

# INTRODUCTION: PHILOSOPHICAL APPROACHES TO SURROGACY AND THEIR LEGAL IMPLICATIONS

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*In this chapter, we will discuss the philosophical reasons for the multifaceted legal regulation of gestational surrogacy worldwide. Indeed, the legal solutions provided for this very controversial issue are influenced by the diverse philosophical approaches to human nature and to its role in shaping legal categories and rules. The reflection will be based on the analytical approach to philosophy, which aims at clarifying concepts to create transparent conditions for debating sensitive issues that otherwise run the risk of being trapped in ideological stances. It will be enriched with the argumentative bioethical methodology.*

## 1. Introduction

Gestational surrogacy (GS) or surrogate motherhood is a method of assisted reproductive technology (ART). It is a technique that allows a woman to carry a pregnancy for another person or a couple. This practice is part of the reproductive revolution, which started in the second half of the 20<sup>th</sup> century with the birth of the first *test-tube baby*, Louise Brown.<sup>1</sup> This was a crucial scientific turning point in medicine for at least two reasons. On the one hand, it separated sexuality from reproduction. On the other hand, and in a related way, it broadened the range of natural phenomena under human control.<sup>2</sup>

This twofold outcome was both scientifically and philosophically and ethically groundbreaking. Indeed, to generate without sexuality and to exercise human control over the reproductive mechanisms overruled the traditional epistemological paradigm governed by *natural* rules. In this unprecedented scenario, opened by science and its technological advances, new, challenging questions have arisen. They are concerned with different, albeit

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<sup>1</sup> In 1978, the Daily Mail reported the news of the birth of the first *test-tube baby* with the headline “And here she is...the Lovely Louise”. The two scientists Robert Edwards and Patrick Steptoe were the main actors of the IVF treatment that led to the birth of Louise.

<sup>2</sup> The variety of developments in reproductive medicine has created new possibilities to control human fertility (contraception, sterilization procedures, infertility treatments etc.) as well as to take different decisions about their offspring (prenatal diagnosis, sex selection, genetic modification etc.). For current new challenges in this field see S. Salardi, M. Vetis Zaganelli, D. L. Binda Filho, *Mater semper (in)certa est: os desafios ético-jurídicos da Reprodução Humana Assistida no Brasil*, in *Humanidades & Tecnologia em Revista*, 47:1, 2024: 1-13.

interrelated, issues ranging from freedom and responsibility for reproductive choices to the interests of future children. The search for answers to the multifaceted aspects of this phenomenon required going beyond science. Indeed, criticalities were not just technical. There were ethical problems concerning the conception of human relationships and coexistence. In this scenario, a philosophical and ethical debate started.

From a philosophical perspective, the problem concerned the moral foundations of the new technological power over nature.<sup>3</sup>

From an ethical perspective, the question concerned the identification of shared guiding principles to address morally controversial issues.

The ethical debate originally arose with reference to ART, such as *in vivo* or *in vitro* fertilization employed by opposite-sex couples unable to have children and using their own gametes for the purpose of generating a child. The main question was the moral justification for accessing ART as many considered these techniques (especially *in vitro* techniques) as unnatural and even against the traditional familial model. This ethical knot is still present in the current debate. Nonetheless, it appears more diluted behind other arguments. One of these is that children conceived through ART may experience harm.<sup>4</sup>

Very soon, the involvement of third parties to overcome specific reproductive problems of an opposite-sex couple became a medical need<sup>5</sup> as well as a further controversial ethical consequence of the availability of these techniques. As a matter of fact, in some cases external donors of gametes must be involved to achieve the expected result. This medical need opened further ethical criticalities: on the one hand, the break of the biological tie resulting in the separation of children from their biological parents; on the other hand, the possibility for same-sex couples to become parents. This was and still is experienced by ethically conservative positions as “pushing the frontiers of what is socially acceptable.” It indeed contrasts with what is assumed to be *naturally* good and therefore morally acceptable.

Despite these resistances, demands were extended to include the possibility for singles and same-sex couples to access these techniques<sup>6</sup>.

