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Relational surrogacies excluded from the French bioethics model: a euro-american perspective in the light of Marcel Mauss and Louis Dumont

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PhD student in social anthropology at École des hautes études en sciences sociales, Paris (France), **Hélène Malmanche** has been a state-qualified midwife since 2011. Her work focuses on donor-conceived families and the transformations of the family in France, in a comparative perspective with Belgium. Starting from the observation of an incomplete institution of donor-conceived families, she studies (pre)parental and medical practices from the pre-conception to the post-partum period. These practices are compared with an analysis of the evolution of family law and the regulatory framework of assisted reproductive technology in France. A member of the Public Health Doctoral Network (EHESP), co-founder of the research group EnCoRe – Engendrement, Corps, Relations, she has been invited twice as a visiting scholar to the Family Law Centre of UCLouvain (Belgium).

Abstract In the French context of prohibition of surrogacy by a legislative framework established in 1994, couples are using surrogacy abroad to create their family. Why does surrogacy not find room in the landscape of donor-conceived families in France? Based on a survey among French intended parents using surrogacy in the USA and Belgium, and a 2-year ethnography on medical practice in a fertility centre in Belgium, this study shows that surrogacy is, in fact, a particular type of gift: the gift of gestational capacity. The preconceptional journey in Belgium or in the USA is a relational process that allows complementary places and statuses to be acquired. This process will transform applicants into intended parents (recipients), and candidates into surrogates (donors). The relationships created by the gift have the particularity of being woven around responsibility towards the fetus. It is the hierarchy of encompassing and encompassed responsibilities in relation to the fetus that organizes the relationships and actions of each protagonist: parents, grandparents, surrogate, surrogate's partner and children, etc. The article thus shows that surrogacy, because it is a gift of a particular type, has no place in the French bioethics model, which is, in fact, built entirely on the notion of 'donation without a donor' in a therapeutic and medicalized view of reproductive donations. 

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Introduction

Since 1994, gestational surrogacy (GS) has been strictly prohibited in France (Article 16–7 of the French Civil Code),

and is severely punished by Article 227–13 of the Criminal Code which punishes the substitution or attempted substitution of a child with a fine of €45,000 and 3 years' imprisonment (Leroy, 2019). However, before that time, some traditional (with genetic link) and gestational (without

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genetic link) surrogacies were conducted during the 1980s (Mehl, 2011b; Novaes, 1989). Nowadays, French couples who need GS to become parents are obliged to go abroad, at least for the in-vitro fertilization (IVF) protocol and the embryo transfer. Indeed, the criminalization of GS in France forces them to seek care in foreign countries where GS is authorized or tolerated (Giroux et al., 2017). Furthermore, the majority of the French political class, magistrates and some of the intellectuals taking part in the public debate are totally opposed to GS, which represents the 'red line' not to be crossed (Mehl, 2011a). This legal and moral prohibition affects both the act of GS in itself, but also the family form that results from it; there is a refusal by judges to legally recognize the filiation of children born by GS made abroad, despite France being condemned by the European Court of Human Rights in 2014 in the case of *Mennesson v. France*. French families created through GS abroad struggle to acquire a status and a social existence as a respectable family form; nevertheless, they have been more and more numerous each year (Gross and Mehl, 2011).

In addition to the difficulties inherent in the cross-border nature of this practice, the particularities of creating kinship through GS have attracted the attention of social science researchers (see, in particular, Courduriès, 2016; Levine, 2003; Pande, 2010; Ragoné, 1996; Teman, 2010; Thompson, 2002). Based on an original survey among French intended parents (IPs) using GS in the USA and Belgium, and a 2-year ethnography on medical practice in a fertility centre in Belgium, this article aims to shed light on the specific relationships that GS creates and the relational statuses that people must adopt at different moments in the process. What characterizes these statuses and how are they specific? What can a relational approach teach us about GS, and, in particular, how can such an analysis contribute to a critical understanding of the French legislative framework? Why does GS not find room in the landscape of donor-conceived families in France?

This article aims to shed light on the tensions between an analysis of the French bioethics model and the results of the qualitative survey on donor-conceived families I conducted between 2014 and 2018. In this article, I will focus on the interviews conducted with IPs who have used GS in the USA and Belgium (i.e. 15 semi-directive interviews with 7 male/female couples and 8 male/male couples. Two interviews with French surrogates that I met during the survey are also included. Finally, I will mobilize the 12 interviews with fertility practitioners and some aspects of the 2-year ethnography I conducted in Belgium at a public hospital fertility centre (Decroly Hospital), which has been responsible for approximately 30 GS births since 1999. The confrontation between the ideology underlying the French bioethics legislative framework versus concrete family practices and the experience of GS (partly or completely abroad, depending on the country that people chose to go to) will provide new keys for assessing the French attitude towards GS.

