

## The Right to Dignity of the Surrogate Mother

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### ABSTRACT

This article explores a different perspective on the right to dignity of the surrogate mother in commercial surrogacy arrangements under international human rights norms and philosophical principles. Here, I examine the concept of human dignity under the lenses of contemporary legal theory reflecting on the right to self-determination of the surrogate mother. This dignity-based approach serves for analysing how International Human Rights Law enables women to enter commercial surrogacy agreements on the basis of their contractual freedom, their reproductive rights, on the prohibition of non-discrimination and their labour rights. Under the lenses of economics and law, I examine how this practice carries the potential to empower the economic emancipation of women and their access to the labour market. Dignity as rights-constraining will reflect on the other side of surrogacy. I investigate the exploitative character of this practice and how it could present human rights abuses for the surrogate mother. Specifically, I focus my analysis on how surrogacy contracts could violate the bodily autonomy of the surrogate and potentially maintain gender inequality and reinforce gender stereotypes. After recognizing certain concerning aspects of individual surrogacy arrangements, I question whether outlawing surrogacy is the right response to this practice.

### KEYWORDS

*Human Dignity; Self-Determination; Contractual Freedom; Non-Discrimination; Exploitation*



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INTRODUCTION

International commercial surrogacy has shaped a new branch of tourism.<sup>1</sup> Methods of baby-making have expanded rapidly through technological advances and globalization. Women worldwide offer themselves to carry a child for another couple who might suffer from infertility or prefer to use this service because of other reasons.<sup>2</sup> The 2030 Agenda for Sustainable Development in Sustainable Development Goal 5 [hereinafter S.D.G. 5] aims to achieve gender equality and empower all women and girls. This provision puts into conflict the two sides of S.D.G. 5 namely, on the one side ending trafficking, sexual and other forms of exploitation of women and girls and on the other side empowering them. In the practice of surrogate motherhood, this tension is clearly visible as there exists a conflict between values of protection and freedom.

The aim of this article is to confront the arguments in favour of and against the participation of potential surrogate mothers in international commercial surrogacy. This article concerns only the practice of commercial surrogacy whereby a woman is compensated to carry the child. The focus of this analysis is the concept of human dignity. Dignity constitutes a central element in International Human Rights Law and has been integrated into various legal instruments.<sup>3</sup>

<sup>1</sup> See April L. Cherry, *The Rise of the Reproductive Brothel in the Global Economy: Some Thoughts on Reproductive Tourism, Autonomy, and Justice*, 17 UNIV. PA. J. L. & SOC. CHANGE 257 (2014).

<sup>2</sup> See Claire Fenton-Glynn, *Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements*, 24 MED. L. REV. 59 (2016).

<sup>3</sup> See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655 (2008).

Contemporary legal theory associates human dignity with the philosopher Immanuel Kant.<sup>4</sup> The idea behind his concept is to equalize dignity with autonomy. In other words, treating people with dignity means to treat them as autonomous individuals able to choose their destiny.<sup>5</sup> In this sense, scholars have found coherence with the theory of contractual autonomy, meaning that surrogate mothers should be able to choose freely to exchange their bodily services in the practice of commercial surrogacy.<sup>6</sup>

On the other side, Kantian dignity prohibits commodification of the human body. As a person, a human being “cannot give himself away for any price”.<sup>7</sup> The argument of non-commodification establishes a limit to the contractual autonomy of the person. By contextualizing surrogacy, serious concerns of exploitation are raised for surrogate mothers participating in surrogacy from the Third World.<sup>8</sup> Financially and socially vulnerable women present a target group with a high risk of exploitation and commodification. According to Judge Dedov in his dissenting opinion in the Grand Chamber judgement of the European Court of Human Rights [hereinafter E.Ct.H.R.] in *Paradiso and Campanelli v. Italy* (Appl. No. 25358/12) judgement of 24 January 2017, “it is extremely hypocritical to prohibit surrogacy in one’s own country in order to protect local women, but simultaneously to permit the use of surrogacy abroad”. Paradoxically, even in states like the United States [hereinafter U.S.] where surrogacy laws are liberal, U.S. citizens still prefer to enter into surrogacy arrangements with women from other lower-resource nations.<sup>9</sup> This reflects another assumption that individuals seek to conduct surrogacy arrangements in developing countries where the offer is cheaper. Ultimately, surrogacy raises decisive questions about the protection of the surrogate mother and her rights in this practice. The methodology for addressing issues concerning international surrogacy in this contribution will take place through the prism of international human rights.

In the first chapter, I will start off by explaining the role of human dignity in the jurisprudence of the European Courts. Human dignity is a fundamental and constitutional value of the European Union, a juridically protected good and the essence of the European Convention on Human Rights. The case-law of the Courts determines

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<sup>4</sup> See James Rachels, *Kantian Theory: The Idea of Human Dignity*, in *COMPUTERS, ETHICS, & SOCIETY* 45 (M. David Ermann, Mary B. Williams, Michele S. Shauf eds., 1990).

<sup>5</sup> See IMMANUEL KANT, *Metaphysical first Principles of the Doctrine of Virtue* §38, in *THE METAPHYSICS OF MORALS* 375, 463 (6 Ak. 1900).

