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SURROGATE MOTHERHOOD – ABUSE OF FINANCIAL (IN)ABILITY OR SOCIALLY ACCEPTABLE FAMILY PLANNING METHOD

Abstract

Surrogate motherhood, as one of the most sensitive and controversial issues not only in the field of contemporary family law, but also in the field of human rights law in general, has its foundations both in medical advancements and achievements and in the evolution of legal and societal awareness. Surrogacy, as an important family-building pathway, is primarily driven by a profound desire of intended parents for parenthood and the fulfillment of the most important role in life. In this paper, the author will analyze surrogate motherhood, especially focusing on the proposed legal framework of altruistic-gestational surrogacy within the Pre-draft of the Civil Code of Serbia. Using normative and axiological methods, it is questionable whether and which type of surrogacy should be understood as an abuse of rights and medical achievements. Having in mind numerous advantages of precise and restrictive provisions of surrogate motherhood as proposed in the Pre-draft of the Civil Code, it would be preferable to consider surrogacy, established as a method of female infertility treatment, a socially acceptable method of family planning.

Keywords: surrogate motherhood, family planning, female infertility treatment, surrogation, biomedically assisted reproduction,

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intended parenthood, assisted parenthood, third-party reproduction

SURROGATE MOTHERHOOD – DEFINITION AND TYPES

First of all, in the introductory part of this paper, the author will briefly define the main types of surrogate motherhood in order to contribute to a better understanding of both surrogacy and the eternal ethical dilemmas regarding its (un)justifiability and the need for legal regulation. Although surrogate motherhood has both its advocates and strong opponents, it is of the utmost importance to present certain facts before drawing a valid conclusion on the necessity of its legal regulation.

The term "surrogate" originated from the Latin word *subrogare*, meaning "to substitute," which in this context refers to the replacement of one person by another or "appointed to act in the place of" (Patel *et al*. 2018, 212). Surrogate motherhood can simply be defined as giving birth on behalf of another person(s). Surrogacy practically represents an arrangement whereby a surrogate mother agrees to carry and give birth to a child for another person or couple, subsequently transferring the child to the intended parent(s), who thereby become the legal parents of the child with all parental rights and obligations (De Groot 2025).

In legal theory, distinctions between surrogate motherhood are made concerning the method of conception and financial compensation (*Gender.Study* n.d.). Regarding the method, i.e., the genetic connection between the child and the intended parents, two basic types are distinguished: traditional and gestational surrogacy. The traditional concept of surrogacy involves the surrogate mother also being a genetic mother (*Europa.eu* n.d.; *Gender.Study* n.d.), meaning her egg is used for fertilization, usually via *in vivo* fertilization, i.e., artificial insemination with the sperm of the intended father or a donor. This type of surrogacy is considered the least desirable, given that the biological connection between the surrogate mother and the child may have significant psychological and emotional implications, potentially leading the surrogate mother to reconsider the arrangement in order to keep the child, which could create legal difficulties and challenge the parental rights of the intended parents. In contrast to traditional surrogacy, gestational surrogacy involves a child whose genetic material does not come from

the surrogate mother but from the intended parents or a donor. In this case, the surrogate mother is the woman into whom an embryo, created via *in vitro* fertilization, is implanted (Pascoe 2018, 456–457). In this type of surrogacy, the child is always genetically related to at least one of the intended parents, or possibly both.

Regarding financial arrangements, compensation, and motives of the surrogate mother, a distinction is made between altruistic and commercial surrogacy. In the case of altruistic surrogacy, the surrogate mother does not receive any financial compensation beyond reimbursement for necessary medical and related expenses arising from the pregnancy. In this case, the surrogate mother is motivated primarily by altruistic reasons, such as the desire to help those who cannot otherwise become parents, and this fact provides her with sufficient satisfaction. On the contrary, commercial surrogacy involves the payment of financial compensation to the surrogate mother in addition to covering all associated medical expenses. This form may be more attractive to some women, but it is also the most criticized in public discourse due to concerns over potential abuse and reproductive exploitation of women in vulnerable financial or socio-economic situations.