Today, GS has become the ultimate matter of the ethical and legal heated debate about ART as it completely overrules both the traditional, biological reproductive order as well as the normative categories, be they moral or legal, governing reproduction and familial ties so far. In relation to this topic, a major problem, which is testified by the lack of a shared consensus expressed through different legal solutions worldwide, is to identify *ex novo* or redefine the (existing) guiding normative principles for individuals living in ethically pluralistic societies. This fact cannot be ignored when searching for guiding ethical principles and legal solutions to GS. This ethical diversity is maintained and promoted by the current framework of fundamental rights. The question is whether the principles and rights framing the current legal system can be interpreted in order to satisfy any demand that single individuals or

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<sup>3</sup> H. Jonas, *The Imperative of Responsibility. In Search for an Ethics for The Technological Age*, Chicago: The University of Chicago Press, 1979.

<sup>4</sup> U. Schüklenk, P. Singer, “Introduction”, in U. Schüklenk, P. Singer (ed.), *Bioethics an Anthology*, fourth edition, New Jersey: Wiley Blackwell, 2022, p. 70.

<sup>5</sup> For couples who cannot use their own gametes.

<sup>6</sup> In Italy, there have been some cases brought before the Constitutional Court concerning single women who ask for access to ART, which is currently prohibited by the Act no. 40/2004. In the recent decision no. 69 of 2025, the Constitutional Court has declared that the issue was constitutionally unfounded referring the decision to the Parliament. According to the Court, access to ART by a single woman would be in contrast with the Italian Constitution.

groups may consider fundamental to their existence, or whether these demands may in some cases be evaluated as not fundamental.

In fact, principles<sup>7</sup> and the derived norms can be interpreted in different ways according to the philosophical, sociocultural, ethical, and legal backgrounds within which the debate takes place. These diverse interpretations are expressed by the differing legal solutions currently adopted worldwide<sup>8</sup>. These differences are found both in legal systems grounded in a specific legal tradition (common law or civil law) as well as in legal orders based on the same legal tradition. For instance, in the European context conservative and stricter approaches coexist with more progressive and liberal ones.

The European Court of Human Rights case law on surrogate motherhood mirrors this complexity. The Court has indeed often insisted on leaving a margin of appreciation in the hands of States in order to allow “a free space that reflects the plurality of statutory answers to this problem.”<sup>9</sup>

In the European context, some nations have legalized the use of ART, granting access to a wide category of subjects, recognizing the possibilities offered by the reproductive revolution in its widest meaning. In so doing, legitimization of surrogacy is possible.

Other nations have legalized the use of some ART, but with limitations on access to individuals with specific characteristics, following a conservative approach based on the therapeutic value of this technique as well as on a certain conception of family and parenthood. In this scenario, legitimization of surrogacy may be more difficult or even banned.

In this chapter, we will discuss the philosophical reasons for this multifaceted legal scenario. Indeed, the legal solutions provided for this very controversial issue are influenced by the diverse philosophical approaches to human nature (HN)<sup>10</sup> and to its role in shaping legal categories and rules. The reflection will be based on the analytical approach to philosophy, which aims at clarifying concepts to create transparent conditions for debating sensitive issues that otherwise run the risk of being trapped in ideological stances.<sup>11</sup> This approach will be enriched with the argumentative bioethical methodology.

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<sup>7</sup> Let us take autonomy as an example. In the liberal tradition, autonomy has a limit in not harming others. If this limit is respected, every individual has sovereignty over their body. In religious traditions, where sanctity of life is the overarching principle, autonomy finds in this principle a limit to its operability.

<sup>8</sup> “Legislation in this area varies from a complete ban in several European countries (such as France, Germany, Italy, and Spain) to the practice of surrogacy being legally accepted as long as it is altruistic/non-commercial (such as Greece and the UK), to allowed but not legally regulated (Belgium), or contract-based and commercial (such as the USA).” See F. Shenfield et al, Ethical considerations on surrogacy, *Human Reproduction* 40:30, 2025: 420-425, p. 421.

<sup>9</sup> A. Ballesteros, Gestational Surrogacy, Private Life and the European Court of Human Rights Case Law, in J. A. Seoane and O. Vergara (ed.), *The Discourse of Bioethics*, Cham: Springer Nature, 2024: 161-175, at p. 162.

<sup>10</sup> In this essay, the notion of HN is used as an epistemological device to distinguish between differing and often contrasting moral views on human beings. The use of the term is not referring to any ontological foundation of the nature of humans or of nature in general. Indeed, its semantically complex history makes this concept useless for definitive answers. On this topic see for instance J. S. Mill, *Nature, the Utility of Religion and Theism*, London: Longmans, Green, Reader, and Dyer, 1874.