<sup>6</sup> See Jamie Cooperman, *International Mother of Mystery: Protecting Surrogate Mothers’ Participation in International Surrogacy Contracts*, 48 *GOLDEN GATE UNIV. L. REV.* 161 (2018).

<sup>7</sup> MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 73 (2000). By contrast, “the core of what exploitation is, [is] to treat a person as a mere object for the use of others”.

<sup>8</sup> See DONNA DICKENSON, *PROPERTY IN THE BODY: FEMINIST PERSPECTIVES* (2007).

<sup>9</sup> See Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 *UNIV. PA. J. INT’L L.* 1429 (2009).

the recognized elements of human dignity: self-determination, freedom and autonomy, identity, equality, and liberty.

In the second chapter, I want to compare the two sides of the right to dignity. In the first part of the chapter, I will examine how the international human rights framework protects the participation of the surrogate mother in commercial surrogacy. Women's participation in the role of surrogate mother is guaranteed by their contractual freedom, on the basis of their reproductive rights, on the prohibition of non-discrimination and their labour rights. Firstly, Article 8 of the European Convention on Human Rights [hereinafter E.C.H.R.] entitles women to the right of privacy and self-determination. Surrogacy involves the importance of women's autonomy, the guarantee that women should be allowed to exercise their right to contract with anyone, for anything, even for their reproductive abilities.<sup>10</sup> The decision to enter into a commercial surrogacy agreement is protected *prima facie* by her right to privacy.<sup>11</sup> The International Covenant on Civil and Political Rights [hereinafter I.C.C.P.R.] holds that all individuals have the fundamental "right of self-determination".<sup>12</sup> This right establishes the ability for individuals to "freely determine their political status and freely pursue their economic, social, and cultural development. The Convention on the Elimination of all Forms of Discrimination Against Women [hereinafter C.E.D.A.W.] requires that countries do not discriminate against women in their laws and policies, including restrictions or regulations of women's choices of labour and reproductive choices and activities. In addition, the E.C.H.R. and the International Covenant on Economic, Social, and Cultural Rights [hereinafter I.C.E.S.C.R.] also require states to ensure non-discrimination in the context of laws and policies around reproductive rights and choices. This obligation includes ensuring laws and policies on reproductive choices which are not based on gender stereotypes such as traditional conceptions of motherhood and maternity.<sup>13</sup>

In the second part of this chapter, I will deal with the question whether commercial surrogacy arrangements could lead to a violation of the right to dignity of the surrogate mother. Authors fear the vulnerability of women in low-resource nations, specifically their risk to exploitation and commodification by not holding an equal

<sup>10</sup> See e.g., Cyra Akila Choudhury, *Exporting Subjects: Globalizing Family Law Progress Through International Human Rights*, 32 MICH. J. INT'L L. 259 (2011).

<sup>11</sup> See generally John Tobin, *To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?*, 63 INT'L & COMPAR. L. Q. 317 (2014).

<sup>12</sup> G.A. Res. 34/180, annex, Convention on the Elimination of All Forms of Discrimination against Women, pt. 1 (art. 1) (Dec. 18, 1979).

<sup>13</sup> See e.g., Liiri Oja & Alicia Ely Yamin, "Woman" in the European Human Rights System: How is the Reproductive Rights Jurisprudence of the European Court of Human Rights Constructing Narratives of Women's Citizenship?, 32 COLUM. J. GENDER & L. 62 (2016).

bargaining power in this arrangement.<sup>14</sup> The unequal bargaining power between the commissioning parents and the surrogate mother is implicated by issues such as the disparity in social class, ethnicity and gender hierarchy.<sup>15</sup> It is doubtful whether the power of consent is truly available for them when recognizing that there may not be other reasonable occupational alternatives with fair compensation.<sup>16</sup> Informed consent can be compromised by various factors, coercion, such as financial pressure, lack of knowledge about pregnancy complications, uncertainty as to health impacts on the surrogate mother. To add on, it must be determined if surrogacy arrangements could amount to slavery or forced labour based on Article 4 of the E.C.H.R. Lastly, their physical integrity could be at risk based on the high rate of maternal mortality and the pregnancy risks that they are exposed to.<sup>17</sup>

This article presents a comprehensive review of the right to be a surrogate under the international human rights norms and philosophical principles. It recognizes certain concerning aspects of individual surrogacy arrangements and questions whether outlawing of surrogacy is the correct response to this practice.

## 1. HUMAN DIGNITY IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF JUSTICE

European constitutionalism recognizes human dignity as a “fully European concept”.<sup>18</sup> It is known for its high complexity, as it can be seen as a fundamental constitutional value of the European Union [hereinafter E.U.] (Article 2 of the Treaty of the E.U.), as a means to frame conflicts, as a tool for interpretation and as a symbol of the European legal order.<sup>19</sup> The European Court of Justice [hereinafter E.C.J.] and E.Ct.H.R. give another function to this concept when resolving conflicts. With the principle of proportionality, the Courts “weigh” or “balance” rights, values and interests and use human dignity as a tool for resolving the clash of rights.<sup>20</sup> In front of the European Court of Human Rights,

<sup>14</sup> See e.g., Nicole F. Bromfield & Karen Smith Rotabi, *Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations*, 1 GLOB. SOC. WELFARE 123 (2014).