On gift, money and regulatory frameworks: From France to Belgium and the USA, a comparison without antagonism

To understand the context in which survey respondents are living and the challenges they are facing, it should be

pointed out that France's attitude among neighbouring European countries is distinguished by its particularly restrictive legislation. The French legislative framework was designed explicitly with reference to the affirmation of certain values, mainly the non-commercialization of the human body, through the valorization of the public sector perceived as a protector against market logics (Mehl, 2001). This approach of bioethics has determined specific legislative choices; in addition to the ban on GS, gamete or embryo donations would only be possible on the condition that the donation is strictly anonymous, voluntary and free of charge, and could only be carried out in public health institutions. In this singular bioethics model, the donation of gametes or embryos is perceived as a medical treatment and should aim for an ideal – 'donation without a donor'. In fact, the whole system was designed so that the donation can be erased from the child's life story, as if it had not occurred in a *ni vu ni connu* ('don't ask don't tell') logic (Théry, 2010, 2020). This intent to conceal the donation behind medical and legal secrecy is explained, in particular, by the fact that the donor could threaten family stability [i.e. undermine the fatherhood (and virility) of the sterile man] (Delaisi de Parseval and Fagot-Largeault, 1986; Novaes, 1989). As gamete donation for lesbian couples or single women has been prohibited in France since 1994, only heterosexual couples with an infertile man are concerned by sperm donation. As a result, the use of a third party to create a family is considerably limited by the regulatory framework, and many French people go abroad to benefit from gamete donation or GS. This typically French attitude contrasts with some of its European neighbours, particularly Belgium which welcomes a significant number of French people seeking cross-border reproductive care (Pennings et al., 2009; Rozée Gomez and de La Rochebrochard, 2013; Shenfield et al., 2010).

Compared with France, Belgium has chosen a completely different path for the (non)regulation of reproductive donations. Neither regulated nor prohibited, GS in Belgium is practised in at least four fertility centres in the country, and some of them have been welcoming French people seeking GS for 30 years (Autin, 2013; Schiffino and Varone, 2003). These centres, where GS alone is allowed, have chosen to assess the GS requests addressed to them on a case-by-case approach; therefore, GS is part of a context of self-regulation of medical practices by the medical team itself, and remains very marginal in Belgium (Autin, 2013). Moreover, Belgian law renders null and void any agreement concerning GS (Gallus, 2013). As no third party is involved in supervising or organizing GS – no specific programme dedicated to recruiting gestational carriers, or supporting IPs and surrogates during pregnancy, exists – physicians impose their own standards because they take on huge responsibility for this practice. In the lack of any regulation, it is other avenues than those of the contract that are mobilized for the implementation of GS. The confidence and trust relationship is at the heart of the Belgian practice. These conditions usually involve a strong pre-existing emotional bond between the parties, and most often, sisters, cousins or friends offer to help the IPs (Autin, 2013).

The absence of intermediaries is directly linked to the fact that Belgian practitioners want GS to remain a so-called 'altruistic' practice (i.e. unpaid). Thus, in Belgium,

it costs approximately €5000–10,000 to cover travel and medical expenses related to GS that are not already covered by the state healthcare system. It also includes expenses related to the pregnancy itself (household help or childcare for the surrogate, compensation for any lost wages, pregnancy clothing, etc.). However, this point must be nuanced; it is not uncommon for IPs to give a significant amount of money or a particularly expensive gift to thank the surrogate, even if she is a family member or a friend. Belgian practitioners, when informed of the existence of such an event, tend to consider it as a 'counter-gift' rather than as remuneration for a service rendered. As in intercountry adoption, the circulation of money cannot be reduced to the idea of 'buying a child' (Lesnik-Oberstein, 2008), and here seems to take on a symbolic function of offsetting a debt incurred by GS (Jadoul et al., 2016). Reading reproductive donations as a specific set of gift relations involved in the giving–receiving–repaying cycle puts money back into this relationship as part of a much larger set of exchanges occurring during the GS process. As Douglas emphasizes in her foreword to *The Gift of Marcel Mauss*, the acts of giving and exchanging money are far from contradictory:

the whole idea of a free gift is based on a misunderstanding. [...] Refusing requital puts the act of giving outside any mutual ties. [...] A gift that does nothing to enhance solidarity is a contradiction (Douglas in Mauss, 2002 [1925]: ix–x).