<sup>11</sup> U. Scarpelli, La grande divisione e la filosofia della politica, in U. Scarpelli (ed.), *L'etica senza verità*, Bologna: Il Mulino, 1982: 115-139.

## 2. Philosophical approaches to surrogacy

To highlight how different philosophical approaches may lead to opposite legal solutions in relation to the legalization of GS, we need to address them in their basic, differing features. The intention is not to assess the moral goodness of these approaches or to judge their value for specific communities or groups who rely on one or the other vision as a foundation of their existence. Rather, the idea is to assess whether they are universalizable in ethically and culturally pluralistic societies in order to be a proxy for the elaboration of shared legal rules which are able to grant equal treatment to all individuals<sup>12</sup>.

Before addressing the major philosophical approaches to GS, we need to dwell on the question of who *the Other* is in this specific bioethical issue.

The general dilemma of who *the Other* is in the bioethical reflection calls into question both the problem of identifying *the Other* who ought to be treated, following the Kantian rule, as an end and not just as a means, and what harm justifies the limitation of the principle of tolerance and equal treatment.

Both the principle of no harm and the principle of tolerance are not absolute principles, but *prima facie* principles, which need to be contextualized in relation to the historical and sociocultural background where they are applied as well as in relation to the ends that a society wants to achieve, which are usually expressed by the *élite* driving the social development.

In the bioethical reflection on beginning-of-life issues, the identification of *the Other* is a crucial point. There is no universal consensus on who is *the Other* valuable for consideration in the balancing process of interests. Its identification depends on the adopted philosophical view on human nature. A testament to this is represented by the different models of legislation elaborated worldwide on topics like abortion, assisted procreation, and GS.

In order to address the notion of *the Other* in bioethical discussion on ART, it is necessary to distinguish between the following categories: *human* individuals, *actual* individuals, *future* individuals, and *possible* individuals.

Let us begin with the definition of human individuals. Once the reductionist views on human nature are discarded<sup>13</sup>, it is not so difficult to generally identify *the Other* as every human being, that is, every subject belonging to the human species and endowed with human dignity. This identification is based both on a descriptive element, which is the biological-genetic tie to a given species with specific biological and genetic characteristics and on a normative element, which is dignity.

Dignity is not an assertoric notion. It is a value judgment. It has been used as the foundation of human rights starting with the Universal Declaration of Human Rights. In the societal model grounded in the new order established after World War II, all human beings are endowed with dignity. This normative statement, based on the assumption that

<sup>12</sup> As Alain Touraine aptly notes in his book titled *La fin des sociétés*, traditional institutions like state, family, class, nation and the like suffer from a great social crisis and distrust. These categories, once conceived as all-embracing, are no longer useful to build and forge social cohesion and relationships. In his opinion, promotion of fundamental rights is the best way to create some kind of social bond in a pluralistic society. In his view, commitment to defending equality in fundamental rights becomes the main driving force for improving social and interpersonal relations. See A. Touraine, *La fin des sociétés*, Seuil: Couleur des Idées, 2013.

<sup>13</sup> S. Salardi, Race and Human Nature in Law: Proxies for Unfairly Framing the Concept of Person, *Notizje di Politeia* 123, 2016: 3-19.

those belonging to the human species (biologically humans) are *homines digni*, does not distinguish between those who are born (actual individuals), those who have been conceived (future individuals) and those who have not been conceived yet (possible individuals). This means that the identification of *the Other* based on the biological characteristics does not tell us whether a distinction should be made in the evaluation of the normative status of the different subjects. This is a decision that cannot be made solely on the basis of biological characteristics without falling into the naturalistic fallacy. This kind of decision calls into question human values and identity. This is not a dilemma that can be resolved by scientific evidence. Indeed, the endowment of every human being with dignity requires defining who the normative subject is in moral and legal terms. This subject is the Person. Thus, the question of justifying or not the normative status (moral and legal) of *the Other* depends on the definition of Person. This definition depends on differing philosophical views of human nature and its relevance in the legal field.

