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# *Biology Commodification and Women Self-determination. Beyond the Surrogacy Ban*

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## **Abstract**

Starting with the analysis of the recent European Parliament's stands on surrogacy, in the frame of the wider bioethical debate on reproductive rights, the aim of this essay is twofold. Considering the low number of States that allow surrogacy on a commercial basis and the relatively low percentage of live births from surrogacy itself, this paper aims firstly to trace and problematize the recurring arguments against surrogacy, involving in the analysis not only appeals and campaigns promoted against it, but also the interventions of the European Court for Human Rights and of the Committee on Social Affairs. Secondly, examining the bioethical perspectives not against surrogacy, from the neoliberal to the feminist and materialist approaches, the essay aims at presenting some of the possible thesis in favour of the recourse to new reproductive technologies.

Keywords: surrogacy, reproductive rights and labor, gender, sexual orientations.

## **1. Introduction**

The European Parliament, on the occasion of the publication of the Annual Report on Human Rights (17 December 2015), declared, for the first time explicitly, its intention to prohibit gestation for others (surrogacy), arguing that it 'undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity' and 'that the practice of gestational surrogacy involves reproductive exploitation and use of the human

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body for financial or other gain, in particular in the case of vulnerable women in developing countries<sup>1</sup>.

On the 15<sup>th</sup> March 2016 the European Committee on Social Affairs, Health and Sustainable Development confirmed the will to ban surrogacy technologies, rejecting the Report of the deputee Petra de Sutter, *Human rights and ethical issues related to surrogacy*<sup>2</sup>. Furthermore, the Parliamentary Assembly of European Council has rejected with 83 votes against (77 in favour and 7 abstentions) another de Sutter's recommendation, *Children's rights related to surrogacy*<sup>3</sup>.

The European Court of Human Rights' Grand Chamber, on the 24<sup>th</sup> January 2017, ruled in second instance on the case<sup>4</sup> *Paradiso e Campanelli v. Italia*<sup>5</sup>. The intending parents, who had resorted to surrogacy without contributing with their gametes, were denied the right to recognize the child as their own. The Grand Chamber did not recognize a violation of art. 8 of European Convention on Human Rights (right to a private life) and decided to entrust the children to third parties, separating him from intended parents, arguing that there is no parental tie between the claimants and the children considering the lack of biological bond. In contrast with previous rulings, which in the interest of the child had allowed the recognition of parenthood, the ruling of the Grand Chamber of January 24, 2017, falls within the political line assumed by Parliament and Council of Europe, aimed at the surrogacy ban<sup>6</sup>.

The thesis supported by European governance (Anrò, 2016), according to which pregnancy's surrogacy techniques necessarily involves the commodification of women's bodies, received support both on the right and on the left of the political spectrum, finding supporters both in feminist or secular and in conservative or religious environments. Emblematic is the case of the appeal promoted in December 2015 by 50 women, entitled *Lesbiche contro*

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<sup>1</sup>Motion for a European Parliament Resolution on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI), 29.

<sup>2</sup> <https://agenda.europe.files.wordpress.com/2015/04/surrogacy-preliminary-report-3.pdf>

<sup>3</sup> <http://assembly.coe.int/nw/xml/Votes/DB-VotesResults-EN.asp?VoteID=36189&DocID=16001&MemberID>

<sup>4</sup> In first instance the court had not ruled the separation of the children from intending parents: *Paradiso e Campanelli v. Italia*, ECtHR, application No 25358/12, 27 January 2015.

<sup>5</sup> *Paradiso e Campanelli v. Italia*, ECtHR, application No 25358/12, 24 January 2017.

<sup>6</sup> *Menesson v. France*, ECtHR, application No 65192/11, 26 June 2014. *Labassée v. France*, ECtHR, application No 65941/11, 26 June 2014. *Foulon v. France*, ECtHR, application No 9063/14, 21 July 2016. *Bouvet v. France*, ECtHR, application No 10410/14, 21 July 2016.

*la GPA* (Lesbian against surrogacy)<sup>7</sup>, shared by sites and blogs connected with the Movement for Life or with explicit no-choices connotations<sup>8</sup>. Moreover, the signatures petition launched by the group of women called ‘Se Non Ora Quando’, titled *No uterus for rent!*<sup>9</sup>, was embraced and signed by the Catholic world, in particular by a newspaper known for its clear condemnation of new reproductive technologies such as *Avvenire*<sup>10</sup>.

On February 2, 2016, several groups of women met in the French Parliament with the aim of drafting a document to ban surrogacy, later published as *Charter for the universal abolition of surrogacy*<sup>11</sup>. According to the signatories of the paper, surrogacy is a transnational commercial phenomenon to be fought on a global level, for this reason they ask for the political-regulatory support of Europe (a commitment somehow obtained with the rejection of de Sutter’s Report).

The aim of this essay is therefore understanding why a clear-cut condemnation is spreading against the use of surrogacy techniques, a condemn that traditionally opposed or politically divergent fronts, such as emancipationist and sexual difference’s feminisms on one side and religious movements on the other, support referring to common arguments, despite the fact surrogacy is legally admitted in few countries on an altruistic basis and even in less countries on a commercial basis.

## 2. *Surrogacy: an overview of numbers and regulations*

These groups and associations dedicate to the surrogacy ban an embellishment that is not due to the existence of a real ‘motherhood’ market, in particular not in the Eu-28 legal framework. In Europe, it is forbidden to pay carriers almost everywhere, since the laws allowing surrogacy use to understand it only as gift<sup>12</sup>.