Money as a counterpart helps keep the act of giving inside the relationship created between surrogates and IPs.

Does this analysis also apply to the situation of French parents using GS in the USA, where the amount of money spent is approximately 10 times higher than that spent by IPs going to Belgium? French parents I interviewed who have benefited from GS in the USA told me that they spent €80,000–120,000 for the full process, considerably limiting access to this practice; for many of them, this sum was 'the price to pay' to become 'parents in due form' thanks to a legal framework that allows them to establish filiation with their children born of a surrogate. In fact, if one distinguishes between the part of the money spent within the framework of a 'surrogacy market' (remuneration of agencies, lawyers) and, more broadly, the 'health market' (payment of medical expenses) in the USA, and the part of the money that actually goes to the surrogate, the situation of American and European surrogates is not so different. In both cases, money meets the function of a counter-gift. From this perspective, does the difference between so-called 'commercial' and 'altruistic' surrogacies (Humbryd, 2009) still prevent them from being grasped by a common approach?

Giving and receiving a gift of 'gestational capacity'

If money (or gifts) acts as a counter-gift, what is the 'gift' given? A relational approach of GS (Toledano and Zeiler, 2017) allows us to continue this non-opposed description of 'commercial' and 'altruistic' GS. They thus appear as two variants of the same practice: a gift of gestational capacity (Vialle, 2017). This gift is time limited and responds to specific relational modalities where comple-

mentary and relative statutory positions of the donor and the recipient must be acquired by the surrogate and the IPs through the process of GS. In this regard, ethnographic observations of the preconception consultations that take place at Decroly Hospital where I conducted my fieldwork help us to understand the characteristics of this singular gift, and how these statuses are built up over time.

At Decroly Hospital, repeated preconception interviews with the IPs, the surrogate and her partner (and the oocyte donor, if involved) are mandatory before any decision is made to initiate a GS process. It thus represents the most important part of the management of GS. Between 6 and 10 interviews are conducted by the chief gynaecologist and the psychologist, who will then resume and present to the medical team the characteristics of the GS request during a specific staff meeting that takes place every month. Access to the next step (i.e. IVF and embryo transfer into the uterus of the surrogate) is directly dependent on the conduct of these interviews. During the consultations I have observed, the practitioners discuss with the IPs and the surrogate – individually and together – the elements that will be at stake during GS. These interviews aim to help anticipate both the practical, relational and emotional aspects, but also the moral aspects of GS: what to do in the event of a fetal anomaly? In the case of a serious obstetric complication for the surrogate? In the event of the death of the IPs before the baby is born, who will take care of the child? All the protagonists must agree on these fundamental issues during the preconception consultations in order for the IVF medical protocol to be initiated.

These interviews are also an opportunity to clarify, for everyone, the status of the given thing: a time of gestational capacity (and an oocyte if an egg donor is needed). In order to limit the risk of confusion between GS and child donation, Belgian practitioners refuse to carry out traditional GS procedures. They insist on the fact that the embryo is entrusted to the surrogate for 9 months, who will then return the child to his/her parents at the time of birth. In doing so, they do not implicitly want genetic links to prevail over the ties created during pregnancy between a woman and the fetus she carries. The emphasis on the genetic disconnection between the gestational carrier and the embryo is a major support for consolidating distinct functions and status for each protagonist. They thus position themselves as kinship mediators (Zanini, 2017); through the way in which they mobilize the description of the trajectory of the embryo – which passes from the IPs to the surrogate and then back to the couple – they give meaning to the act of GS. A woman will give birth to a child that will not be hers, while others will be designated and recognized as the child's parents. Belgian professionals begin to trace, from the inception of the preconception period, the statutory choreography that the embryo, the IPs and the future surrogate will draw during pregnancy, until birth and beyond.

Relative and complementary statuses, reciprocally encompassed responsibilities over time

This important distinction in GS between giving back and giving up the baby (Jacobson, 2016) relies on prior acquisi-

tion of sufficiently stable kinship and relational statuses, otherwise confusion concerning the places and roles of each protagonist is a potential risk. Although very different in shape, preconception interviews in Belgium perform the same function as the 'matching phase' my interviewees described, carried out by GS agencies in the USA. Seen from an anthropological perspective, they allow candidate surrogates to become donors, and couples to become recipients. In other words, they make it possible to occupy relative relational positions within the gift relationship. This issue is raised by Martine, a 48-year-old mother thanks to GS with oocyte donation in California:

Traditional surrogacy was not an option for me, I needed a dissociation between the baby and the person carrying it. It was for the sake of putting 'everything in its right place'. Each one has his role, even if it means multiplying the number of people involved. [...] I really wanted her [the surrogate] not to risk any confusion, not to suffer from that.