<sup>15</sup> See generally Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J. L. & PUB. POL'Y 139 (1990).

<sup>16</sup> See generally Tobin, *supra* note 11.

<sup>17</sup> See Jeffrey Kirby, *Transnational Gestational Surrogacy: Does It Have to Be Exploitative?*, AM. J. BIOETHICS, 25 Apr. 2014, at 24.

<sup>18</sup> CATHERINE DUPRÉ, *THE AGE OF DIGNITY: HUMAN RIGHTS AND CONSTITUTIONALISM IN EUROPE* 91 (2003).

<sup>19</sup> See, e.g., DAVOR PETRIĆ, “Different faces of dignity”: A Functionalist Account of the Institutional Use of the Concept of Dignity in the European Union, 26 MAASTRICHT J. EUR. & COMPAR. L. 792 (2019).

<sup>20</sup> See McCrudden, *supra* note 3.

the concept of human dignity is represented by three layers of protection. An absolute protection is given to human dignity by Article 3 E.C.H.R. In a second step, human dignity serves for the concretization of other human rights that are granted only relative protection. Hereby the proportionality test will test the severity of the interference. Thirdly, the Court uses the concept of human dignity in a political matter for reflecting a desirable outcome for human rights protection without imposing a legally binding consequence for the contracting states.<sup>21</sup>

Article 1 of the Universal Declaration of Human Rights [hereinafter U.D.H.R.] of 1948 states that all human beings are born free and equal in dignity and rights. The Preamble of the International Covenant on Civil and Political Rights of 1966 recognizes human dignity as the source of natural human rights. The European Convention on Human Rights in 1950 and its additional protocols give a pivotal role to human dignity. Respect for human dignity is not articulated in any of the substantive rights guaranteed under the Convention.<sup>22</sup> This concept appears in Protocol no.13 to the European Convention which emphasises that the abolition of the death penalty is “essential” for the protection of right to life and for “the full recognition of the inherent dignity of all human beings”.<sup>23</sup> However, it underpins guaranteed rights such as the right to life, the right to respect for private life, the prohibition on inhuman and degrading treatment, in the context of the right to a fair hearing and the right not to be punished in the absence of a legal prohibition. Based on the interpretation of the European Court of Human Rights on Article 3 of the Convention, life and human dignity are fundamental values of a democratic society. The duty of the state is to protect dignity under all conditions.

The preamble of the Charter of Fundamental Rights mentions human dignity as the first value among the “indivisible and universal values on which the European Union is founded”. The Charter provides for a prioritisation of the concept “human dignity” as it holds the heading of Title I (before Title II “Freedoms” and Title III “Equality”). Article 1 states that “Human dignity is inviolable. It must be respected and protected”. In other words, human dignity is not seen as a right, but as a general clause implying the recognition of an inviolable juridically protected good.<sup>24</sup> Article 3 of the Charter refers to the “right to integrity of the person” and in para 2 it mandates respect for the free and informed consent of the person concerned, according to the procedures laid down by

<sup>21</sup> See, e.g., Sebastian Heselhaus & Ralph Hemsley, *Human Dignity and the European Convention on Human Rights*, in *HANDBOOK OF HUMAN DIGNITY IN EUROPE* 969 (PAOLO BECCHI, KLAUS MATHIS EDS., 2019).

<sup>22</sup> See Susan Millns, *Death, Dignity and Discrimination: The Case of Pretty v. United Kingdom*, 3 GER. L. J. (2019).

<sup>23</sup> Protocol no. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in all circumstances, Vilnius, 3.V.2002.

<sup>24</sup> See generally Millns, *supra* note 22.

law. In *Omega*,<sup>25</sup> the Court of Justice handed down a landmark judgement that the concept of dignity represents a fundamental right in the E.U. Charter, a general principle of E.U. law and a constitutional value of the Union. Advocate General Stix-Hackl, in her Opinion in *Omega*, stated that human dignity is attributed to every human being solely based on their human nature.<sup>26</sup> She emphasised that human dignity is inherent and inalienable to humans who are endowed with reason and represents the “substance” of mankind. In her opinion, human dignity is what distinguishes every person from other living beings.<sup>27</sup> It contains elements of self-determination, freedom and autonomy, individual’s personality, and identity. It subsumes the concept of equality of people. Lastly, she reflected on dignity as being the foundation for all other human rights and yardstick for their interpretation.<sup>28</sup> In conclusion, Advocate General Stix-Hackl recognized the high importance of this concept in the E.U. legal order by stating that it cannot be subject to any restriction nor weighed against other values or interests.

The substance of human dignity has been defended by Advocate General Maduro in the *Coleman* case.<sup>29</sup> In his opinion in *Coleman*, Advocate General Maduro expressed that dignity corresponds to the principle of equality. According to his opinion, dignity has an intrinsic value and is possessed merely by being human. As a consequence, every human being is worth the same.<sup>30</sup> Based on the opinions of Advocate General Stix-Hackl and Maduro, the concept of dignity is built upon liberty and equality. However, in both opinions there is a clear tendency that human dignity in E.U. has a stronger link to liberty.<sup>31</sup> Advocate General Stix-Hackl concentrates on the self-determination of the individual. Advocate General Maduro reflects on autonomy as an underlying value of dignity.