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<sup>7</sup> <http://download.repubblica.it/pdf/2016/cronaca/no-regolamenti.pdf>

<sup>8</sup> See the space devoted to the issue by the catholic website Documentazione.info: <http://www.documentazione.info/utero-in-affitto-lappello-di-50-lesbiche-per-fermare-la-pratica>

<sup>9</sup> <http://www.cheliberta.it/2015/12/04/appello-che-liberta/>

<sup>10</sup> <https://www.avvenire.it/famiglia-e-vita/pagine/contro-utero-in-affitto-se-non-ora-quando-raccolta-firme>

<sup>11</sup> <http://www.abolition-GPA.org/charte/italiano/>

<sup>12</sup> EU, *A Comparative Study on the Regime of Surrogacy in EU Member States*, 2013. [http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/474403/IPOL-JURI\\_ET\(2013\)474403\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf). It should be noted that Greece has adopted less stringent legislation with margins for negotiating compensation for lost earnings,

The countries that admit the signing of a contract, which provides for fair compensation, are currently concentrated in the United States (pioneers California and New Jersey), followed by Russia, Ukraine, Armenia and a few other exceptions<sup>13</sup>.

Certainly, in recent years there has been an increase in the use of surrogacy, however it is pivotal to broaden the gaze for placing these techniques in the ampler framework of assisted reproduction therapies.

The numbers of couples and people who resort to surrogacy remains scant, both in absolute terms and when compared to the number of people using the other assisted reproduction techniques (with their own or third parties' gametes). Let's consider the United States: surrogacy was used in 1% of cases in 2008 (just over 900 times), while oocytes taken from third women were used in around 12% of cycles, allowing the birth of 5,894 children<sup>14</sup>.

A more recent statistic shows an increasing trend, but this increase concerns all assisted reproduction therapies<sup>15</sup>. Between 1999 and 2013, on 2,071,984 assisted reproduction cycles, gestational surrogacy was used in only 30,927 cases (1.9%) (Perkins *et al.*, 2016). We can narrow the field to understand how, even in countries considered pioneers, the use of surrogacy techniques is limited: in California, it is estimated that about 100 births from surrogacy<sup>16</sup> and 8.649 births from ICSI and IVF (Sunderam *et al.*, 2015) occur per year. There are sufficient reasons to reckon that these numbers are increasing, although it cannot be said that the spread of surrogacy is alarming.

As regards Europe, there are no precise facts and figures on the number of people resorting to surrogacy; official statistics admit the limits of the data gathering. Anyhow, numbers for surrogacy are very scant when compared with ICSI and IVF (EU, 2013). As instance, the report made by the Osservatorio sul

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medical expenses, travel expenses, hospital stays etc. (Law 3089/2002, amended 3305/2005), see: K. Rokas, 'Greece', in Trimmings and Beaumont, 2013.

<sup>13</sup> CORE, *Worldwide Surrogacy Laws*, 2015. <http://corethics.org/wp-content/uploads/Surrogacy-Laws.pdf>

<sup>14</sup> Centers for Disease Control and Prevention, *2008 Assisted Reproductive Technology Success Rates. National Summary and Fertility Clinic Reports*, Department of Health and Human Services, Atlanta US 2010.

<sup>15</sup> Centers for Disease Control and Prevention, American Society for Reproductive Medicine, Society for Assisted Reproductive Technology, (2015), *2013 Assisted Reproductive Technology Fertility Clinic Success Rates Report*, Atlanta (GA), US Dept of Health and Human Services. <ftp://ftp.cdc.gov/pub/Publications/art/ART-2013-Clinic-Report-Full.pdf>

<sup>16</sup> M. Gugucheva, *Surrogacy in America*, Cambridge (MA), Council for Responsible Genetics, 2010. <http://www.councilforresponsiblegenetics.org/pagedocuments/kaevej0a1m.pdf>

Turismo Procreativo has showed that in 2011 the Italian partners travelling abroad for surrogacy were 32, a very small number compared with the 4.000 partners that in the same year travelled abroad for assisted reproductive therapies requiring donors' gametes<sup>17</sup>.

The European legal framework on reproductive rights and sexual health can be defined as light, since it allows a broad autonomy to Member States, which normative production is influenced above all by medical professional associations, feminist and women movements as well as pro-life and religious organizations.

Seven European countries (Belgium, Denmark, Ireland, Latvia, Netherlands, United Kingdom, Hungary) today prohibit surrogacy on a commercial basis, while eight prohibit all types of surrogacy (Finland, Germany, Italy, France, Austria, Bulgaria, Malta, Portugal), in ten countries there are no specific laws on the topic (EU, 2013: 15-16).

It can therefore be said that most European countries prohibit gestational surrogacy within national borders. No country can, however, go so far as to prevent citizens from going abroad to follow their parenthood desire. Following the report *A Comparative Study on the Regime of Surrogacy in EU Member States*, it appears that surrogacy ban miss its purpose, that means it fails in the reduction of the surrogacy techniques: in 2012 in France, where there is the prohibition of all forms of surrogacy, 200 children were born abroad out of a total assisted fertilization cycles of 85,487 (Calhaz-Jorge *et al.*, 2016); in the United Kingdom, which instead admits surrogacy on an altruistic basis and regulates it through specific guidelines when carried out abroad, 149 children were born out of a total assisted reproduction cycles of 62,155<sup>18</sup>.

### 3. Why invoke the surrogacy ban?

Considered the small number of countries that allow surrogacy as well as the relatively low percentage of births, the question we propose to answer is the following: what drives political and regulatory actors, emancipationist and/or differentialist feminists, movements for life and Catholics to express themselves so clearly against surrogacy and which topics return as common *leitmotiv* of their discourses?