Whether it is a question of profound relational reworking of pre-existing ties (Belgium) or the creation of new ones (USA), the period preceding the transfer is always a phase of intensive relational work (Toledano and Zeiler, 2017). Agencies in the USA, or medical staff in Belgium, are acting as a third-party mediator in order to help the creation or the reshaping of the ties in a way that allows the protagonists to be positioned within the exchange relationship of GS. The fact that this positioning is clearly acquired before the embryo transfer is a crucial point; sincerity and confidence in the role that everyone will play during the very long months of GS are decisive for its smooth running.

Matching failures between IPs and the surrogate can be understood as situations where the first steps of the constitution of the reciprocal statuses fail, leading to a shift of protagonists, or to the postponement or even the abandonment of the project. This is the case of Julie and her husband, who are candidates for GS in Belgium:

We made a first attempt 2 years ago with the surrogate mother, but it turned out that she was not yet ready at that time. [...] Now we are at the same stage of the procedure as the last time, except that my file is on hold at the moment. They're waiting for Pauline to get her answers, and for us to find a medical team that can take care of us all in France.

When roles and places are not acquired in a sufficiently stable way during the preconception phase, the IPs' demand is rejected or postponed in the Belgian case because they anticipate what could occur later during pregnancy if either of them were no longer able to act as a gestational carrier or as the parents.

These statuses need to be consolidated and confirmed during pregnancy and beyond, in particular by the way in which each person acts and positions himself/herself in relation to the unborn child and then newborn, as well as between the surrogate (and her husband) and the IPs. If parents no longer behave as IPs (e.g. if they break contact during pregnancy), the role of the surrogate is put at risk because the very meaning of pregnancy changes: without intended parents, is it still a surrogate pregnancy? Conversely, if the surrogate no longer behaves as a surrogate

and cuts off contact with IPs, the parental status of IPs is strongly destabilized and only a legal procedure could restore everyone's positions. Without going as far as these extreme situations, I found, in my interviews, the shadow of the danger that threatens the relative positions of each other when one of the partners in GS no longer behaves as he/she is expected to act within this particular relationship. For example, the involvement of the surrogate's husband in the process is one of these expectations, and passing doubts about this commitment may have been expressed by Jérôme and Aymeric, who went to Minnesota to benefit from GS:

Her husband, Jerry, we saw him only one time on 30 Skypes... he just said 'hello' but he was a little withdrawn. Before we met him, we thought, 'Gee, is he hostile? Does he feel bad about it?' Because surrogacy means a lot of sacrifices for husbands. We were a little scared but in fact he was super friendly from the beginning, when we met him the next day! It made us feel better.

On the place of each depends the place of all the others because their roles are relative and complementary; if only one of the protagonists leaves his/her role, the position of all the others is correlatively affected. The complementarity of roles revolves around a pivot: the responsibilities towards the future child that each person will assume over time. This crucial issue of the responsibilities towards the fetus has been addressed through different approaches (Berend, 2012; Kroløkke and Pant, 2012; Teman, 2010; Toledano and Zeiler, 2017; Van Zyl and Walker, 2013). It is particularly interesting to observe how responsibilities are actually shared between the IPs and the surrogate throughout the process, in a way that varies over time. This sharing of responsibilities and its temporality are organized according to a principle of hierarchization of responsibilities, which can be described thanks to the encompassing theory proposed by the anthropologist Louis Dumont (Dumont, 1988). Here, the hierarchization of the value is made in reference to the general commitment that GS represents: when is the surrogate's responsibility with regard to the fetus worth more (or less) than that of the parents? Of the medical practitioners?

Depending on the stage of the process, parental responsibility may encompass the responsibility of the surrogate with regard to the fetus, or *vice versa*. The relationship of encompassing and encompassed responsibilities is reflected in how people can or cannot act on the embryo. When the embryo is in the laboratory, responsibilities for embryos are shared between laboratory practitioners and parents (see A-S. Giraud's article in this issue). From the moment the embryo is transferred into the uterus of the surrogate, its responsibility comes into play and is encompassing that of the future parents. The fear of a transfer failure or a miscarriage, very often expressed by the surrogates, reflects their acute awareness of the importance of the issues for which they are responsible. IPs experience their dependence on the surrogate from those first moments and throughout the pregnancy; although they are able to express requests about the surrogate's lifestyle or diet during pregnancy, they know that their scope for action is limited and depends on the surrogate's action on the fetus. Bénédicte, who had her first child thanks to an oocyte dona-

tion and then a second child thanks to GS in the USA, explained to me:

We hadn't made any very specific requests for food, I don't even know what the toxoplasmosis serology of our surrogate was. We really trusted each other. We really did. [...] We didn't intend to control everything.