The notion of personal autonomy is connected to the concept of “private life” as the European Court of Human Rights expressed that: “although no previous case has been established as such any right to self-determination as being contained in Article 8 of the Convention [. . .] the notion of personal autonomy is an important principle underlying the interpretation of its guarantees”.<sup>32</sup> “Private life” protects a right to personal development and the right to establish and develop relationships with other

<sup>25</sup> Case C-36/02, *Omega v. Oberbürgermeisterin der Bundesstadt Bonn*, ECLI:EU:C:2004:162 (Mar. 18, 2004).

<sup>26</sup> See Opinion of Advocate General Stix-Hackl in Case C-36/02 *Omega*, EU:C:2004:162, para. 75.

<sup>27</sup> *Id.* paras. 75-76.

<sup>28</sup> *Id.* paras. 76-81.

<sup>29</sup> Case C-303/06, *Coleman v. Attridge Law*, EU:C:2008:61 (July 17, 2008).

<sup>30</sup> See Opinion of Advocate General Maduro in Case C-303/06 *Coleman*, para. 9.

<sup>31</sup> See e.g., Petrić, *supra* note 19.

<sup>32</sup> *Id.* para. 66.

human beings.<sup>33</sup> It recognizes an inviolable sphere of privacy.<sup>34</sup> The structure of Article 8 E.C.H.R. does not grant absolute protection to human dignity, but it establishes a two-tier approach.<sup>35</sup> First, a core of human dignity is granted absolute protection; in a second step the Court is then required to balance conflicting rights. The interference can be justified. In *Haas v. Switzerland*,<sup>36</sup> the Court outlines that it is the choice of the applicant to avoid what she perceives to constitute an undignified and painful end to her life. The European Court of Human Rights acknowledged that the choice of how one ends his life falls in the ambit of Article 8 E.C.H.R.. By doing this, the Court modifies the grounds of dignity: it is not seen any more as inherent to human nature but linked to the perception of each individual on the concept of dignity.<sup>37</sup> The measure of human rights is no longer human, but each individual.<sup>38</sup>

In *Pretty v. the United Kingdom*,<sup>39</sup> the Strasbourg-based Court refers to respect for human dignity as the “very essence of the Convention”.<sup>40</sup> The Court recognizes that the notion of dignity is composed of a social component that relates to issues of the quality of life and is not simply limited to a consideration of life per se. The interpretation of the Court concentrates on the concept of dignity as the need of the individual for self-respect. The European Court of Human Rights emphasises the importance of self and personal identity by admitting that: it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.<sup>41</sup> In *Christine Goodwin v. United Kingdom*, the Grand Chamber specified personal autonomy as an element of both the freedom and the dignity central to the Convention.<sup>42</sup> This case dealt with the recognition of the rights of transsexual people in the light of Article 8 E.C.H.R..

<sup>33</sup> *Id.* para. 61. There was no previous Strasbourg case law which explicitly recognised a right to self-determination as being contained in Article 8 of the Convention; the Court now held that *the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.*

<sup>34</sup> On the ambit of Article 8 E.C.H.R. see, e.g., Cesare Pitea & Laura Tomasi, *Art. 8 - Diritto al rispetto della vita privata e familiare*, in COMMENTARIO BREVE ALLA CONVENZIONE DEI DIRITTI DELL’UOMO 297 (Sergio Bartole et al. eds., 2012).

<sup>35</sup> ANNE PETERS & TILMANN ALTWICKER, *EUROPÄISCHE MENSCHENRECHTSKONVENTION: MIT RECHTSVERGLEICHENDEN BEZÜGEN ZUM DEUTSCHEN GRUNDGESETZ* (2012).

<sup>36</sup> *Haas v. Switzerland*, App. No. 31322/07, First Section, 2011, Eur. Ct. H.R. para. 50.

<sup>37</sup> See Gregor Puppincck & Claire de La Hougue, *The right to assisted suicide in the case law of the European Court of Human Rights*, 18 INT’L J. HUM. RTS. 735, 755 (2014).

<sup>38</sup> See Grégor Puppincck, *Les droits de l’homme, nouvelle religion d’État*, 31 LA NOUVELLE REVUE UNIVERSELLE (2013).

<sup>39</sup> See, e.g., *Pretty v. the United Kingdom*, App. No. 2346/02, Fourth Section, 2002, Eur. Ct. H.R.

<sup>40</sup> *Id.* para. 65.

<sup>41</sup> *Id.*

<sup>42</sup> See, *Christine Goodwin v. United Kingdom*, App. No. 28957/96, Grand Chamber Judgement, 2002, Eur. Ct. H.R. para. 90.



The Court concluded that “the right to establish details of identity is in immediate proximity to the respect for human dignity”.<sup>43</sup>

In matters of prostitution, the European Court of Human Rights has clearly concluded that forced prostitution is incompatible with the dignity of the person. This was stated in the judgement of September 11, 2007 in *Tremblay v. France*.<sup>44</sup> On the other side, prostitution based on the free choice of the person that is free from any form of coercion is not incompatible with the right to dignity. In matters of biomedicine, the Court has followed the interpretative doctrine of considering the convention as a “living instrument” when reflecting on the repercussions of social and technological progress on human rights.<sup>45</sup> In the field of reproductive rights, the Court has generally recognized a particular need for restraint and remained hesitant in interfering with national politics concerning issues of bioethics.<sup>46</sup> In this specific matter, the European Court of Human Rights has sometimes used the concept of human dignity to defend tradition and morality based on Article 8 E.C.H.R..

