

Dr. Loredana PERSAMPIERI
PhD Candidate
LUMSA University of Rome

**Reproductive tourism and surrogacy:
new challenges for European values.**



OVERVIEW

- What is reproductive tourism?
- Definition and forms of surrogacy
- Key drivers
- Common features to CBRC tourists
- Surrogate mothers motivations
- Reproductive tourism risks: ethical and legal issues
- European countries and regulatory heterogeneity
- Practical cases
- The theoretical debate around surrogacy
- Current trends
- New challenges for EU values



What is reproductive tourism/fertility tourism/cross-border reproduction?

- It is a type of “medical tourism”
- This practice involves traveling abroad to access a variety of commercially provided assisted reproductive technologies, among which the international surrogacy market is experiencing an increasingly global expansion



Definition and forms of surrogacy

Surrogacy is “*the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth*” (**Report of the Committee of Inquiry into Human Fertilization and Embryology, chaired by Mary Warnock, London 1984**)

It can take several forms:

- Traditional surrogacy
- Full or host gestational surrogacy



Cross-border reproduction: a growing phenomenon

- At an early stage, it was a low-profile phenomenon
- Travel for reproductive services was initially mentioned in a 1991 paper by Bartha Knoppers
- It has grown into a transnational industry over time, also fueled by the process of globalization



What are the key drivers of CBRC?

International regulatory heterogeneity

the willingness to circumvent existing national bans on surrogacy or restrictions on:

- who can access this procedure
- patient age
- marital status
- sexual orientation



Common features to CBRC seekers

- the desire for a child who is genetically related to them
- the inability to give birth to this child through natural means
- price-sensitive issues



surrogate mothers motivations

Financial reasons, directly linked to:

- poor and vulnerable condition (they usually come from low-income countries)

Therefore, they turn out to be:

- highly available
- affordable



Reproductive tourism risks: ethical and legal issues

risks specifically arising out of the gestational surrogacy industry:

- risks to the source country
- risks to the destination country
- risks to reproductive tourists
- risks to the surrogate mothers
- risks to the children born via surrogacy



Risks to the source country

- insofar as regulatory issues reflect social values, elements of the state of origin's values system may also be affected
- there is a lack of consistency between the extent to which a country's domestic law is assumed to reflect societal values and the extent to which such values are expressed and protected in the actual enforcement of law



Risks to the destination country

- the possibility that a sufficiently powerful industry may influence national laws to reflect its needs, instead of mirroring the values of society
- India: an illustrative case



Risks to reproductive tourists

The threat is considerable for unsupported promises by disreputable clinics and brokers of:

- High success rates
- Uncomplicated surrogacy negotiations



Risks to surrogate mothers

There are a number of bioethical/legal/emotional/social risks:

- **autonomy** in expressing an informed consent to participate in a commercial transaction involving their body may come out of hardship
- vulnerability to exploitation
- heightened chance of multiple pregnancies
- physiological outcomes (migraines, back pain, diabetes, high blood pressure, permanently impaired fertility, death in extreme cases)
- potential emotional attachment to a child that they must give away after delivery
- social consequences



Risks to the child

- forming the “object” of a commercial transaction
- becoming “stateless” until adopted

Open questions:

- how should source countries deal with children born through surrogacy abroad when their citizens are the “intended parents”?
- If the source country prohibits this practice, is it appropriate for it to refuse to grant citizenship to the resulting children, in order to protect their best interest?
- Is it a morally problematic form of exploitation of most vulnerable subjects?



To what extent is Europe involved in the process?

- Some European States explicitly prohibit surrogacy (Bulgaria, France, Germany, Italy, Portugal, Spain)
- In other States explicit payment is forbidden (such as in Denmark, Ireland, Hungary, Greece, the Netherlands)
- Other countries facilitate the so-called “altruistic form of surrogacy” (i.e. UK)
- Heterogeneity or lack of regulations across countries/continents



A variegated landscape of regulatory solutions

Concrete cases:

- In the **UK**, surrogacy is highly regulated through a series of comprehensive laws, including the 1985 **Surrogacy Arrangements Act** (and amendments) and the **Human Fertilisation and Embryology Act** (first enacted in 1990 and amended in 2008)
- Surrogacy contracts are not necessarily binding in court
- In **France**, surrogacy is prohibited as it is regarded as a violation of the principle that the human body is inalienable. However:
 - commissioning parents have circumvented these restrictions by travelling abroad to hire the services of surrogate mothers in countries such as India, Ukraine and the USA
 - According to the French Supreme Court, recognizing birth certificates of children born via surrogacy would violate fundamental principles of French law, as surrogacy contracts are contrary to French public order, regardless of their possible validity abroad
 - As a result, these children cannot acquire French citizenship and are at risk of becoming stateless.



Concrete cases

- The **Italian law** bans surrogacy (*Article 12, section 6, Law n°40/2004*)
- According to Italian law (*Article 269 paragraph 3, Civil Code*) a woman who gives birth to a child is that child's legal mother
- There is a broad and complex case-law on this practice, occasionally contradictory
- Judgment delivered by the European Court of Human Rights (*Paradiso and Campanelli v. Italy*)
- Difficulty arises out of the mix of laws on filiation, assisted reproduction and citizenship involving all the parties.