In general, surrogate motherhood can be defined as a means of creating a family for infertile heterosexual couples who have often undergone long and painful IVF treatments and/or repeated miscarriages, for homosexual couples, for single individuals, as well as for women rendered infertile by cancer treatment or born with certain congenital conditions that prevent them from carrying a pregnancy (Horsey 2024, 2). Based on the previously outlined fundamental differences between the types of surrogate motherhood, the most acceptable type appears to be altruistic-gestational surrogacy. It should also be noted that indications of surrogate motherhood can be traced back to the Code of Hammurabi and the Old Testament (Kaur 2021, 15–16; Patel *et al*. 2018, 213; Boruta Krakowski 2019, 134). However, what is common to all the aforementioned types of surrogacy is that the surrogate mother must freely consent to such an arrangement, although the motives and reasons for which she would agree to carry a child for another person(s) may differ.

SURROGATE MOTHERHOOD – A METHOD OF FAMILY PLANNING OR MISUSE OF BIOTECHNOLOGICAL PROGRESS

In this part of the paper, various aspects of surrogate motherhood will be analyzed in order to clarify the eternal moral dilemma of whether surrogacy constitutes a method of family planning or, rather, an abuse of scientific achievements, primarily in the fields of medicine and embryology, and an exploitation of the poorest and most socio-economically vulnerable female members of society. Depending on the type of surrogate motherhood adopted, the reasons that could socially justify the legal regulation of surrogacy will also vary.

Like any legal institution, surrogate motherhood, as a particularly complex issue, can always be observed in multiple ways, depending on the position of the analyst and his/her perspective. Therefore, surrogate motherhood can be seen positively, as a method of family planning for childless individuals and couples who face difficulties and cannot otherwise become parents, most often due to medical reasons, or negatively, as an abuse of advances in medical science, practice, and achievements in the field of biomedical assisted reproduction. Both perspectives exist among legal scholars as well as medical professionals. The aim of this paper is to analyze the positive and negative aspects of different types of surrogate motherhood and to perceive the essence of such arrangements.

The commercial concept of surrogacy has the fewest supporters. Cammu and Vonk particularly emphasize that surrogacy is closely associated with global inequality, human trafficking, and exploitation, especially in the context of transnational surrogacy. They also note that the ethical and legal challenges related to surrogacy, as well as the ways in which different jurisdictions have addressed these challenges, regardless of the preferred regulatory model, whether prohibitive, permissive, or free-market, clearly demonstrate the lack of consensus within Europe and beyond (Cammu and Vonk 2024, 14). Some authors emphasize that there is a broad consensus that additional payments to a surrogate mother beyond actual and necessary expenses should not be high, so as not to constitute undue inducement, whereby "women who are financially vulnerable may feel pressured into a surrogacy agreement they would not voluntarily enter if they had other options" (Writing Group on behalf of the ESHRE Ethics Committee *et al*. 2025, 422).

Regarding the ethical and moral issues of surrogacy, Harleen Kaur indicates that "surrogacy arrangements may have an ill effect on the matrimonial life of the surrogate mother as well as on the life of the commissioning parents," because "the husband may feel emotionally attached with the surrogate mother, who" (Kaur 2021, 29), unlike his wife, can fulfill his desire for offspring. On the other hand, Kaur highlights that at the same time, "surrogacy often acts as a factor which ultimately saves the institution of marriage" (Kaur 2021, 29) while also fulfilling the desire of a childless couple to have a child.

Some authors emphasize the importance of surrogacy as a significant "fertility treatment, wherein advent of *in vitro* fertilization (IVF), has made motherhood possible for women without uterus, with uterine anomalies preventing pregnancies, with serious medical problems, or with other contraindications for pregnancy, to achieve motherhood through the use of embryo created by themselves or donor and transferred to the uterus of gestational carrier" (Patel Nayana *et al*. 2018, 212). The same authors note that surrogacy "has also made it possible for gay couples and single men to achieve fatherhood by having embryo created with their sperm and donor oocytes" (Patel Nayana *et al*. 2018, 212).

Regardless of the surrogacy concept, it is of paramount importance that surrogate mothers are thoroughly informed about all potential medical, health, psychological, legal, and other risks and consequences associated with entering into a surrogacy arrangement. This ensures that consent is given based on informed consent, which should reduce potential abuses, as in all other areas of law and human relations. The cases of human trafficking, rape, or the coercion of women into the role of surrogate mother constitute criminal acts rather than freely given consent, and such practices are clearly unacceptable,[1] requiring stricter control over institutions and individuals involved in the whole process of surrogacy. If we consider surrogate motherhood as a legitimate method of family planning, then we must also acknowledge that it is necessary to make an exception to the universally accepted legal presumption and maxim *mater semper certa est*, which must be interpreted in light

[1] Pascoe mentions the notorious "Baby 101" case in which "a surrogacy clinic in Thailand called Baby 101 trafficked at least 13 Vietnamese women to Thailand, where they were imprisoned, and impregnated with genetic material supplied by commissioning parents," but "in some cases, the method of impregnation was rape by the would-be father" (Pascoe 2018, 462).

of changing societal relations and circumstances, requiring new and modified legal solutions (Cvejić Jančić i Jančić 2021, 23).