Debates on the definition of who a Person is –moral or legal– and the identification of the essential features to be classified accordingly, have been tightly interwoven into larger controversies over the desirability of policies mandating inclusion or exclusion from the distribution of benefits. So, when we consider the concept of a Person, especially in the legal sphere what is at issue is more than just the description of relevant aspects, such as, for instance, biological or genetic characteristics distinguishing individuals or groups from others. In certain moral approaches and in specific models of legal organization (liberal democratic rule of law), a Person is a scheme indicating the normative qualification of selected behaviors<sup>14</sup>. In other words, a Person is a scheme to be used to morally and legally judge human behaviors, and not human characteristics. This is true for the current European legal system, which does not define who a Person is as a quality inscribed in nature. Conversely, Person is a normative scheme of qualification of behaviors, and consequently Persons' equality is based on the equal treatment of human conduct, irrespective of differences in HN. This reflection on the notion of Person allows us to draw two conclusions. Firstly, in the moral and legal sense, a Person cannot be reduced to objective referents of identity, unless we agree that principles and norms can be logically derived from facts (naturalistic fallacy). Secondly, if a Person is not the biological individual but the set of behaviours relevant in the moral or legal field to balance rights and duties, in which social coexistence of conflicting interests is grounded, the question is to decide how to prioritize certain demands, positions, and statuses over others. This brings us back to the list of subjects mentioned above.

All listed individuals (actual, future, and possible) may be considered Persons from a moral viewpoint and endowed with dignity, as they belong to the human species. However, when it comes to balancing their interests through the law, a scale of priorities has to be taken into account, otherwise no rule could be applied to guide behaviours. In the case of GS, *the Other* includes a variety of individuals within any single category. The clear and definitive definition of a scale of priorities between their interests is not easy, as it depends on many factors ranging from the sociocultural context to the axiological basis of the legal system in which they operate. It also depends on the recognition as a legal Person. The philosophical questions that accompany this process are: which individuals among the *actual*,

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<sup>14</sup> H. Kelsen, *Pure Theory of Law*, New Jersey: The LawBook Exchange, 2005, original English version 1967.

*future*, and *possible* individuals should we consider and treat as *the Others* valuable as ends in themselves? Are they all Persons in legal terms?

*Actual* individuals – those who exist right now and are Persons in moral and legal terms<sup>15</sup> – are the biological parents, the intended parents, the surrogate mother, and the born child. All these individuals carry legally valuable interests in terms of both rights and duties, and they are morally considered ends. However, for each of these individuals complex moral and legal questions arise: Does being an end mean that all their interests have equal value? And does this imply equal treatment before the law? Should the desire to become a parent be prioritized over the interest of the surrogate mother not to be exploited or suffer both physical and/or psychological damage? Should the legal ban on formal recognition of the child prevail over the best interest of the born child to be recognized by the intended parents? How to balance the interests of *actual* individuals with the interests of the *future* individuals or *possible* individuals?

*Future* individuals are those who have been conceived but are not yet born. Their status as a moral and legal Person is controversial, as the attribution of this normative qualification depends on the philosophical view on human nature. They are for sure human beings from a biological perspective, but open questions persist at the normative level: Do they have valuable interests, and should these interests be prioritized over the ones of *actual* individuals? Should they be considered and treated as ends? Should legal rules recognize subjective rights?

*Possible* individuals have not been conceived yet. Unlike *future* individuals, *possible* individuals “will exist if we act in one way, but will not exist if we act in the other ways”<sup>16</sup>. In the case of GS, these are the children, or better the idea of these children, who could be generated by means of ART but have not yet been generated. Many dilemmas are related to this category: What is their moral status? Should we also include in this category also cryopreserved gametes and cryopreserved embryos? If yes, is there a moral difference in the interests of those who are imagined (the idea of possible children) and gametes and embryos that are ready to generate future children? Are they *Others* valuable as ends? In case the answer is affirmative, how do we balance or even prioritize their interests over the interests of *actual* individuals?

All the questions posed so far do not have one answer as the different philosophical approaches to human nature often provide opposite solutions. Let us discuss the possible philosophical approaches to GS and the question of *the Other* in this field.