The most popular destination countries

India:

- It has grown into a multi-billion dollar industry due to its low-cost services, generated from roughly 3000 clinics
- The average cost of a surrogacy procedure ranges from 10.000 to 35.000 dollars, therefore, making it more affordable if compared with the cost of 59.000-80.000 dollars for this same practice in the United States, which is another great provider of surrogates (especially California). Among others: Ukraine, Russia
- Information on the extent of surrogacy is scarce due to the absence of a robust international reporting system



India's regulatory framework

Commercial surrogacy has been legal in India since **2002**. India's evolving regulatory framework (most recent **2013 draft ART Bill**) focuses on a few constant elements:

- no procedure should be performed without the client's spouse's consent
- sex selection is not allowed except to prevent sex-based disease transmission
- the surrogate should be a stranger to the commissioning couple
- it is preferable that the intended parents be a married couple
- the surrogate should relinquish all parental rights over the child
- it is highly desirable that the sperm originate from the male member of the commissioning couple



surrogacy cases that resounded worldwide

- The "*baby Manjhi*" case (2008)
- The "*baby Gammy*" case (2015)



Arguments for/against surrogacy

Arguments in favour of surrogacy:

- Freedom to choose
- Right to privacy
- Women should be able to choose their parental role from available reproductive techniques
- According to C. Shalev: "Making babies is one of women's possible forms of power. Establishing a paid contract can help those having limited income opportunities".
- A free reproductive market would enable women to autonomously set a value for their procreative activities.
- Back in the 1980s, Peter Singer and Deane Wells suggested establishing "State Surrogacy Boards" to monitor agreement terms and conditions/offer medical counselling to the parties involved.



Arguments for/against surrogacy

Arguments in favour of surrogacy:

- In L.B. Andrew's view:
- Surrogacy is not a form of exploitation in itself, it becomes so whenever there are poor living conditions. Efforts should focus not on abolishing compensation but, instead, on increasing it. The "**professional surrogate**" could fulfil "extra needs" (desires)
- Other orientations:
- Therapeutic reasons (a solution for infertility, most likely causing considerable suffering).
- No compensation is claimed (this way everyone could afford exercising their right to a family, through procreation)
- Appropriate regulation to control possible risks (for the commissioning couple, surrogate and child):
- Clear procedures guaranteeing the surrogate's free consent



Arguments for/against surrogacy

Arguments against surrogacy:

- Harm to surrogates/children (it can be psychologically damaging to be forced to give up a baby; philosophical considerations against “using a person as a means”)
- Commodification of women/children
- Exploitation (vulnerability of poor women)
- It is defined as “reproductive slavery” / “incubatory servitude”
- Baby business



Arguments for/against surrogacy

Arguments against surrogacy:

- Power imbalances
- Acts of disposition of one's body affecting the subject's physical integrity are generally prohibited by legal systems (for instance, Art. 5 of the Italian Civil Code)
- Lack of proportionality between risks/benefits
- Psychological pressures and negative effects:
 - separation from the child after birth
 - lack of autonomy
- intermediary agencies do not conduct appropriate medical testing/ counselling, minimising risks while emphasizing benefits
- What about the rights of the child?
- In case of conflicting interests, the ones belonging to commissioning parents prevail.



Current trends

It is possible to identify two trends at European and international levels:

- endeavours towards universally condemning surrogacy
- devising harmonized standards for legalizing surrogacy



What about the role of the European Union?

- The European Parliament adopted the **Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter** (30 November 2015).
- In this report, the Parliament condemned all forms of surrogacy, as it *'undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity.'*
- In 2011, it adopted a resolution, where it acknowledged the link between surrogacy and human trafficking by saying that *'surrogacy [...] constitutes an exploitation of the female body and her reproductive organs.'*



Initiatives by the Council of Europe

Ongoing discussion on surrogacy at the Parliamentary Assembly of the CoE:

- The **Draft Report on “Human rights and ethical issues related to surrogacy” (Rapporteur: De Sutter)** openly supported a framed legalization of surrogacy
- In March 2016, the Council of Europe’s Social Affairs and Health Committee voted against this draft report



Surrogacy and human rights

the “principle of non-commercialisation of the human body” is recognised in several important human rights documents, such as:

- Art. 21 of the *Convention on Human Rights and Biomedicine*
- Art. 3 of the *EU Charter of Fundamental Rights*

The connection between the limits to the commercialisation of human reproduction and human rights is explained in the Oviedo Convention’s *Explanatory Report* on Art. 21:

- Interpretations of human dignity as “empowerment” and “constraint” pertain to this context
- As for children’s right, their right to know their parents (Art. 7, *Convention on the Rights of the Child*) should be equally taken into account



Surrogacy challenges to EU values:

- equality
- justice
- freedom
- autonomy
- non-discrimination



Final remarks

difficulty to reconcile ethical pluralism and conflicting rights of all parties involved

- 1) on one hand, ethical pluralism dominating european and international debates can positively contribute to enriching our reflections and practices
- 2) on the other hand, building on common ground and on our shared heritage (which draws inspiration from european values) will enable us to safeguard what we have in common and devise common solutions for challenges deriving from this growing phenomenon, which can only be faced by enabling these agreed-upon values to survive.



Thank you for your attention

