybe, *NPR*, available at: <https://www.npr.org/sections/health-shots/2018/09/19/648923906/do-ivf-and-other-infertility-tech-lead-to-health-risks-for-the-baby-maybe>.

Corradi L (2017) *Nel ventre di un'altra*, Bologna, Castelvecchi.

Larry A et al. (2018) Epigenetics. Is the mode of conception a marker for future cardiovascular risk?, *Journal of the American College of Cardiology* 11, 72, 1275-1277.

DNA than one of the carrier, pharmacological treatments for eggs 'donors' and carriers, in majority of cases multi-embryo implantation and selective reductions, and cesarean birth) is **pregnancy at higher risks** (for both the surrogate and the foetus) of several complications: gestational diabetes, foetal growth restriction, pre-eclampsia, premature birth, intracranial pressure, malformations, delay in bones growth, infertility and cancer. Also, **eggs retrieval** implies for women high risk to develop hyper-stimulation syndrome, infertility, and obesity. Surrogates after birth are at risk of **postpartum depression** and trauma for being detached from the baby (although not genetically bonded).

Psychological, cognitive and emotional development of the child, her ability to relate to other people and space, starts in the uterus through a bi-directional biological, physiologic and sensory exchange with the gestational mother.¹⁰ The sudden removal of all the points of reference that the child had acquired while in the womb (*e.g.* external voices, heartbeat and breathing) creates a **fracture in this process** of attachment and learning. As philosopher Marcus Agnafors¹¹ points out, this fracture cannot then be erased, not even if the child, thanks to her adaptive abilities and her family's love, will then undergo a healthy development. In other words, the happy ending does not erase the intentionally created fracture, and this fracture in itself harms the child.

In our opinion, we should include in the **costs/risks evaluation** the fact that the child born via surrogacy or through IVF, unlike in natural conception, is not generated in a space protected from the intrusions of the will of others, but through the actions, decisions, and technical selections of third parties (parents and medical staff) who will then be responsible for her "configuration".¹² When naturally conceived, the child cannot pinpoint those responsible for her personal and physical characteristics, for being as she is, because these are given by a series of micro-events and spontaneous combinations that science can know and reproduce only in part. According to philosopher Jurgen Habermas, neo-liberal genetics and biotechnology interfere with the **development of identity** as a unique and free subject, the sole owner of his/her own identity and actions.¹³ Also, as transhumanism predicts, GS might be a transitional phase and in future the fabrication of human beings in **artificial uterus** might be achievable from a technological point of view, with no need for exploitation of women's bodies. Reaffirming, at this stage of technological development, the right of being generated in human spaces and in conditions of minimum risks, is urgent also in a future perspective.

Nicolau Y et al. (2015) *Outcomes of surrogate pregnancies in California and hospital economics of surrogate maternity and newborn care*, World Journal of Obstetrics and Gynecology 4, 4, 102-07.

Video-documentaries: Eggsplotation <http://www.eggsplotation.com/about.htm> and BigFertility <http://www.bigfertility.com/>

Riben M. (2019) All Ways of Family Building are NOT Equal and do Not Protect Child's Rights, *Dissident Voice*, available at: https://dissidentvoice.org/2019/01/all-ways-of-family-building-are-not-equal-and-do-not-protect-childs-rights/?fbclid=IwAR0M_SFo9QIZ8FmLY8HktdhVVyVIHmvHJibbIuzg4yknoXvGZMVBC4B5lg#footnote_1_87806

¹⁰ Nicolais G (2018) *Il bambino capovolto*, Milano, Feltrinelli.

Tieu M (2009) Altruistic surrogacy: The necessary objectification of surrogate mothers, *Journal of Medical Ethics* 35, 3, 171-175

¹¹ Agnafors M (2014) The harm argument against surrogacy revisited: Two versions not to forget, *Medicine, Health Care and Philosophy* 17, 3, 357-363

¹² Habermas J (2003) *The future of human nature*, Cambridge, Polity Press.

¹³ For a more extensive discussion see Bandelli D & Corradi C (2019) Abolishing or regulating surrogacy. The meanings of freedom according to Italian feminism, *Salute e Società* 18, 1, 9-25.