### 2.1. *The theological approach*

The philosophical and ethical reflection on GS may follow the theological direction. In this case, the investigation is the search for a divine will or the rational form imprinted on nature by God by means of reason and based on the doctrinal tradition of a certain religion. This approach may not be suited to solving ethical problems arising within ethically pluralistic

<sup>15</sup> This has not been a constant shared opinion throughout human history. Today, in Western, democratic countries based on fundamental rights, the recognition of all *actual* individuals as Person is however non-controversial. This is the result of the secular separation between law and morality and between law and nature. This separation represents the assumption of equality and freedom. See on this point, L. Ferrajoli, *Principia Juris*, vol. II, Roma-Napoli: Laterza, 2007, at p. 587.

<sup>16</sup> D. Parfit, Rights, Interests, and Possible People, in U. Schüklenk, P. Singer (ed.), *Bioethics an Anthology*, New Jersey: Wiley Blackwell, 2022, pp. 85-89.

society, as the risk is to impose one moral vision over the others, without being able to definitively prove why that position should be evaluated as morally superior to other moral views.

What is undeniable, if one follows the theological approach, is that a clear definition of a Person would be suggested. In fact, Person is the *actual* individual, the *future* individual, and the *possible* individual. In such a situation, all these people would be Persons in the moral sense, and therefore they should be recognized as Persons also at the legal level (Natural Law Tradition). If all the listed categories are Persons, no balancing and prioritization of interests would be possible. In addition, the theological approach usually presents a specific model of family and parenthood, and this strict position would rule out the possibility of any alternative model deviating from the traditional one.

This way was followed by the Italian legislator in 2004 when the Act no. 40 was first promulgated.<sup>17</sup>

From the very beginning, the Act was criticized for being ideologically grounded in a given theological vision, giving rise to a heated ethical and legal debate in Italy. Legally, the controversial nature of this Act culminated in different court decisions – both national and European- stating the unconstitutionality of many of its provisions as axiologically inconsistent with the framework of fundamental rights.

## 2.2. *The approach based on nature*

The temptation of solving ethical problems with reference to what is inscribed in nature is an attitude that usually characterizes conservative positions, although it is not limited to them.

Following this approach means believing that there are behaviours which are good or bad in themselves (*mala in se*). The good behaviours are those which are adherent to nature, whereas the bad behaviours are those which are against nature. If one follows this approach GS and ART in general are morally unacceptable as they are artificial and therefore against nature. The peculiar problematic aspect of GS is the multiplication of individuals involved, specifically of the maternal figure if compared to what is *natural*. In case of non-religious positions which base their arguments on nature, the main criticism of GS is the assumed risk for the welfare of the child, with particular attention paid to the psychological development.

The critical aspects of the approach based on nature have been discussed by eminent moral philosophers like John Stuart Mill<sup>18</sup> and David Hume<sup>19</sup>, and by legal philosophers like Hans Kelsen.<sup>20</sup> All have pointed to the ambiguity and uncertainty of the notion of nature, which for this reason does not seem to be a suitable basis for legal solutions. In addition, in the current society the border between natural and artificial is even more transient than in

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<sup>17</sup> Article 1 of the Act no. 40/2004 makes no distinction between the subjects (actual and future ones) involved, granting them equal treatment. The Article states that “in order to promote the solution of reproductive problems deriving from human sterility or infertility it is possible to access assisted reproductive technology, under the conditions and according to the modalities established by the law, which ensure the rights of *all the involved subjects*, including the unborn child.”

<sup>18</sup> Mill, *op. cit.*

<sup>19</sup> D. Hume, *A Treatise of Human Nature*, London, Printed for John Noon, 1739-1740.

<sup>20</sup> H. Kelsen, *What is Justice?*, Berkeley: University of California Press, 1957.

the past. Scientific knowledge and technological possibilities have long been applied to control different human activities like medicine, which is one relevant artificial *art*. Indeed, choices in the field of medicine are not choices between nature and culture (nature v nurture debate). Rather, these are choices relating to different uses of this kind of *art* generated from the history of culture.<sup>21</sup>

This approach is therefore not adequate to solve the problems that arise from GS as it sacrifices the sociocultural and psychological aspects as well as the scientific and technological advances of this very complex phenomenon.

### 2.3. Principlism

There are two ways of arguing based on principles. On the one side, some argue in favor of or against GS based on *common* moral principles assumed to be widely shared in society. These alleged shared principles are usually deployed to hide the real position maintained by the advocates of one or the other position, who are in search of a compromise. However, in the case of GS compromise solutions risk disguising the violation of the rights of one or the other individual involved in the process. In such a delicate and sensitive issue, principles apparently accepted by common morality are not adequate to justify the legitimacy of this technique.