SURROGATE MOTHERHOOD – VIOLATION OF WOMEN'S AND CHILDREN'S HUMAN RIGHTS AND DIGNITY, OR PROTECTION AND GUARANTEE OF THE RIGHT TO PARENTHOOD

When discussing surrogate motherhood, the debate often begins with the assumption that it is inherently harmful and undermines the dignity and bodily integrity of women who choose to act as surrogate mothers. Those who advocate the prohibition of the legalisation of surrogacy often position themselves as defenders of women's human rights, insisting that surrogacy constitutes a violation of human rights, particularly women's dignity. According to Patel *et al*: "The prime ethical concern raised in the whole system of surrogacy is regarding the concern about exploitation, commodification, and/or coercion when women are paid to be pregnant and deliver babies, especially in cases where there are large wealth and power differentials between the intended parents and the surrogates" (Patel *et al*. 2018, 215). Some authors argue that surrogacy violates women's human rights and inherent dignity regardless "of whether money is exchanged for the service or not," emphasizing that the argument portraying surrogacy as "an empowering experience shall be dismantled, given that consent is never a justification for the abuse of human rights and that the inherently exploitative nature of surrogacy can easily create conditions of coercion" (Mclathcie and Lea 2022, 1). According to the Writing Group on behalf of ESHRE Ethics Committee: "Concerns arise about the potential impact on women who are financially vulnerable and may feel pressured into a surrogacy agreement they would not voluntarily enter if they had other options," which "is oftentimes expressed as an infringement on human dignity, exploitation of (the body of) vulnerable women, an instrumentalization of the female body, or commodification of reproduction" (Writing Group on behalf of ESHRE Ethics Committee *et al*. 2025, 422–423). One may partially agree with this perspective, but it is important to acknowledge that many workplaces already involve conditions that may violate human dignity or pose health and bodily risks, yet individuals perform such work because they are "forced" by financial and existential circumstances, often for much longer than the nine months of pregnancy. Some authors highlight

that "a gestational surrogate mother sells her reproductive capacities much as one sells bodily sexual function in prostitution," emphasizing the dual dynamic in which "the poor will need money, and the rich can offer to pay" (Callahan 2014, 90).

It can also be argued that surrogacy "is no different from other instances of labor agreements that entail physical risks and burdens" (Writing Group on behalf of ESHRE Ethics Committee *et al*. 2025, 422). Surrogacy also raises the question of a woman's right to enter into a contract and to make decisions regarding her own body (Patel *et al*. 2018, 215). The leading motives and reasons for making such a decision may vary for each woman, as with other personal choices and issues regarding her and her body. If we argue that potential abuse of law is possible, then no personal decision or legal action could ever be taken, as there is always the possibility of misuse. Thus, the legislator must approach surrogacy issues carefully, precisely regulating surrogacy and the control system over agencies and healthcare facilities licensed to operate in this field.

In the literature, one can read about the recent case of a young surrogate mother, who fainted and experienced convulsions during a routine eighth-month prenatal examination. The clinic performed an emergency cesarean section, resulting in the birth of a healthy boy, before transferring the mother to another hospital where she eventually died (Laufer-Ukeles 2013, 1268). This illustrates the risk posed when clinics prioritize the interests of intended parents and their own profit over the surrogate mother's life and well-being. However, this case primarily raises questions of medical liability and professional ethics regarding the (non)implementation of medical measures, which is exclusively a matter of the medical profession and professional medical ethics. Unfortunately, surrogate motherhood is not the only situation in which pregnancy, childbirth, and postpartum complications due to professional medical errors and unethical conduct result in maternal death.