A first answer could be found in the special status that many of them grant to certain parts of the body and to some functions historically ascribed to

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<sup>17</sup> Osservatorio sul Turismo Procreativo, *Turismo procreativo: la fuga continua, anche senza indicazione medica*, 2010. <http://genitorialester.altervista.org/?p=70>

<sup>18</sup> HFEA, 2013, p. 14. <http://www.hfea.gov.uk/docs/FertilityTreatment2012TrendsFigures.PDF+>

women, such as reproductive, affective and care&cure functions. The belief that the body is not transferable by money, that its parts are not marketable objects by means of a contract, remains predominant. As instance, let's read the appeal of *Lesbiche contro la GPA*: 'We say no to work performances that invade our own body and commercialize a new human being, which becomes the product of pregnancy'<sup>19</sup>. Furthermore, consider what was written in Se 'Non Ora Quando' petition: 'We cannot accept, only because the technique makes it possible, and in the name of alleged individual rights, that women return to being available objects: no longer of the patriarch but of the market'<sup>20</sup>.

The urge to focus precisely on commercial gestation, even if the most used technologies remain ICSI and IVF, is explained by the inability to free from identity models, from strictly normed gender roles and from the dominant morality, which still understands nature as opposed to culture. The re-proposal of the dialectic between nature and culture is evident in the text of *Lesbiche contro la GPA*, which expresses itself in favor of a concept of essentialist motherhood, similar to that of pro-life movements, invoking the 'common sense' of legislators, which according to the signatories of the appeal would consist in recognizing as unique mother 'the one who gave birth'.

A special value is attributed by the signatories to the rights of the born by surrogacy and to maternal-fetal relationship, as well as to the need of not separating the mother from the child during breastfeeding. These arguments are variously diffused among the pro-life movements, as can be seen from the press release of the 'Italian Movement for Life', intended to promote the birth of the committee and the related campaign 'Di mamma ce ne è una sola'<sup>21</sup> (There is only one mother), from which we learn that: 'the struggle against the practice of surrogacy is a battle that takes up a frontier that the Movement has been following for long time – that of the child's right to life and to grow with natural fathers and mothers'<sup>22</sup>.

Both the appeal *Lesbiche contro la GPA* and the *Charter for the universal abolition of surrogacy* argue that carriers are especially women with low incomes, without a real right of choice: 'Some women agree to engage in a contract that alienates their health, life and person, under multiple pressures: family domination, sexist, economic, and geopolitical relationships'<sup>23</sup>. The appeal *Lesbiche contro la GPA*

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<sup>19</sup> <http://download.repubblica.it/pdf/2016/cronaca/no-regolamenti.pdf>

<sup>20</sup> <http://www.cheliberta.it/2015/12/04/appello-che-liberta/>

<sup>21</sup> Committee supported by Roccella and disseminated by Famiglia Cristiana: <http://www.famigliacristiana.it/articolo/di-mamma-ce-n-e-una-sola-contro-l-utero-in-affitto.aspx>

<sup>22</sup> <http://www.mpv.org/mpv/allegati/21665/comunicato5novembre.pdf>

<sup>23</sup> <http://download.repubblica.it/pdf/2016/cronaca/no-regolamenti.pdf>

goes even further speaking for and self-electing themselves to represent carriers arguing that: 'It is not acceptable to become a mother for others obliged by a contract or by the rules of regulations that normalize this practice having as a consequence the creation of a sub-class of makers'<sup>24</sup>.

In the analyzed documents, surrogacy is described as a harbinger of the commercialization of biological reproduction, which is detrimental to the supposed rights of the unborn and of the child, the cause of the exploitation of less wealthy and non-Western women. Such a reading of surrogacy is possible, however, only wearing the lenses of moralism and essentialism. Moralism and essentialism in fact, operate a double abstraction: on the one hand, they allow to abstract from the local and global political-economic context and from its history; on the other, they allow to silence the embodied subjectivities, both intending parents and carriers. Let's start from the political-economic context: despite the dominant morality remains anchored to the conception of 'entire body' of which theoretically the individual person should be sovereign, advanced capitalism has transformed the whole life, human and not, in surplus value, and the bodies themselves in biological materials ready to be divided in 'pieces' and marketable (Scheper-Hughes, Wacquant, 2004). The conceptual nodes around which the arguments contrary to commercial surrogacy revolve, should be applied to the current reality and to embodied and embedded subjectivities. Thus, it would be discovered that *the commodification of biological reproduction, the rights of the child and the exploitation of other women* are mystifying arguments, which conceal and remove three material and conceptual assumptions, around which capitalism incessantly continues to reorganize: the *gratuity of reproductive and care work*, the *heterosexual family* understood as production unit and core backbone of the nation-states' socio-political architecture, the *representation and proxy devices of inclusion and exclusion* which determine the fact that some subjectivities can access certain rights, such as the rights to health and self-determination, while others are denied.

We are therefore going to investigate these three assumptions in light of the ongoing changes in production systems and forms of life/work after the bursting of biotechnologies. First, referring to Cooper's thesis that life itself becomes a source of surplus value in late capitalism (2008), we will try to understand why is so difficult to consider biological reproduction a work itself, no less difficult to bear than other forms of reproductive and/or care work.

Secondly, rather than focusing on the rights of the child, which is only an unborn intention at this stage, we will investigate the legal framework to understand to which subjects the right to surrogacy is reserved, following the current tendency to exclude LGBTQ subjectivities from accessing to assisted

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<sup>24</sup> <http://download.repubblica.it/pdf/2016/cronaca/no-regolamenti.pdf>

reproduction techniques.

Thirdly, we will propose to not speak on behalf of other women, to not self-delegate to the representation of carriers, but to reason more modestly on the rights to self-determination and to scientific progress, on the possible alternatives offered by biotechnology developments, in the attempt not of feeding the exploitation with counter-producing bans, but of promoting freedom of choice by improving the right to health and the access to income.

#### **4. On commodification of biological reproduction or on unpaid care&cure labor**

Condemning surrogacy by describing it as a form of commodification of biological reproduction means uncritically assuming the argument on the basis of which reproductive work must be performed without remuneration.