On the other side, the principlist approach as elaborated by Beauchamp and Childress<sup>22</sup> is based on four principles (autonomy, beneficence, non-maleficence, and justice) applied in medical ethics. As Oscar Vergara<sup>23</sup> observes, these general principles are abstract and need specification. However, even when they undergo this specification process, they do not appear to play a decisive role in tackling the multifaceted challenges of GS. In fact, this approach “is perfectly consistent with either the validity or the lack of validity of GS in much the same way as it is perfectly consistent with the validity or the lack of validity of euthanasia.”<sup>24</sup>

Principlism in these two versions is therefore not a decisive approach to tackle GS and the problems it creates in terms of prioritization of contrasting interests.

## 3. On the role of law in bioethical complex issues

In light of the previous considerations, it follows that no satisfying solution can be found in the analyzed philosophical and ethical approaches to GS. We can ask whether further philosophical theories like utilitarian or contractarian theories of justice would be an adequate justification for GS, and whether they would be a satisfying starting point for legal solutions in this field. In case we try to provide universal minimal standards to grant access to GS, would these theories be a good justification?

Although there is no space here to discuss the details, we can anticipate the conclusion of their reasoning. In fact, based on the assumption that decisions should aim at promoting

<sup>21</sup> U. Scarpelli, *La bioetica. Alla ricerca dei principi*, *Biblioteca delle libertà* 99, 1987: 7-32, at p. 13.

<sup>22</sup> T. L. Beauchamp and J. F. Childress, *Principles of Biomedical Ethics*, Oxford: Oxford University Press, 2013.

<sup>23</sup> O. Vergara, *Gestational Surrogacy as a New Right: A Narrative Approach* in J. A. Seoane and O. Vergara (ed.), *The Discourse of Biorights*, Cham: Springer Nature, 2024: 177-191.

<sup>24</sup> *Ibid.*, p. 183.

the happiness or fair advantages of a majority, they would conclude that if there is a majority that will suffer unnecessary unhappiness or unfair disadvantage in case access to GS were denied, then this access should be granted by legalizing the technique.

Is this conclusion acceptable? Can we reason based just on the happiness or fair advantages of the majority about such a delicate issue?

My answer is negative. I do not think that the Utilitarian approach is of any utility when it comes to sensitive bioethical issues where the question concerns the balancing of subjective rights, often of a fundamental nature. Indeed, as Tiedemann notes “the Utilitarian approach is not able to appreciate the status of any single individual person as a bearer of absolute human rights.”<sup>25</sup>

Although I do not have a definitive solution to the question whether GS should be generally legalized or whether we should respect the different cultural traditions and accept the varied legal solutions currently in force, I think that we can adopt a different viewpoint on the topic by asking what the role of law in bioethical issues should be.

When the debate concerns such sensitive issues, and the notion of nature is often a central argument in defining legal standards, returning to the basic question of the role of law may be an appropriate strategy to avoid confusion, misunderstanding, and ideological traps.

As noticed earlier, there are conservative positions that argue against GS because this is considered *unnatural*<sup>26</sup>. This argument goes back to the Natural Law Tradition, which grounded positive law in the Natural Law, intended as a universal, immutable, and overarching rule. In this perspective, positive law must adhere to the moral standards established by Natural Law, otherwise it would not be a valid law, being in contrast with Justice. If one follows this perspective, which is still present in the ethical discussion on such delicate issues as GS, and ART in general, the consistent legal solution is prohibition and ban of GS. This has been the Italian way in 2004, as testified by the arguments used during the parliamentary discussion on the contents of the Act no. 40.<sup>27</sup>

Advocates of this conception consider law not as an autonomous field of regulation, but as the *ancilla* of morality serving one moral view.

The problem with this conception of the role of law is that it does not allow for combining the opposing interests and ethical views of *the Others*, as it rules out any discussion by grounding law in nature as the only measure for justice.