Considering the motives that lead a woman to accept the role of a surrogate mother, one could conclude that poverty emerges as the major problem, as individuals who are financially vulnerable may engage in actions they would otherwise avoid, such as criminal activity, prostitution, taking loans, or becoming vulnerable to human trafficking, even though such acts are illegal and constitute serious criminal offenses. Despite the prohibitions of such criminal activities, these actions continue to occur, so banning surrogacy would not prevent illegal practice when there is

no control, and the risks to health and body are far greater. Instead, the legislator should approach these issues seriously, with careful regulation of the most acceptable solutions to protect all parties involved, ensuring high levels of control over institutions and individuals.

While some authors who equate surrogacy to "selling of one's body for the temporary job or to renting of one's womb for nine months" argue "that economic pressures might tantamount to duress, wherein the surrogate might be coerced into consenting to the process, the prosurrogacy group is of opinion that it should not be viewed as intrinsically coercive as no one would do it unless driven by poverty" (Kaur 2021, 29).[2] Although women primarily choose surrogacy for the financial benefits and "because it provides a better economic opportunity than alternative occupations," Kaur argues that they also "enjoy being pregnant and the respect and attention it draws" (Kaur 2021, 29).

However, the most vulnerable party in the surrogacy arrangement is not only the surrogate mother but also the child born through surrogacy. Therefore, regulation must always prioritize the fundamental family-law principle of the best interest of the child. Regarding this principle, supporters of surrogacy ban emphasize the prenatal mother-fetus bond, saying that it is well documented in the medical literature that maternal-child bonding begins *in utero* and is biologically and psychologically significant, even in the case of gestational surrogacy. They argue that the only person a newborn initially recognizes is the mother who gave birth, as the baby does not know the origin of the genetic material used for conception (Lahl 2016, 294).

The cases of international surrogacies may be particularly problematic due to potential exploitation, difficulties in establishing legal parentage, and uncertainties regarding the child's legal status, which can lead to legal battles and emotional distress for all parties involved. According to Pascoe: "The international nature of commercial surrogacy, often taking place in locations without regulation or/and poor law

[2] In her paper, Kaur gives an interesting example of a race-car driver or stuntman: "Does anyone think that they are forced to perform risky activities for money? They freely choose to do so, is not it? Don't they do it because they enjoy their work, and derive satisfaction from doing it well? Of course they '*do it for the money*' in the sense that they would not do it without compensation; though a few people are willing to work '*for free.*' But the element of coercion is missing, because they enjoy the job, despite the risks, and could not do something else if they chose. Such should be the perception about the surrogates as well" (Kaur 2021, 29).

enforcement, provides parents with a back-out option if they change their mind, a crude 'returns policy' where the unwanted child is abandoned or left behind when the commissioning parents return to their home country" (Pascoe 2018, 465).[3] While such cases do occur, it is important to be aware of the fact that children are also abandoned upon birth (or later) by biological parents or mothers outside of surrogacy. Thus, such rare abuses would never justify the prohibition of the right to motherhood and parenthood. Even under the most just regulations providing adequate protection for surrogate mothers, many women will not choose and agree to act as surrogates, not even with additional compensation, given that pregnancy is one of the most complex and uncertain conditions, entailing constant stress and fear until childbirth.

SURROGATE MOTHERHOOD IN SERBIA – AN OVERVIEW OF THE CURRENT SITUATION

Within the normative framework of the Republic of Serbia, a distinctly negative and restrictive stance has been adopted toward surrogate motherhood. Currently, the Law on Biomedical Assisted Fertilization, adopted in 2017, explicitly prohibits any type of surrogacy and prescribes imprisonment as a penalty.

However, there have been efforts within national legislation to legalise surrogate motherhood. The Commission of the Government of the Republic of Serbia, established to draft the Civil Code for the purpose of re-codifying civil law, proposed provisions regarding surrogacy within the fourth book, which addresses issues of family law and family relationships.