Historically, the reproductive and affective labor of women was complimentary, no matter if extorted or spontaneous, it was never paid or rewarded. To remain in the West and at relatively recently time, an entire system of production, namely Fordism, has stood on the guarantee of reproduction at no cost. Both the carriers, which receive the payment only at the child's birth, and the intending parents, which receive the child only paying, make explicit the hidden grounds of contemporary economy: reproduction is an integral part of the productive cycle. As Fraser explains, these hidden grounds constitute one of the most glaring contradictions of capitalism:

My claim is that every form of capitalist society harbours a deep-seated social-reproductive 'crisis tendency' or contradiction: on the one hand, social reproduction is a condition of possibility for sustained capital accumulation; on the other, capitalism's orientation to unlimited accumulation tends to destabilize the very processes of social reproduction on which it relies. This social-reproductive contradiction of capitalism lies at the root of the so-called crisis of care (Fraser, 2016: 100).

Cooper and Waldby, in their book *Clinical Labor* (2014), reconstruct this crisis in Europe and USA by explaining how the unformal and precarious market for services related to domestic setting was born only after the western and white women's refusal to perform care&cure work for free. Since western and white women refused to perform any unpaid reproductive work, the services' economy was nourished by a cross-border and low-cost female labor force.

In western societies, the outsourcing of both biological and social reproductive work has been theorized and pursued by the Chicago School of

Economy, the one studied by Foucault in *The Birth of Biopolitics* (2008) and described by Cooper and Waldby as the bioeconomy incubator. The Chicago School's economists, known as theorists of human capital, were the first to focus on the analysis of the interconnections between biological materials and bodily grounded services, as well as on the privatization of work and the outsourcing of reproduction. Posner and Epstein contributed to the elaboration of gestational surrogacy contracts (Posner, 1989; Epstein, 1995). Becker has fostered monetary incentives to increase the number of organs available for transplantation and was the first to understand and suggest how to reterritorialize the dismantling of the fordist family determined by women's choices and struggles. Becker made it possible to put at value the disappearance of traditional family by suggesting that all social, family and private relationships could fall under the aegis of economic-rational calculation (Becker, 1976; 1981; Becker, Elias, 2007). Thirty years after the publication of his *Treatise on the Family*, it can be argued that the contemporary financial capitalistic societies' 'care deficit', well pointed out by Fraser, it is not only limited to social reproduction, since it is expanding until the point of incorporating biological reproduction.

Oocytes and wombs gain value in the transnational circuits of reproductive markets thanks to their scarcity, as 'raw material' but not as products of women's work, they are defended as organs and cells with a special, almost sacred status: their commodification raises intransigent moral reactions, however in both cases they are abstracted from the subjects/bodies to which they belong and by which they are produced. As Cooper and Waldby suggest, we must recover and re-read the structural categories of Marx theory of value to understand that oocytes and wombs are not just 'raw material' on which would be possible applying a commodification ban despite women's decisions.

It therefore becomes decisive to update the concepts, identified by Marx, of living and dead labor. This Marxian distinction is, in fact, informed by the technological context of the XIX century and rest on the belief that the technomachinic structure of capital remains inanimate. For Marx the variable component of capital was only human: the living labor of worker's body, conceived as an organic, never machinic, whole. Nevertheless, new life sciences developments, in particular in biomedicine, have unsettled the validity of these categories. The breakthrough of those innovations that Landecker (2007) defines 'living technologies' – bio-machinic cell lines and in vitro tissues, reproducible outside the body but extracted from it – makes a noticeable shift. Production no longer occurs *only* in the laboratory (or clinic/hospital) or *only* in women's bodies: the production process is today a human-machinic hybrid that intersects life sciences and posthuman bodies.

In this perspective, a carrier can be understood as a worker, in particular as a worker who, acting as *living technology*, produces and sells reproductive services.

Marx attempted an analysis of labor as production of services and performances in *Theories of Surplus-Value*, the fourth book of his *Capital* that he could not finalize. Here Marx stated, against Smith, that the productive sphere, the labor-generating surplus value, could extend beyond the material production of goods and commodities, since it includes all the performances and personal services that liberal economists had defined 'unproductive'. While not mentioning the forms of work most directly related to biological reproduction, Marx accused Smith of having disqualified service's workers (maids, cooks, teachers, actors and all those who offer performances in change of an income) and wrote:

Is not the [total] value of the commodities at any time in the market greater as a result of the 'unproductive labour' than it would be without this labour? Are there not at every moment of time in the market, alongside wheat and meat, etc., also prostitutes, lawyers, sermons, concerts, theatres, soldiers, politicians, etc.? These lads or wenches do not get the corn and other necessaries or pleasures for nothing. [...] Reckoned as consumable articles, there is at every moment of time, alongside the consumable articles existing in the form of goods, a quantity of consumable articles in the form of services (Marx, 1863: 557-558).

The housekeeper of which Marx already spoke, is today the caregiver, the migrant worker whose care work we find difficult to recognize, even if every day her labor guarantees the conditions of our existential reproducibility.

The social reproduction outsourcing<sup>25</sup>, however, did not provoke the same reactions of the biological reproduction outsourcing. Just as early liberalism could not grasp the productivity of service's workers, bioethical literature inspired by the principle of the sacredness of life fails to grasp the productivity of carriers, understanding and naming them only as donors, even when they receive a compensation, because the oblation gesture is more acceptable for dominant morality. The neoliberal bioethical perspective, on the other hand, understands carriers as flexible workers available to brokerage agencies, employed by intending parents, that are recognized as the only owners of the human capital necessary to produce the baby-commodity.