In *Evans v. United Kingdom*, a cancer survivor asked for the *in vitro* embryos to be returned to her for the purpose of procreation.<sup>47</sup> This was rejected by her ex-partner. The E.Ct.H.R. refused the request of the distressed woman by asserting that the legal provision requiring the consent of both members for the *in vitro* fertilisation [hereinafter I.V.F.] procedure was not in violation with the right to respect for her private and family life.<sup>48</sup> This provision protects the person donating gametes for the purposes of *in vitro* activation in order for them to be certain that their material cannot be used against their consent. According to the Court, this provision protects human dignity, free will and the desire to maintain a fair balance between the parties to the I.V.F. treatment. By invoking human dignity, the Court justifies a conservative limitation on the right of the woman to become a mother by the use of assisted reproductive technologies and emphasizes the personal autonomy of the man, who could not be forced to become a father in a situation where the procreation required medical intervention.<sup>49</sup>

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<sup>43</sup> *Id.* para. 92.

<sup>44</sup> See, *Tremblay v. France*, App. No. 37194/02, Second Section, 2007, Eur. Ct. H.R.

<sup>45</sup> See, *Knecht v. Romania*, App. No 10048/10, Third Section, 2012, Eur. Ct. H.R., para. 59.

<sup>46</sup> See generally Alice Margaria, *Parenthood and Cross-border Surrogacy: What is “New”? The ECtHR’s First Advisory Opinion*, 28 *MED. L. REV.*, Issue 2 (2020).

<sup>47</sup> See, *Evans v. United Kingdom*, App. No. 6339/05, Grand Chamber Judgement, 2007, Eur. Ct. H.R.

<sup>48</sup> *Id.* para. 92.

<sup>49</sup> See Jean-Pierre Marguénaud, *The Principle of Dignity, and the European Court of Human Rights in the reality of Human Dignity in Law and Bioethics*, in 71 *THE REALITY OF HUMAN BODY AND DIGNITY IN LAW AND BIOETHICS* 141 (Brigitte Feuillet-Liger & Kristina Orfali eds., 2018).

The E.Ct.H.R. refers to the practice of surrogacy not as a rights issue, but as an ethical issue that must be left to the discretion of the state. In *Mennesson v. France*,<sup>50</sup> a case concerning a surrogacy arrangement of a French couple and their children born from surrogacy in the state of California, the Court found no violation of Article 8 E.C.H.R. for the parents of the children. On the contrary, regarding the children, the Court found a violation as the measure undermines the identity of the children and concluded that “the interests of the minors should always prevail, since they cannot be denied their right to a private life or to adopt the nationality of their biological parent”. The Court makes no reference to the dignity of the surrogate mother and missed the opportunity to engage with constructions of gender and family roles set in the national legislations.

## 2. SURROGACY, BETWEEN VALUES OF FREEDOM AND PROTECTION: THE RIGHT TO SELF-DETERMINATION OF THE SURROGATE MOTHER

### 2.1. WOMEN'S CONTRACTUAL FREEDOM AS A SOURCE FOR EMPOWERMENT

Women are the individuals who provide the service of surrogacy. Some refer to the role of the surrogate mother as the “gestational carrier”, whilst others see her as having rented out her womb.<sup>51</sup> The reasons women choose to work as surrogates are various. Some women become surrogates based on altruistic motivations, others see surrogacy as an additional source of income. A common motivation is improving their financial situation, providing for their children, to renovate, build, or buy their own home, to start a business, to pay debt. They may also enter surrogacy contracts when they do not have other professional options as there is no available employment. The payment received for the surrogacy arrangement enables them to contribute towards the achievement of these goals that would not have been possible otherwise. The right of the woman to dispose of her bodily parts or bodily services should not be effectively subject to governmental control.<sup>52</sup> Prohibiting women from entering commercial surrogacy contracts could potentially deprive them of engaging in contractual labor. Their right to surrogacy is derived from their contractual freedom. The right to surrogacy protects the interests of the contractual parties involved to enter a contract freely.

<sup>50</sup> See e.g. *Mennesson v. France* App. No. 65192/11, Fifth Section, 2014, Eur. Ct. H.R. together with *Labassee v. France*, App. No. 65941/11, Fifth Section, 2014, Eur. Ct. H.R.

<sup>51</sup> See Lauren Andrew Hudgeons, *Gestational Agreements in Texas: A Brave New World*, 57 BAYLOR L. REV. 863 (2005).

<sup>52</sup> See generally CARMEL SHALEV, *BIRTH POWER: THE CASE FOR SURROGACY* (2009).