For the first time in Serbia, legalisation of surrogate motherhood was proposed by the Pre-Draft of the Civil Code (PDCC) as an altruistic-gestational surrogacy. In cases of surrogacies, a woman who, according to the surrogacy agreement, had an intention to raise a child, regardless of whether her reproductive cells were used or not, would officialy be considered the mother of a child (intended mother), and the husband or cohabiting partner of the intended mother would be considered a

[3] In his paper, the author mentioned the example of an Australian couple who "commissioned a child through surrogacy in Thailand. When the surrogate mother developed twins and one twin is revealed to have Down syndrome, the couple abandoned the child with Down syndrome and returned to Australia with his sister only" (Pascoe 2018, 465–466).

father (intended father) (PGZ 2015, čl. 2176, st. 1. i 2). Thus, surrogacy would be carried out through a surrogacy agreement. The parties to the agreement must be adults with full legal capacity: on one side, the woman who will carry and give birth to the child (the gestational carrier) and on the other, either married or extramarital partners (intended parents), or a single woman (intended mother) who lives alone or a single man (intended father) who lives alone, if they are capable of exercising parental rights and duties and are in a psycho-physical condition that allows the expectation of acting in the child's best interests (PGZ 2015, čl. 2177, st. 1. i 2; čl. 2180, st. 2. i 3). In case the intended mother is a single woman who lives alone, the surrogate must be fertilized with the intended mother's oocytes. If the intended father is a single man who lives alone, the surrogate must be fertilized with the intended father's sperm and donated oocyte (PGZ 2015, čl. 2180, st. 2. i 3). Besides being married or cohabiting partners, intended parents must meet certain health and medical conditions in order to enter into a surrogacy agreement. Therefore, it was suggested that surrogacy agreement could be concluded only if the intended parents obtained medical evidence that natural conception or conception by biomedical assisted reproduction were not possible, or if such methods of conception were not desirable because of the serious danger of transmitting a severe hereditary disease to the child (PGZ 2015, čl. 2177, st. 1. i 4). There are also certain conditions that should be met by a gestational carrier, who is obliged to meet medical guidelines and prove she is suitable to carry and deliver a child, while both parties of the surrogacy agreement must provide evidence of attending counseling for psychological preparation for surrogacy (PGZ 2015, čl. 2177, st. 4).

By the provisions of the Pre-Draft, it was regulated who cannot act as a gestational carrier and which additional conditions should be met for the validity of the surrogacy agreement. Therefore, if the gestational carrier is married or in a cohabitation, the consent of her spouse or partner is required for the contract to be valid (PGZ 2015, čl. 2177, st. 3). In addition, the gestational carrier must have previously given birth, and it is forbidden to use her reproductive cells for fertilization (PGZ 2015, čl. 2179, st. 2. i 3). Instead, reproductive material from at least one of the intended parents or both must be used for conception, while kinship between the gestational carrier and the intended parents does not impede

the conclusion of the agreement, allowing surrogacy arrangements between relatives (PGZ 2015, čl. 2180, st. 1; čl. 2179, st. 1).[4]

What makes the surrogacy agreement altruistic rather than commercial is that only reasonable expenses related to childbearing may be covered, such as lost wages, medical costs, transportation, accommodation, and nutrition for the surrogate mother, as well as a moderate fee that would be paid monthly or in a lump sum (PGZ 2015, čl. 2183). Therefore, the payment of the additional moderate fee is optional, and it was not intended to commercialize surrogacy, but rather to provide a minimal incentive. There are authors who argue that jurisdictions sincerely seeking to remove financial incentives for surrogacy should prohibit any payments not related to medical expenses (Field 1990, 22). Although the additional remuneration to a gestational carrier is strongly opposed, a surrogate mother makes not only a significant personal sacrifice but also does one of the most important things in a person's life, which is giving birth to a child for another childless couple/person.

For the validity of the surrogacy agreement, it is required that the participation of a state authority be obtained, making it a strictly formal contract. The surrogacy agreement must be certified by a judge, who is obliged to determine whether medical and other conditions for surrogacy had been met, and whether the contracting parties attended counseling, and to warn them of the consequences of such an agreement, particularly that the gestational carrier will not be considered the child's mother (PGZ 2015, čl. 2178, st. 1. i 2). If the judge finds that conditions have not been met or that the contracted reimbursement or reward is disproportionate, certification of the agreement would be denied (PGZ 2015, čl. 2178, st. 3). Given that the child's best interest includes the right to know his/her origin, which contributes to the stability of family life, intended parents are obliged to inform the child about the method of conception and his/her origin, at the latest when the child began attending school (PGZ 2015, čl. 2185). Such a provision would be in accordance with the Constitution of the Republic of Serbia, guaranteeing the child's right to know its origins (Ustav Republike Srbije 2021, čl. 64, st. 2).