As an alternative to these approaches, let me try to translate the marxian insight in the framework of surrogacy, hybridizing it with feminist theories. In the feminist-marxist reading, carriers are framed as self-employed workers who provide the services necessary to complete a pregnancy and who in return receive a rarely adequate salary. Marxist feminism, while recognizing carriers and oocyte vendors as workers, denounces alienation and exploitation and

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<sup>25</sup> On the outsourcing of social reproductive work see: Ehrenreich, Russell Hochschild (2004), Morini (2010).

recalls that there are also two risks at stake: the reduction of women's multiple abilities to reproductive functions alone and the patriarchal appropriation of their generative power (Dickenson, 2007; Corradi, 2017; Pateman, 1988). However, the parallelism 'carrier-industrial worker' is not sufficient to describe the peculiarities of reproductive labor. The neo-feminist socio-political analysis undertaken by Cooper and Waldby seems here more effective: they are able to hold together the strengths of Marx and Foucault and to overcome their respective limitations. According to their analysis, carriers, not limiting themselves to supplying the uterus but using their whole body and a part of their life time, are workers who provide 'services in the self': embodied services, rooted in vivo biological processes but continually exceeding them<sup>26</sup>. In fact, carriers do not only have the task of completing a pregnancy, having to fulfill many duties, from the obligation to undergo periodic gynecological examinations to meetings with intending parents, from sessions with the psychologist to smoking/alcohol/drug bans, up to requests for special diets and/or exercise. It is also important to remember that carriers have to add some personal value if they want to be selected by agencies and intending parents, such as keeping themselves in perfect shape and health, or highlighting their negotiation, mediation and control skills necessary to sign the contract. Thus, carriers begin to look very similar to self-employed workers, entrepreneurs who valorize their human capital. Cooper and Waldby describe *surrogacy* as a form of too often disregarded clinical labor:

Egg and sperm donors and gestational surrogates provide the living tissues and in vivo services that sustain a thriving economy of public and private fertility medicine and stem cell research. These forms of transaction, however, do not figure in economic analysis of labor in life sciences. Almost invariably, such investigations concern themselves with the professional division of labor within the laboratory and clinic and do not extend to the in vivo labor that sustain the innovation process (Cooper, Waldby, 2014: 9).

In order to overcome the distinctions between productive and unproductive, material and immaterial labor, it is necessary to overturn the atavistic sexual division of labor, the disparity of income and the relative values' hierarchy that derives from it. For centuries women have been excluded from science, thus excluded from the sphere of immaterial production and relegated to reproductive tasks never classified as productive work per se. Nowadays, however, stem cell industries, umbilical cord biobanks, gamete and surrogacy

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<sup>26</sup> Cooper and Waldby (2014: 65): 'We term these "services in the self": services that rely on in vivo biological processing and the utilization of the workers' living substrate as essential elements in the productive process'.

agencies would have no reason to exist without women's generative power.

*Ironically*, let's focus on the fact that the physician undertaking the embryo transfer in the womb of the gestational carrier is not asked to *work for free*, nor is it expected that he donates his/her competence in the name of reproduction's gratuitousness. *Logically*, let me ask: if the physician can be understood as a professional worker, whose salary is not called into question as 'immoral', why should the carrier be a donor, whose activity is barely repaid and recognized?

## 5. On children's rights or on heterosexual family

Nation-states, using both religion and medical knowledge, have produced and conveyed a standard family model, biologically and civically recognizable, which can be regularized thanks to the spread of precise gender norms.

As shown by the latest ruling on *Paradiso e Campanelli v. Italia*, the scenario does not necessarily improve by moving from the national to the European level: according to the Grand Chamber the child is not bound to parents if there is no biological descent. It is worthwhile, however, to ask whether the argument of children's right is not used, in the case of surrogacy, as an instrumental bank, a moral brake on the potentialities disclosed by the new technologies of life.

Surrogacy, in fact, breaks the linearity of family binarism, places third and fourth persons in the dualistic couple system, allows singles to reproduce without a life-long partner and lesbians and gays to experiment with non-heterosexual forms of parenting. Nevertheless, this potential of alternative forms of life is hetero-ruled, unable to express due to laws articulated around the pivot of mandatory heterosexuality, harbingers of concrete discriminations. It's always useful remembering that the Italian Constitutional Court has not yet intervened to amend art. 5 of Law 40/2004, the article that prohibits the access to new reproductive technologies to lesbian, gay and single people. In Europe, there are only six countries that do not explicitly require marriage and/or cohabitation of the couple to access assisted reproduction techniques (Finland, France, Greece, Slovenia, Switzerland, Great Britain); only ten countries admit single women (Belgium, Bulgaria, Denmark, Hungary, Estonia, Russia, Spain, Finland, Great Britain, Greece); only seven countries admit lesbian women (Belgium, Bulgaria, Denmark, Finland, Great Britain, Estonia, Spain) (Präg, Mills, 2017).

Let us now look at the international level to follow the legislative changes regarding the access to reproductive biotechnology. Some of the past most famous destinations of intending parents, such as India and Thailand, have passed laws ruling surrogacy in a precise direction: the reproduction of the heterosexual family.

In August 2016, the Indian Ministry of Health and Family launched the *Surrogacy Regulation Bill*, which aims to prohibit commercial surrogacy and restrict access on an altruistic basis to Indian couples, a purpose redundantly stated in the legislative text, as it can be seen in Chapter III:

no surrogacy or surrogacy procedures shall be conducted, undertaken, performed or availed of, except for the following purposes, namely: (a) when either or both members of the couple is suffering from proven infertility; (b) when it is only for altruistic surrogacy purposes; (c) when it is not for commercial purposes or for commercialization of surrogacy or surrogacy procedures; (d) when it is not for producing children for sale, prostitution or any other form of exploitation<sup>27</sup>.