Based on self-determination and freedom of contract, women have the right to enter into a surrogacy contract. The I.C.C.P.R. holds that all individuals have the fundamental “right of self-determination”.<sup>53</sup> This right establishes the ability for individuals to “freely determine their political status and freely pursue their economic, social, and cultural development”. On the basis of I.C.C.P.R., women can demonstrate their right of using the resource of their bodies to enter into surrogacy agreements by fulfilling the conditions of the right of self-determination.<sup>54</sup>

Surrogacy reflects the guarantee that women should be allowed to exercise their freedom of contract with anyone, even on the basis of reproductive abilities.<sup>55</sup> Pregnancy contracts do show differences to other types of contracts as long as they are voluntarily accepted by the surrogate mother. The surrogate mother provides a service that does not entitle her to direct ownership, nor does she represent an identity interest in the embryo/fetus, nor a parental/maternal interest in the child she is carrying.<sup>56</sup> Both parties, the surrogate mother and the intended parents, enter the commercial surrogacy agreement on the basis of an exchange: the surrogate mother agrees to engage in reproductive labor and the intended parents agree to compensate her for this service.<sup>57</sup> This contract has the nature of an employment contract. The surrogate mother is compensated for her service, not for relinquishing parental rights. Under the lenses of economics and law, a contract should be enforced when it makes two people better off.<sup>58</sup> The parties are the best judges of their own welfare and their desire to enter a surrogacy contract should only be interfered by paternalistic intervention in exceptional circumstances.<sup>59</sup> Under legal paternalism we understand the view that it is permissible for the state to legislate against self-regarding actions when necessary to prevent individuals from inflicting physical or severe emotional harm on themselves.<sup>60</sup> It is to be assumed that the parties would not have entered the contract if they did not wish for it to become enforceable. In the case of surrogacy, the intended parents wish to have a child from this practice and the surrogate mother aims at being paid for her service. By prohibiting the practice of commercial surrogacy, it is questionable whether the freedom of contract of the surrogate mother is paternalistically encroached.

<sup>53</sup> G.A. Res. 34/180, | Annex, The International Covenant on Civil and Political Rights, art. 1 (1), (Dec. 18, 1979).

<sup>54</sup> *Id.* art. 1 (2).

<sup>55</sup> See Choudhury, *supra* note 10.

<sup>56</sup> Yasmine Ergas, *Babies without borders: Human Rights, Human dignity, and the regulation of international commercial surrogacy*, 27 EMORY INT'L L. REV. 117 (2013).

<sup>57</sup> See Christine Staele, *Is There a Right to Surrogacy?* 33 J. APPLIED PHIL. 146 (2015).

<sup>58</sup> See e.g., LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002).

<sup>59</sup> See e.g., Aristides N. Hatzis, *From soft to hard Paternalism and back: The Regulation of Surrogate Motherhood in Greece*, PORTUGUESE ECONOMIC JOURNAL, 8 PORT. ECON. J. 205 (2009).

<sup>60</sup> ROLF SARTORIUS, PATERNALISM (1983).

The gestational mother in this case is making a trade-off, offering her uterus to obtain a goal that is more important to her. She might opt for surrogacy and prioritize this choice in her life. The regulatory framework based on C.E.D.A.W. enables women to access their contractual and economic rights.<sup>61</sup> States which have adopted the treaty are mandated by C.E.D.A.W. to provide equal rights for women to conclude contracts. The treaty demands that contracts that limit the legal capacity of women shall be deemed null and void.<sup>62</sup> Contractual autonomy in surrogacy is supported by the theory of possessive individualism.<sup>63</sup> This theory differentiates between the property of the person in his or her capacity to labor and the property in “his own person”. The theory of Macpherson used in surrogacy matters entitles the women to be paid for the work of gestation (her capacity to labor) and not for the pregnancy itself (personhood of the woman).<sup>64</sup> This idea emphasizes individual determination. Parental roles and their content are subject to individual determination as a source of self-determination.

In terms of human dignity, the Kantian argument dignity as autonomy can form the basis of the right to enter in a surrogacy agreement. According to Kant, treating people with dignity means to treat them as autonomous individuals who are able to choose their destiny.<sup>65</sup> Human beings should be able to choose freely to exchange their own bodily goods and services as this represents a fundamental right to make a decision regarding the own person. Dignity is attributed to the individual because of his/her self-determination and the ability to make rational choices. The concept of autonomy based on the theory of Kant includes autonomy as self-defining, self-interested and self-protecting.<sup>66</sup> Autonomy is reflected by having a choice, as a fundamental value in reproductive rights. This argument is protected by the theory of liberalism. The protection of the autonomy of individuals is central for liberalism as it reflects the main duty of the state to protect.<sup>67</sup> Under reproductive liberalism, the freedom of choice and contract opens the path to the practice of surrogacy.

In this regard, wealthy individuals have the option to exercise their freedom of choice by contracting surrogate mothers and compensating them. On the other side, poorer women have the freedom of choice and contract to enter into such agreements. The theory of Kant establishes that dignity is correlated to duty. In this sense, individuals

<sup>61</sup> G. A. Res. 34/180, Annex, Convention on the Elimination of all Forms of Discrimination Against Women (Dec. 18, 1979), at art. 15.

<sup>62</sup> *Id.* art. 15 (3).

<sup>63</sup> See C. B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 263-77 (1962).

<sup>64</sup> *Id.* at 263-64.

<sup>65</sup> See McCrudden, *supra* note 3.

<sup>66</sup> See e.g., TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 58 (5th ed. 2001).