Although the work on the Civil Code was suddenly and unjustifiably terminated, many family-law provisions, particularly those concerning surrogacy, are a significant novelty for which Serbian society

[4] The rights and duties within the surrogacy agreement are regulated by the Article 2181 of the Civil Code Pre-Draft.

and political milieu were evidently unprepared, despite all the benefits for childless individuals and couples, supporting positive population policy. Through surrogacy, many couples unable to conceive naturally or through currently legally permitted biomedical assisted procedures could become parents, although not all would necessarily enter the surrogacy arrangement in order to become parents (Jančić 2021, 432). Moreover, the provisions of the Pre-Draft are a valuable initiative for potential future legal regulation of surrogacy in Serbia, for which I truly believe it would be incorporated into the domestic legal system.

On one hand, by the Law on Biomedical Assisted Fertilization it is explicitly prohibited to involve, in the biomedical assisted reproduction process, a woman who would give birth to a child for a third party, with or without payment, as well as offering surrogacy services, with or without payment (ZBMPO 2017, čl. 49, st. 1, tač. 18). Surrogacy is, therefore, not only prohibited in Serbia but also criminalized and punishable by three to ten years of imprisonment (ZBMPO 2017, čl. 66, st. 1).[5]

On the other hand, the law permits biomedical assisted fertilization procedures using the reproductive cells of both married and extramarital partners, while the use of donated reproductive cells is allowed if it is not possible to use the reproductive cells of one of the partners, or in the case of a single woman who lives alone, as well as the use of a donated embryo from another married or extramarital couple is allowed if they do not wish to use it for their own fertilization (ZBMPO 2017, čl. 29).[6] Access to biomedical procedures is, thus, granted to married and extramarital partners and, exceptionally, to a single woman who lives alone and is capable of performing parental duties and is in such a

[5] If the criminal offense is commited against a minor, the punishment is prison from three to twelve years (para. 2). If the act causes serious injury to a donor of reproductive cells or embryos, the punishment shall be imprisonment from five to fifteen years (para. 3). If the death of the donor occurs, the punishment shall be imprisonment of no less than fifteen years (para. 4). If a person repeatedly engages in the commition of these criminal offenses, or if the offense is committed by an organized group, the punishment shall be imprisonment of no less than ten years (para. 5) (ZBMPO 2017, čl. 66).

[6] Paragraph 1 of this Article states: "When, in the procedure of biomedical assisted reproduction, it is not possible to use the reproductive cells of one of the spouses or cohabiting partners because the conception is not achievable or other methods of BAF have failed, or when it is necessary to prevent the transmission of a serious hereditary disease to the child, donated reproductive cells may be used in the procedure of biomedical assisted reproduction" (ZBMPO 2017, čl. 29, st. 1).

psychosocial condition that it can reasonably be expected that she would be able to exercise parental responsibilities in accordance with the law and in the best interests of the child (ZBMPO 2017, čl. 25, st. 1. i 2). Regarding the reproductive cells of a single donor or donated embryos from a married or extramarital couple, these may be used in biomedical assisted fertilization procedures for one married or extramarital couple, as well as for a single woman who lives alone (ZBMPO 2017, čl. 30, st. 1).

The Law on Health Insurance of the Republic of Serbia regulates that insured persons are fully provided with examinations and treatment related to family planning from mandatory health insurance funds (ZZO 2023, čl. 131, st.1, tač. 1, alineja 2), which includes infertility treatment through biomedical assisted fertilization. In December 2022, the Republic Fund of Health Insurance issued Guidelines for the Implementation of Infertility Treatment through Biomedical Assisted Fertilization funded by mandatory health insurance, providing detailed criteria for inclusion in infertility treatment and specifying what the right to infertility treatment entails (Republički fond za zdravstveno osiguranje [RFZO] 2022). The right to infertility treatment also includes three stimulated biomedical assisted fertilization procedures using donated sperm and three cryo-embryo transfers using donated sperm for women up to 45 years who are single and do not have children.