It is also interesting the definition of couple provided by the law: a man and a woman that must be both Indian citizens and married for at least 5 years. The *Surrogacy Regulation Bill* strictly rules the carrier/oocyte donor's profile: she can participate only once in her life to a surrogacy procedure. Furthermore, the carrier must be moved by altruistic purposes alone, married and with a child of her own, aged between 25 and 35, a close relative of the intending couple. If surrogacy has to exist, the Indian legislator seems to suggest that it must take place within the heterosexual family, in the narrow space of the home and based on the unpaid reproductive women work, it must be only a therapy for a disease, it must reproduce the nation.

Also, in Thailand, since 2015, commercial surrogacy is forbidden and the only oblativ act is authorized. Also, here it can be used only by married Thai heterosexual couple, not LGBTQ and/or single people. The title of the regulation is emblematic: *Protection for Children Born Through Assisted Reproductive Technologies Act (ART Act)*<sup>28</sup>. Here the law immediately introduces the 'children born', although it is known that not every assisted reproduction cycle ends happily with a birth. It follows that the object of the rule, although not explicitly named, is the unborn, the random possibility that the carrier will generate a new life. If the object of the law is the protection of the unborn, what place is reserved for the right to self-determination of *who is already a person?*

Not much space seems to be granted to women's self-determination, it is sufficient to note that in Thailand to become a carrier a woman not only has to be married with a child of her own, but also get her husband's authorization.

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<sup>27</sup> Indian Minister of Health and Family Welfare, *Surrogacy Regulation Bill* 2016. [http://164.100.47.4/billtexts/lbilltexts/asintroduced/257\\_ls\\_2016\\_eng.pdf](http://164.100.47.4/billtexts/lbilltexts/asintroduced/257_ls_2016_eng.pdf).

<sup>28</sup> National Legislative Assembly of Thailand, *Protection for Children Born Through Assisted Reproductive Technologies Act (ART Act)*, 2015.

## **6. On the exploitation of the others or on women subjects without self-determination**

The exercise of self-determination in the sexual and reproductive sphere is not always fully acted by women, although it has long been rightly claimed and placed at the very heart of many feminist struggles. However, in the recent debates on surrogacy and in the normative texts we have considered here, it is rarely nominated. The realm of women self-determination remains less investigated compared to the realm of carriers' exploitation, often depicted as unable to manage their own bodies. All too often, both at the cultural and at the normative-economic level, women are depicted as subjects to be protected, who need medical-state or family authorization, whether it is a matter of interrupting a pregnancy or to carry it for others. The choice to carry out a pregnancy or not is only recently, and not everywhere, exercised freely. The uterus is perhaps the first exercise place of control devices that aims to women's subjugation: historically it becomes a synecdoche for the feminist movements of the Seventies, which not by chance chose the slogan 'l'utero è mio e lo gestisco io' (the womb is mine and I manage it) for claiming a more general right to freely dispose of their own body. Today as yesterday, on the reproductive choices of women lies the shadow of the 'product of conception', improperly understood as a person. Whether it is abortion or surrogacy, the arguments in defense of the potential unborn child – presented as an extremely vulnerable life form, therefore to be protected – come back. Women are in any case in the background, barely recognized as full subjects, capable of self-determination in matters of health and reproduction.

In the case of surrogacy, the regulatory interventions examined here show a common tendency to deny the carrier the possibility of earning compensation, both for the supply of oocytes and for pregnancy, excluding that there are women who consciously participate in assisted fertilization cycles as a form of work. In this regard, it is worth remembering that some sociological studies prove the fact that carriers, from California to India, are competent and autonomous adults. In *Clinical Labor* Cooper and Waldby argue that in many cases the compensation resulting from surrogacy allows carriers to improve their life conditions and expectations, to avoid more dangerous and less satisfying jobs. Moreover, in countries like California carriers are not only low-income but also middle-class women who understand surrogacy as a solidarity practice, aimed at the birth of another human being, whose growth they do not mean at all to contribute<sup>29</sup>.

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<sup>29</sup> See what carriers write on their own blog: <http://www.scarymommy.com/5-things-say-gestational-surrogate/>; <https://www.westcoastsurrogacy.com/>.

The right to self-determination needs to be lowered into the reality of the different embodied subjectivities. Its exercise depends on class, sex, gender and sexual orientation, as well as on access to education, health, work and/or income rights. Where these rights become goods that can be purchased on the market due to the privatization of health and education, it is certainly possible that women with low, precarious or non-existent incomes may decide to sell parts of their bodies in order to access them.

The arguments to foster the ban and to spread the use of the legal instrument of sanction, to which every prohibition is closely linked, present not a few contradictions and produce not irrelevant side effects, such as the diffusion of unregulated private agreements that foresee a compensation even if illegal. The contracts, with all their limitations and certainly improvable, represent a guarantee instrument for the subjects involved in a surrogacy. The prohibition determines the invisibilisation of the agreements, bringing them back to private and family, right where the power relations between genders can expose carriers to greater risks. Neither the nation-state nor Europe should arrogate the power to deny access to surrogacy techniques. As Riva writes about new human reproduction techniques:

The course of action we hope for excludes that the state can, except in really exceptional cases, intervene through obligations and prohibitions to regulate access to new techniques [...]. The state should guarantee all citizens an equal opportunity to access some of these techniques and to provide citizens with all the information necessary to make responsible choices (Riva, 2004: 75).

It is at this point that the question arises again: what is the ultimate aim of the law when it engages with life sciences and technologies? The imposition of a moral or rather the promotion and protection of techno-scientific freedom and self-determination?

To answer this question, we refer to the theoretical proposals developed by different scholars in their reasoning on biolaw. In Deleuze and Braidotti, Hanafin and Rodotà philosophies' we can find a common appeal for a jurisprudence and a right to life no longer prone to the interests of the lobbies, be they neoliberal-conservative or neoliberal-progressive, on the contrary founded on desires of self-determination and participation expressed by embodied subjectivities (Hanafin, 2014; Braidotti, Colebrook, Hanafin, 2009). In this conceptual framework, it is pivotal to engage with the deconstruction of the bioethical moralist and reactionary/religious approach, since it has been focused for too long only on the unborn rights, completely ignoring parents. On the other side, the liberal approach focused on fertility treatments patients' rights, lacking to deserve the same attention to whom provide the in vivo

materials necessary for the success of fertility therapies.