In rare and severe circumstances, the encompassing relationship may be reversed during pregnancy. These reversal moments remain exceptional and are anticipated as far as possible in the preconception period. These exceptional cases are covered by specific clauses in GS contracts in the USA. With a lesser degree of formalization, the professionals at Decroly Hospital dedicate a great amount of time to the clarification of each individual's position regarding the appropriate conduct to adopt in the event of a fetal anomaly, for example, or if an embryo reduction should be carried out. The need to anticipate the circumstances in which the parents 'take control' of development of the fetus underlines the rarity of the inversion of the responsibility relationship.

The hierarchical superiority of the responsibility of the gestational carrier over that of the parents during pregnancy must be contained within a certain limit. If the disproportion is too high, the relationship may be endangered. This is why Amy, surrogate for Maxime and Jean-Baptiste, waited until their daughter Chloé was born to 'confess' to them that she had continued water-skiing until the last month of pregnancy, and said she had preferred not to tell them at the time because she thought it would frighten them unnecessarily. While Maxime and Jean-Baptiste laughingly recall this memory, it nevertheless remains that not only did Amy talk about this event in the form of a confession, but also after the facts, once the pregnancy was over and therefore Chloé was no longer under her responsibility. It is understandable that if Amy preferred not to say at the time that she was still water-skiing at 8 months of gestation, it is also because she would have recalled too forcefully the superiority of her ability to act on the fetus compared with that of the IPs. The fact that she was finally able to make a joyful confession of this behaviour demonstrates the prolongation of the bond of trust between her and the IPs, under a different modality than that which prevailed during the pregnancy. Where it would have been a danger before, now full transparency is possible. Potentially risky conduct that was highly transgressive at one point in the process no longer has the same effects once the pregnancy is over, and will not impact the bond of trust in the same way. In the case of Maxime and Jean-Baptiste, this transparency may even have contributed to strengthening the bond as Amy will bear their second child in two years later.

Conclusion: A critique of the French bioethics model

Stories of GS, as narrated by the IPs I met during my investigation, occupy a highly important place in the history of the child. The journey of these long months of mutual expectations, the sharing of responsibilities regarding the coming into the world of a newborn, far from being overshadowed are valued as one of the most important things in their lives and inspiring the most pride to the people

who have experienced it, whether for the IPs, the surrogate or their respective entourages. The bond of mutual trust between the IPs and the surrogate leave an indelible trace in life trajectories, and cannot be erased from their relational and narrative identities and that of the child.

The media coverage of some of those stories, and the subsequent legal battle of these families to have their filiation recognized, contribute to changing public opinion on the practice in France. Today, a majority of French people are in favour of authorizing and regulating GS (Deffontaines, 2018). This discrepancy between public opinion sensitized by lived experiences and the virulent opposition to GS by the French political body, which claims to belong to the philosophical tradition of the Enlightenment, makes the debate almost impossible as it is based on two different levels of reflection. However, the authorization of GS is definitely not on the political agenda of the current revision of bioethics laws, which is expected to end in 2021.

In the light of what has been set out in this article, we can approach the criticism of the current French bioethics model from a new angle. Two points stand out in particular: the role of money in GS, and the importance of the gift relationship and the reciprocal responsibilities that this relationship creates with regard to the fetus.

The strong opposition to the commercialization of the human body coupled with the full funding of reproductive care by social security (i.e. the French state) has radicalized the perception of money exchanges in the field of bioethics. This has rendered inaudible the counter-gift function that money can assume in certain situations, GS in particular.

Moreover, at a time when GS is undoubtedly the most relational of all reproductive donations, how could it fit in the French bioethical framework which leaves no room for the gift and the donors in its 'donation without a donor' ideology? Definitely GS cannot find any place in a model conceived according to the ideal of a reproductive donation, which would be a pure medical treatment, without complementary statuses of donors, recipients and donor-conceived child; in other words, without a gift relationship. However, the bill currently under discussion in the French Parliament suggests the possibility of a paradigm shift by opening access to personal origins for donor-conceived people. If this legal provision were to be enacted, it could represent a decisive step in the recognition of the gift relationships created by gamete and embryo donations, and could eventually reopen the debate on GS at last.

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