However, it raises the question of whether, from an ethical perspective, the provisions prohibiting surrogacy and favoring the position of a single woman accessing biomedical assisted fertilization using donated sperm are equally socially acceptable or whether they are highly controversial. It is worth questioning how society has reached such level of awareness where biomedical assisted fertilization procedures using donated oocytes, donated sperm, or even a donated embryo from another couple (in which case neither parent is genetically related to a child) are socially and legally acceptable, without considering the potential for abuse, while the procedure of biomedical assisted fertilization (BAF) through surrogacy, in which case both intended parents are also genetic parents, is considered controversial and absolutely unacceptable under the excuse of moral reasons and the protection of woman's rights and dignity. Particularly given that the need for a surrogate mother typically arises solely due to the health and medical condition of a woman unable to carry a pregnancy (e.g. woman without a uterus, who is able to produce oocytes), whereas the use of donated sperm may be based on

social reasons, such as a perfectly healthy single woman not having or not wanting to have a partner. From this perspective, a single woman who lives alone and wishes to raise a child may be in a more favorable position than a couple who are having difficulties conceiving a child and are unable to have one (naturally or through biomedical assisted reproduction) due to medical reasons but wish to have one to whom they could also be genetically related (e.g., when a woman has no uterus congenitally or due to surgery).

This issue raises concerns regarding the principle of the best interest of the child, as it questions whether it is in the child's best interest to live from birth only with the mother (when the father may not be identified) or with both parents, who are also fully genetically related. From the very liberal point of view, this could be considered discrimination based on health status, explicitly prohibited by the Law on the Prohibition of Discrimination (ZZD 2021, čl. 2, st. 1, tač. 1). The purpose of comparing these cases was not to criticize the normative framework established by the Law on Biomedically Assisted Fertilization, but rather to draw a parallel and highlight the lack of substantiation in the reasons and arguments advanced by opponents of the legalisation of surrogacy, particularly in the cases of intended parents being also genetic parents, as proposed in the Pre-Draft Civil Code.

As far as health and bodily risks for women are concerned, some authors emphasize that in the case of surrogacy, these risks are considered very high, whereas in the case of oocyte donation, they are rarely addressed, despite the risks associated with oocyte retrieval. This procedure of oocyte donation, too, could be considered exploitation of women and their reproductive organs, yet for some reason it has become legally permitted and socially acceptable. Callahan argues that "when young persons sell their eggs and sperm, they are selling the unique genetic identity inherited from their own parents and grandparents," which "is not like donating a kidney, because sperms and eggs contain the unique information and inherited generative potential that is basic to identity, one's own and a future other" (Callahan 2014, 90).[7]

The arguments presented in this paper regarding surrogacy reflect a society in which the principle of equality is interpreted inconsistently

[7] She argues that "an egg donor is selling the reproductive capacities of the eggs that she inherited from her mother while still in her mother's womb" (Callahan 2014, 90).

and restrictively, with a significant degree of hypocrisy and resistance to the unfamiliar, the new, and the evolutionary development of both society and the individual. There are authors who emphasize that history and empirical studies demonstrate the benefits of surrogacy, as do the thousands of personal success stories, with litigations being rare and general satisfaction high among both commissioning parents and surrogate mothers (Laufer-Ukeles 2013, 1278). Some authors emphasize that, in order to achieve a balance between fundamental human rights and the moral framework protecting all parties' rights, the only type of surrogacy that should be considered is the surrogacy that does not support a consumerist society, in which everything can be sold, bought, or rented, under the excuse of the protection of the right to family planning (Čović 2023, 664). Nevertheless, the law should follow social trends and rapid daily changes and provide relevant legal responses that consider all circumstances, and offer a generally acceptable legal framework. However, ignoring societal changes, evolving needs, and global awareness could have far-reaching consequences for both individuals and society. According to Boruta Krakowski: "What is natural in a given society is the collective social consciousness undergoing changes in the historical process of changes in customs, norms, and cultural perspectives" (Boruta Krakowski 2019, 140). Bearing in mind that before the Pre-Draft of the Civil Code there have been no serious attempts to legalise surrogacy in Serbia, the provisions of the Pre-Draft hold significant historical-legal importance as an attempt to expand not only the means of becoming a parent but also the scope of persons entitled to the right to parenthood, while respecting all fundamental legal principles and human rights of all parties involved in the surrogacy arrangement.