<sup>67</sup> See e.g., Joan C. Callahan & Dorothy E. Roberts, *A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory*, 84 *KY. L. J.* 1197, 1198-99 (1996).

have the duty to respect the autonomy of others.<sup>68</sup> Nevertheless, the Kantian dignity is limited by the arguments of non-commodification of the human being. Kant emphasizes that human beings “cannot give themselves away for any price”. For this reason, surrogacy is regarded as an attack on human dignity. The surrogate mother is seen as an instrument and not as an end to herself. Hence, the stereotype is reinforced that the gestational capacity of a woman is identified as her best contribution to humankind.<sup>69</sup> Other elements of her right to dignity, such as the ability to take decisions freely about her reproductive autonomy, her body, her own life and self-determination are disregarded.

## 2.2. PROVIDING SURROGACY ON THE BASIS OF REPRODUCTIVE RIGHTS

The Council of Europe Commissioner for Human Rights has published an issue paper on women’s sexual and reproductive health and rights. This document established that the fulfilment of the right to sexual and reproductive health requires states to provide universal access to diagnosis and treatment of infertility.<sup>70</sup> Reproductive rights are internationally recognized in human rights law. Women have a right to control their own bodies and decide their own reproductive choices. The basis for women choosing their reproductive choices and bodily autonomy is the right to privacy, the right to health and reproductive rights. Women are protected against arbitrary and unlawful interferences under their right to privacy under Article 8 of the E.C.H.R., Article 12 of the U.D.H.R., Article 17 of the I.C.C.P.R. and Principle 21 of the Association of Southeast Asian Nations Human Rights Declaration. To add on, women have the right to the highest attainable standard of health based on Article 12 of the I.C.E.S.C.R. and Article 25 U.D.H.R. This right includes a right to reproductive health on the basis of which

women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as the right of access to appropriate health-care services that

<sup>68</sup> See Jacob Dahl Rendtorff, *Basic Ethical Principles in European Bioethics and Biolaw: Autonomy, Dignity, Integrity, and Vulnerability - Towards a Foundation of Bioethics and Biolaw*, 5 MED., MEDICAL CARE & PHIL. 235 (2002).

<sup>69</sup> See Noelia Igeda González, *Regulating surrogacy in Europe: Common problems, diverse national laws*, 26 EUR. J. WOMEN’S STUD. 435 (2019).

<sup>70</sup> See Council of Europe, December 2017: *Women’s sexual and reproductive health and rights in Europe - Issue paper published by the Council of Europe Commissioner for Human Rights*. Available at: <https://rm.coe.int/women-s-sexual-and-reproductive-health-and-rights-in-europe-issue-pape/168076dead>.

will, for example, enable women to go safely through pregnancy and childbirth.<sup>71</sup>

Article 16 (1) (e) of the C.E.D.A.W. reaffirms the right of women to decide autonomously and responsibly on the number and spacing of their children and to have access to the information, education and means to do so. This is clearly seen in cases of access to contraception, now provided widely by states as a free public health benefit.<sup>72</sup>

The right to privacy and the right to health have been interpreted as a guarantee for the protection of physical integrity. It covers the protection of women against external interference with their bodies. Hereby women are protected from physical assault, forced sterilization or inhuman and degrading treatment. Additionally, the United Nations Committees on Civil and Political Rights and on Economic, Social and Cultural Rights have recognized as components of the rights to health and privacy a right to bodily autonomy.<sup>73</sup> This right establishes the framework of protection for women to make their own informed decisions about their bodies, taking under consideration also reproductive choices. In surrogacy, a complete prohibition of this practice would introduce the infringement of women's reproductive rights and freedoms. A ban would leave women without a choice of participating legally in surrogacy and could raise their vulnerability for being abused in illegal markets. Their right to bodily autonomy and reproductive freedom is threatened by criminalizing surrogacy.

### 2.3. PROVIDING SURROGACY ON THE BASIS OF NON-DISCRIMINATION AND GENDER JUSTICE

The prohibition of surrogacy is directed only to women, based on the fact that they are the only ones who can provide this service. Laws restricting, criminalizing, or prohibiting surrogacy restrict only the rights of women. States are required to ensure non-discrimination in their laws and policies about reproductive rights and choices and to safeguard that these laws are not based on gender stereotypes.<sup>74</sup> The payment for

<sup>71</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4 (2000), para 14.

<sup>72</sup> See, e.g., D.MARIANNE BLAIR ET AL., FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN COMPARATIVE AND INTERNATIONAL FAMILY LAW 819-20 (2009).

<sup>73</sup> See M.T. v. Uzbekistan, CCPR/C/114/D/2234/2013 Committee on Civil and Political Rights | (2015), para 2.1 - 2.14; I.V. v. Bolivia, Petition 270-07, Inter-Am. Comm'n H.R., Report No. 40/08, OCEA/Ser.L/V/II.134, doc. 5 rev | (2008), para 1-2 and 80; Szijarto v. Hungary, CEDAW/C/36/D/4/2004, Committee on the Elimination of Discrimination Against Women | (2006), para 2.2 -2.3.