This serving function of law has been at the centre of heated debates in the past century in Western countries, especially those of the Civil Law tradition. The advocates of an independent role of law ranged from hard to soft ones. The hard positions maintained that law never incorporates moral principles<sup>28</sup>. The soft positions recognize the possibility of contingent incorporation of moral values in legal norms, although this is not a measure for

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<sup>25</sup> Tiedemann also observes that “the benefit to society or the majority, or any other abstract concept beyond the single person, is the relevant benchmark for good and evil and not the human person” P. Tiedemann, *Philosophical Foundation of Human Rights*, Cham: Springer, 2023, p. 30.

<sup>26</sup> This notion refers here to the biologically normative conception of nature as bearer of ends.

<sup>27</sup> D. Milani, *«Veluti si deus daretur»*: Law no. 40 of 2004 on Assisted Reproductive Technology from the parliamentary debate to the law text, in *Quaderni di diritto e politica ecclesiastica* 1, 2015 April: 117-142.

<sup>28</sup> J. Raz, *The Authority of Law: Essays on Law and Morality*, Oxford: Oxford University Press, 1979.

the validity of law<sup>29</sup>. Today, in the European context fundamental rights express shared moral values, although this does not mean that pre-judicial ethical rules have been incorporated for assessing the validity of the law. In legal systems grounded in the constitutional rule of law, fundamental rights express ethical and social values. Fundamental rights are indeed the minimal standard of protection, they are «neither maximal moral claims nor a higher ethos»<sup>30</sup>.

In light of the previous considerations, we can now reason on the role of law in case of a constitutional system based on fundamental rights. The rationale of these legal systems allows us to differentiate between *the Others* as it forces us to take into account the status of each entity of *the Others* to balance different and opposing interests.

In this sense, the case of GS is paradigmatic for the complexity of the balancing process. Indeed, the different individuals involved in the procedure (actual, future, and possible individuals) are all human beings endowed with dignity, although they do not have the same legal status. The fundamental rights' framework provides rules to distinguish the status of these categories of individuals. For instance, this framework does not recognize the status of a Person to future and possible individuals. It takes into consideration some interests of *future* individuals but not directly interests of *possible* individuals.

Thus, the main challenges are between *actual* individuals. There is the right of the intended parent(s) to fulfil their desire for parenthood. There are the rights of the gestational carrier to decisional autonomy<sup>31</sup>, to physical and psychological health, to non-discrimination, and more in general there is the mandatory respect for her dignity. And there is the protection of the best interest of the born child as a paramount interest.

The balancing process between these very different interests is usually done on a case-by-case analysis by national and international courts.

However, are there arguments in favor of or against surrogate motherhood that may help to overcome the fragmented legal scenario, at least in the EU? Based on the interpretation of the principle of dignity that inspires both autonomy and the best interest of the child, I suggest that minimal standards can be derived from the current framework of fundamental rights to avoid any form of subordination of *actual* individuals, in particular of the weakest ones (the surrogate mother and the born child), but also to avoid imposition of one moral vision on intended parent(s). This position illuminates the role of law within an ethical dimension based on responsibility. In this view, the possible negative effects deriving from the coercive imposition of one system of values gain relevance, and the evaluation of minimal legal standards becomes a valuable option.

The ethically pluralistic configuration of contemporary societies requires indeed that, in bioethical issues, the law is deployed to reconcile different positions and ease the moral and social tensions, instead of exacerbating underlying moral conflicts. Therefore, penal law is usually not an adequate instrument for regulating bioethical issues<sup>32</sup>. To ban a practice like

<sup>29</sup> H. L.A. Hart, Positivism and the Separation of Law and Morals, *Harvard Law Review*, 71: 4, 1958: 593-629.

<sup>30</sup> P. Kirchschräger, *Digital Transformation and Ethics*, Germany: Nomos, 2021, at p. 146.

<sup>31</sup> This right encompasses different aspects: preconception and prenatal care, antenatal screening, termination of pregnancy; mode of delivery. See on this point Shenfield et al., *op. cit.*, at p. 423.