When bioethical rhetoric limits itself to reiterating the gratuitousness of biological materials, it denies a reality represented by unbalanced contractual forms in favor of patients. For finding an approach capable of recognizing carriers' self-determination, it is necessary to move on the side of secular bioethics which, as Flamigni and Mori write: 'believes that no one is entitled to prohibit a human being from doing what s/he wants from his own body, without before having asked a series of questions: [...] what will this person do if I prevent him/her from profiting of his body or part of it?' (Mori, Flamigni, 2016: 41).

Let us hypothesize that the thesis according to which a woman would choose to work as carrier only because 'forced' by economic necessity is a solid one. How would it follow that we should ban surrogacy? Why not rather questioning the set of conditions that led that woman to be unemployed, not to find any other source of income? Why that woman is not exercising a form of self-determination in choosing to become a carrier and not a caregiver?

It can certainly be objected that carriers are mainly women from lower income classes, although many countries in the United States today require a minimum income, precisely to prevent bioethical diatribes (Cooper, Waldby, 2014). Let us hypothesize, however, that all carriers are driven by the economic need to surrogacy: the logical consequence would be to ask why these women do not have the possibility of choosing to become scientists, architects, sound techniques, computer science and so on, why the possible jobs they can aspire are paid even less than surrogacy.

If there is a contradiction at stake here it relies on the fact that today the employment sectors in which women find more opportunities are still those of the informal economy, closer to care, reproduction and sexuality<sup>30</sup>.

Focusing on the criticism of sexual division of labor, which today still and above all informs scientific progress, may be more useful of invoking bans with technophobic tones against a specific form of assisted reproduction. In order to overcome the contradictions that surrogacy raises, we need to ask ourselves what technological and socio-cultural alternatives are available to respond intending parents' requests. Can we imagine a scenario in which ectogenesis would replace surrogacy cycles? Will the intentional parents agree to outsource

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<sup>30</sup> The International Labor Organization report, *Women at Work: Trends*, states that still today at a global level (2016: 16-17): 'Women remain overrepresented as contributing family workers. Many working women remain in employment statuses and in occupations that are more likely to consist of informal work arrangements'. [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_457317.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_457317.pdf)

their reproduction if the carrier would be an artificial womb and not a woman?

Already in 1970 Firestone wrote: 'Artificial reproduction is not inherently dehumanizing' (Firestone, 1970: 199). The marxist feminist philosopher described artificial reproduction as 'an alternative to the oppressions of the biological family' (Firestone, 1970: 202). In her vision, life sciences could help humanity to free from the 'tyranny of its biology', especially when accompanied by socio-cultural and economic changes. Her technophile approach was shared by many feminists of different backgrounds and contributed to the development of cyborgfeminism of which Haraway is among the most well-known thinker<sup>31</sup>. This current, with its unparalleled imaginative power, has seriously considered the consequences of ectogenesis in a neo-feminist framework. Nor it is a case that one of the Haraway most quoted novel is *Women on the Edge of Time* (Piercy, 1976), a resource for whom will to dare with imagination<sup>32</sup>. Here Piercy describes a world in which it is no longer up to the 'biologically assigned women' to carry out a pregnancy. In 1976, Piercy imagines that embryos and genetic material are stored in a 'brooder', a place similar to an aquarium, and that pregnancies are carried out by artificial placentas:

It was part of women's long revolution. When we were breaking all the old hierarchies. Finally, there was that one thing we had to give up too, the only power we ever had, in return for no more power for anyone. The original production: the [...] power to give birth. Cause as long as we were biologically enchained, we'd never be equal. And males never would be humanized to be loving and tender. So, we all became mothers. Every child has three. To break the nuclear bonding (Piercy, 1976: 197).

In Piercy's world, men nurse like women and they all together take care of children and the elderly. To the objections that ectogenesis de-humanizes parenthood, Piercy answers: 'you think because we do not bear live, we cannot love our children. But we do, with whole hearts' (Piercy, 1976: 250).

There are also some liberal and feminist bioethicists who sustain that ectogenesis could guarantee, protect and foster gender equality. In her book *Equal Opportunity and the Case for State Sponsored Ectogenesis* Kendal (2015), reckoning that pregnancy is a very heavy job, asks why the risks (not only biological) related to human reproduction must be undertaken only by women. The author claims that ectogenesis could free women from the excessive

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<sup>31</sup> On Firestone's contribution to cyborgfeminism see: Merk, Sanford (2010), Haraway (1995; 2000).

<sup>32</sup> For a dystopian literature on ectogenesis see: Atlan (2006). Here the focus is on the gender roles' deconstruction operated by feminist and technophile science fiction, see: Casalini (2007).

economic, social and physical sacrifices that pregnancy entails. Another bioethicist, Smajdor, also agrees on this point and goes so far as to state: 'The fact that women have to gestate and give birth in order to have children, whereas men do not, is a prima facie injustice that should be addressed by the development of ectogenesis' (2007: 338).

And if ectogenesis is still far to come, today we need to reiterate that those who become parents thanks to surrogacy can love their children even if they are not genetically bound, that women can choose to work as carriers by agreeing to collaborate in their parental project for a fair income.