CONCLUSION

Technological and medical achievements, notably through surrogacy, have significantly contributed to enabling childless couples and individuals to become parents in circumstances when natural conception or biomedical assisted reproduction would not be possible. What remains particularly problematic and controversial is the fact that access to these technologies for the treatment of male infertility encounters almost no opposition or disputable arguments, enjoying broad societal approval and being regarded as a fully legitimate method of family planning. This, however, is not the case when it comes to

female infertility and access to all medically possible and available methods, which further demonstrates that we live in a world where male supremacy, primarily heterosexual, is still prevalent. This can also be interpreted as indicating that the right to equality is not equally accessible to all, as it is interpreted differently and quite restrictively, in ways that serve certain social structures in positions of power. Although surrogacy presents certain risks of abuse, legal difficulties, and challenges, I argue that the possibility of its regulation and incorporation into the national legal system should not be automatically excluded. On the contrary, it is essential to analyze and study in detail how the issue of surrogacy can be regulated, as the law cannot entirely prevent abuses but can significantly reduce the potential for misuse and manipulation. A legal vacuum regarding surrogacy or its prohibition can have multiple harmful consequences. Couples and individuals may seek solutions abroad, exposing themselves to higher costs, potential abuses, and additional risks, while parental relationships established through surrogacy arrangements abroad are recognized in Serbia and recorded in the civil registry. Therefore, the provisions of the Pre-Draft Civil Code regarding surrogacy provide a solid starting point for establishing parentage.

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СУРОГАТ МАТЕРИНСТВО – ЗЛОУПОТРЕБА ФИНАНСИЈСКЕ (НЕ)МОЋИ ИЛИ ДРУШТВЕНО ПРИХВАТЉИВ МЕТОД ПЛАНИРАЊА ПОРОДИЦЕ

Резиме

Сурогат материнство представља једно од најосетљивих и најконтроверзнијих питања и института не само у области савременог породичног права, него и права људских права уопште. Овај институт има своје темеље како у напретку и достигнућима у области медицине и биомедицинских технологија тако и у промени правне и друштвене свести о значају права на родитељство водећи се изузетно великом жељом за родитељством и остварењем у најважнијој животној улози. Институт сурогат материнства омогућава паровима и појединцима да се остваре у родитељској улози у случајевима када то није могуће природним путем, али истовремено отвара бројна етичка, правна и друштвена питања која захтевају пажљиво разматрање. У раду је анализиран институт сурогат материнства са посебним детаљним освртом на предложено нормативно решење у оквиру Преднацрта Грађанског законика Републике Србије, а које је превасходно алтруистички конципирано. Применом нормативног и аксиолошког метода у раду је истражено да ли и који вид сурогат материнства треба посматрати као злоупотребу права и напретка медицинских достигнућа. Истраживање је показало да је приступ биомедицински потпомогнутој оплодњи у циљу лечења мушке неплодности у потпуности друштвено и правно прихватљиво, док лечење женске неплодности путем сурогат материнства изазива бројне моралне, етичке и правне дилеме и контроверзе, што указује на постојање дубоко укорењене родне неједнакости и рестриктивно тумачење начела једнакости. Посматрано са моралног аспекта, сурогат материнство у нашем друштву још

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увек изазива отпор услед традиционалних схватања породице и улоге жене. Међутим, етички приступ заснован на универзалним принципима људског достојанства и права на родитељство, налаже потребу преиспитивања таквих тренутно владајућих ставова. Сходно томе, етичка аргументација у корист нормативног уређења сурогат материнства може допринети смањењу дискриминације и афирмацији једнаког приступа биомедицински потпомогнутој оплодњи. Иако постоји известан простор за злоупотребе, правне потешкоће и етичке дилеме, рад указује да сурогат материнство не би требало аутоматски искључити из националног правног система. Напротив, потребно је детаљно и прецизно регулисати овај институт како би се смањио ризик од злоупотреба и омогућило контролисано и транспарентно спровођење сурогат аранжмана, уз истовремено поштовање људског достојанства и заштиту права свих учесника, посебно уважавајући и начело најбољег интереса детета. Потпуно одсуство правне регулативе или рестриктивна забрана сурогат материнства могу произвести штетне последице, пре свега у виду тражења решења, односно услуга сурогат мајке у иностранству, што доприноси додатним трошковима, ризицима и правној несигурности. Имајући у виду бројне предности рађања за другог чије је нормативно решење пажљиво и рестриктивније предложено у Преднацрту Грађанског законика, пожељно је да сурогат материнство које је успостављено као вид лечења женске неплодности посматрамо као друштвено прихватљив метод планирања породице и заснивања родитељства у Републици Србији.

Кључне речи: сурогат материнство, планирање породице, лечење женске неплодности, сурогација, биомедицински потпомогнута оплодња, намеравано родитељство, асистирано родитељство, рађање за другог

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