<sup>32</sup> The legitimization of penal intervention is usually based on the interplay between different liberty-limiting principles: the harm to others principle; the offence principle; legal paternalism; legal moralism. In case of bioethical issues, the conducts of *actual* individuals are not easily subsumed under one or the other principle without arising questions of imposing one moral view on those

GS as a universal crime (as is the case in Italy) does not produce the expected effects of reducing access to GS. On the contrary, it has relevant side effects like reproductive tourism. This practice exacerbates social inequalities, as those who can afford to go abroad will see their reproductive desire fulfilled in contrast to those who do not have the money to travel abroad. Even though the legal regulation of GS in one country refuses to recognize a birth certificate from a foreign country where surrogacy is legal<sup>33</sup>, this penal strategy is not a winning one<sup>34</sup>. It affects not only intended parents, but all the children who may nonetheless be conceived with GS in violation of this prohibition: the interest of the child would not be considered at all, as no margin of appreciation is left to the national judge where the certificate should be issued.

In view of this relevant limitation of the penal regulation, the legal trend in bioethical issues should follow a different approach. Legal instruments in this field must be characterized by flexibility, lightness, and openness<sup>35</sup>. *Flexibility* refers to rules that are not set in stone, but that subordinate research and biomedical practice to conditions that are considered an acceptable balancing of the differing demands in a given historical moment. *Lightness* refers to legal rules which are – as much as possible – devoid of moral content as they are focused on technical and procedural aspects while at the same time promoting fundamental rights. *Openness* addresses the ability of the law to grant a fair ethical debate and create conditions for the implementation of individual moral convictions.

If we follow these indications, we can identify minimal legal standards for GS that should be regulated by a flexible, light, and open law.

Following the precautionary principle and considering the state of the art of information on some relevant aspects concerning GS<sup>36</sup>, our proposal for the minimal standards is the following:

- 1) access to GS should be granted only to couples who, for medical reasons, cannot have children following any alternative method;
- 2) prohibition of accessing GS for those who do not have a medical problem;

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who do not share it. This is the reason why alternatives like various civil disabilities appear more balanced. Indeed, when regulating bioethical issues, penal statutes risk being used to reinforce social pressures, which may correspond to the moral convictions or beliefs of just one part of the public opinion. In ethically pluralistic societies like the European one, state interferences with individual liberty and private life through the penal instrument should be restricted to those conducts which cause serious private harm or create unreasonable risks of harm to others.

<sup>33</sup> This is now the case of Italy. On October 16, 2024, the Italian Senate approved a law that criminalizes surrogacy as a "universal crime," prosecutable regardless of where the act is performed.

<sup>34</sup> Penal law has "an immense destructive impact on human interests" as Feinberg observes. See J. Feinberg, *The Moral Limits of the Criminal Law: Volume I Harm to Others*, Oxford: Oxford University Press, 1984. Therefore, we should ask whether, in very sensitive bioethical issues, the use of criminal law does not overstep the limit of moral legitimacy.

<sup>35</sup> P. Borsellino, *Bioetica tra autonomia e diritto*, Zadig, 1999, p. 209.

<sup>36</sup> F. Shenfield et al., Ethical considerations on surrogacy, *Human Reproduction* 40:30, 2025: 420-425, at p. 423. The authors explain that "There is some empirical evidence and long-term follow-up regarding the social and psychological consequences of surrogacy arrangements but there is no information available on the potential role confusion in the context of the upbringing of a child. Long-term consequences of the gestational carrier keeping in contact with the resulting family have not been studied either. The possibility of conflict cannot be excluded."

- 3) considering the possibility of broadening the categories of individuals who may access adoption<sup>37</sup>;
- 4) identifying specific characteristics for the surrogate mother (she has already had at least one child; she should not belong to indigent categories; she participates in the process for altruistic reasons);
- 5) granting the right to abortion and the right of withdrawal to the surrogate mother;
- 6) granting adequate support to the surrogate mother – be it psychological, physical or economic;
- 7) clear definition of the legal relationships between the child and the other *actual* individuals;
- 8) mandatory recognition of the birth certificate from a foreign country unless evidence exists that the intended parent(s) do not meet the requirements of good parenting;
- 9) providing strategies to limit cross-border reproductive care to maintain control over the use of the technique at the national level;
- 10) clear registration modalities of surrogacy agreements within the state where surrogacy takes place.

These minimal standards could be enriched with further details. In any case, they ought not be considered as definitive or ultimate standards. On the contrary, when further empirical evidence is available on the welfare of the child born from surrogacy and on the condition of the surrogate mother, these minimal standards may be revisited in order to broaden or restrict them.

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<sup>37</sup> In Italy, only couples can adopt.

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