## **7. On the right to have children at any cost or on the right to new technologies**

Generally, who is against surrogacy uses to argue that it does not exist a right to have children at any cost. Among the first to embrace this position there was Pope Giovanni Paolo II, who asserted: 'the legitimate desire of a child cannot be interpreted as a sort of right to the child to be satisfied at any cost'<sup>33</sup>. In 2016, the Medical Catholic Association's president stated: 'the greatest form of love consists in the renunciation of a child at any cost'<sup>34</sup>. In the first instance, one could succumb to the temptation to embrace this thesis, since the expression 'child at any cost' evokes not reassuring scenarios: for example, it could lead us to think that in the name of children's desire one can kidnap others' children or force women to pregnancy and childbirth. Obviously, such a right without limits to reproduction does not exist: contextualizing the slogan 'no children at any cost' is crucial. Resorting to surrogacy does not mean obtaining a child at any cost, rather it means trying to reproduce thanks to the assisted fertilization's technologies and thanks to the active and conscious collaboration of the gametes and wombs' providers. Reactionary and catholic bioethics are denouncing aleatory costs, not proved by any scientific evidence, as can be seen in the words of Medical Catholic Association's president, who once again appeals to unborn's rights and nature's intangibility: 'each substitute and unilateral way of understanding reproduction goes to crush the biological harmonies that nature has given us [...], ignoring the destiny of the younger and

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<sup>33</sup> [https://w2.vatican.va/content/john-paul-ii/it/angelus/1994/documents/hf\\_jp-ii\\_ang\\_19940731.html](https://w2.vatican.va/content/john-paul-ii/it/angelus/1994/documents/hf_jp-ii_ang_19940731.html)

<sup>34</sup> <http://agensir.it/quotidiano/2016/2/29/unioni-civili-amci-no-al-figlio-ad-ogni-costo-sfruttando-le-donne-e-schiacciando-le-leggi-naturali/http://agensir.it/quotidiano/2016/2/29/unioni-civili-amci-no-al-figlio-ad-ogni-costo-sfruttando-le-donne-e-schiacciando-le-leggi-naturali/>

innocent voiceless<sup>35</sup>.

For materialist and feminist bioethics, however, the ‘costs’ of assisted reproduction concern the expenses that the intending parent have to sustain for acceding to the therapies, for travelling abroad if such therapies are forbidden in their countries. Moreover, costs concern carriers and gametes providers’ reimbursements and payments: their bargaining power could hopefully increase. Instead of focusing on the inexistent and mystifying right to the child, it would be more profitable to understand the meanings of both the ‘right to reproduction’ and the ‘right to share scientific advancement’.

Reproductive rights are recognized in national and international codes, intended as the individual right to freely decide number and timing of pregnancies, to have access to information and means. In the framework of reproductive rights, the first step is represented by the achievement of the highest standards of sexual and reproductive health, without which the right to self-determination of one's body is unthinkable. In order to fully exercise self-determination, the synergy between of jurisprudence and medicine's efforts is crucial.

Reproductive rights were born in particular thanks to the impulses of the movement on the world's population development and of feminisms and LGBTQ struggles. The expression ‘reproductive rights’ appears for the first time in Cairo (United Nation Population Fund Conference, UNFPA, 1994), where 179 countries agreed on making reproductive health accessible through the basic health system to all individuals, to offer individuals and couples, with particular attention to women: family planning, counseling, information, education, pre/post-natal assistance, assisted reproduction services, voluntary interruption of pregnancy, prevention and treatment of sexually transmitted diseases, contraception. Always in 1994 World Health Organization (WHO) provided a working document for the Conference in Cairo, where is reiterate that everyone has the right to be informed and have access to effective and safe fertility therapies. Therefore, reproductive rights include the right to reproduction (parenting pursued through surrogacy or adoption) and the right to non-reproduction (abortion, contraception). Considering that rights should always refer to subjectivities embodying multiple differences, and that they are not abstracted from space-time conditions but always rooted in history, we cannot fail to recognize that the exercise of reproductive rights depends on access to scientific development's results.

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<sup>35</sup><http://agensir.it/quotidiano/2016/2/29/unioni-civili-amci-no-al-figlio-ad-ogni-costo-sfruttando-le-donne-e-schiacciando-le-leggi-naturali/http://agensir.it/quotidiano/2016/2/29/unioni-civili-amci-no-al-figlio-ad-ogni-costo-sfruttando-le-donne-e-schiacciando-le-leggi-naturali/>

The right to share scientific advancement and its benefits, included in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights<sup>36</sup>, seems to be nowadays strictly interrelated with reproductive rights, reinforcing the thesis against surrogacy ban.

Despite the European prohibitionist tendency, Italian courts seem sometime to understand the close links between reproductive and health rights, self-determination and scientific advancement. On 30 September 2016, in fact, the Supreme Court of Cassation, with sentence n. 19599, established that the transcription of a birth certificate signed abroad by two women has to be considered legal even in Italy. Furthermore, on 23 February 2017, Trento Court of Appeal has recognized homoparental families, allowing two men to become fathers thanks to surrogacy.

Hoping that these sentences will open spaces for the full exercise of reproductive rights, let us suggest that it is not necessary understanding reproduction and parenting as core values to embrace the motivations of those who choose to resort to surrogacy. To this end, it is sufficient to recognize as core value individuals' autonomy, being embodied subjectivities the only one entitled to decide on their body. As we have seen, there are critical approaches that can be embraced and that focus on different implications and consequences of assisted reproduction technologies – that in some cases perform the function of biocontrol devices, of nationalistic and familistic population management, of generative power exploitation means – while not denying the individuals' rights. When talking of sexual and reproductive rights – that ranges from abortion to assisted reproductive technologies passing by transgender therapies – the only path that seems sustainable and equitable is 'to cease legislating for all lives what is livable only for some, and similarly, to refrain from proscribing for all lives what is unlivable for some' (Butler, 2004: 8), trying at the same time to guarantee the access to scientific progress to all, contrasting sexual orientation, race, sex, gender and class discriminations.

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<sup>36</sup> ICESCR, supra note 11, art. 15(b).

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