<sup>74</sup> See Council of Europe, European Convention on Human Rights, Nov. 4 1950, Art. 14; Office of the High Commissioner (UN), International Covenant on Civil and Political Rights, Mar. 23 1976, Art. 3; Office of the High Commissioner, Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, Art. 1, 16. See generally L.C. v. Peru, CEDAW/C/50/D/22/2009, para. 8.15; K.L. v. Peru, CCPR/C/85/D/1153/2003, para. 6.4; V.D.A. v. Argentina, CCPR/C/101/D/1608/2007, para. 9.3.

surrogacy is prohibited by the state, reproductive activity is framed the same as the domestic labor of women. Traditionally, domestic labor of women has been seen as noneconomic acts of love and nurturing, rather than as work and real economic contributions to family life.<sup>75</sup> It is additionally questionable why the risks of exploitation are disregarded when permitting other altruistic acts such as donation of organs. Based on the Kantian principle “treating others as a means to their own”,<sup>76</sup> not only surrogacy but also other acts such as sperm donation, egg donation, embryo donation should be made unlawful.

The matter of surrogacy reflects a battle towards gender stereotypes. Motherhood is dependent on cultural notions and gender stereotypes. Doubting the power of the free consent of the surrogate mother in entering into a surrogacy agreement leads to the reinforcement of gender stereotypes about the inconsistency of women’s decisions and their inevitable biological destiny.<sup>77</sup> The doubts about the capacity of the woman to give her free consent are often raised in matters of her reproductive autonomy, such as abortion. This capacity includes a minimal level of rationality, consideration of risks and alternative options and awareness of the consequences of this choice. The exercise of autonomy of an individual will be limited by the autonomy of others. For this reason, it requires a balancing of choices between individuals. The question stands: Under which conditions is paternalism justified in surrogacy? In cases when the individual is unable to give free, informed consent to the action, paternalism is justified as a response to the lack of capacity.<sup>78</sup> The choice in this case is non-autonomous. Factors that must be taken under consideration for the restriction of autonomy through paternalism are social, economic, or educational elements that might represent threats to autonomy.<sup>79</sup> In surrogacy arrangements the surrogate mother suffers not only a loss of control over her body but also psychological harm. The risks connected to this practice for the surrogate might include long-term health problems due to medical interventions.

The capability of informed consent is not doubted in other medical procedures for a woman, but in cases of her decision to become or not to become a mother state intervention is justified. Abortion and surrogacy challenge the constructed notion of maternity, namely the social identity of women as natural nurturers. Similarly to surrogacy, in matters of abortion, gender stereotypes are found in national laws in which women are allowed to opt for abortion in cases of rape, incest, or serious medical risks

<sup>75</sup> See Mary Lyndon Shanley, “Surrogate Mothering” and Women’s Freedom: A Critique of Contracts for Human Reproduction, 18 SIGNS 618, 623 (1993).

<sup>76</sup> IMMANUEL KANT, THEORETICAL PHILOSOPHY AFTER 1781 (Cambridge Univ. Press ed. 2002).

<sup>77</sup> See, e.g., Eleonora Lamm, *Gestational Surrogacy - Reality and Law*, 3 INDRET 1 (2012).

<sup>78</sup> See Karen Jones & Susan Dodds, *Surrogacy and Autonomy*, 3 BIOETHICS 1 (1989).

<sup>79</sup> *Id.* at 12.

for the woman.<sup>80</sup> These laws protect at any cost prenatal life and present the cases in which a woman can be excused from practicing her maternal role. The practice of surrogacy grants women the chance to have control over the biological processes that historically have defined them.<sup>81</sup>

By separating the responsibilities of parenthood from gestational surrogacy, childbearing can be seen as a thing a woman can choose to do, independent of her social role or her legal rights. Surrogacy can represent a method of making income to women who have limited options. The risk of exploitation of vulnerable women is not unknown in the labor world. Many other activities in which vulnerable women involve themselves raise their risk of exploitation.<sup>82</sup> Prohibiting surrogacy based on exploitation arguments only can create higher potential of the exploitation of women in black markets. Risks associated with surrogacy do not exist based solely on the existence of this practice. They are the fruit of social inequality and poor state infrastructure. The obligation of the state is to protect human rights by addressing issues of social inequality and not by limiting women's choices of pursuing surrogacy.

#### 2.4. PROVIDING SURROGACY BASED ON LABOR RIGHTS

Commercial surrogacy has not been recognized as "labor" under international law. Nevertheless, the conditions of surrogacy could fulfill the requirements to be classified as "work" or "labor". The service performed by the surrogate has the nature of a process: becoming pregnant, pregnancy itself and giving birth. Intended parents also compensate the surrogate mother for her services. Article 3 and 5 of C.E.D.A.W. require states to work towards eliminating such stereotypical assumptions and to adopt appropriate measures to ensure full and equal enjoyment of social, political, and economic rights for women. Surrogacy reflects a practice that is laden by stereotypical assumptions about women and their roles. This has brought to an under-evaluation of their capacities and autonomy.<sup>83</sup> Based on the assumption that surrogacy can constitute "work", Articles 23 U.D.H.R. and 7 I.C.E.S.C.R. entitle women to just and favorable working conditions. These provisions cover fair wages that ensure a decent living for workers and their families as

<sup>80</sup> See T. W. SMITH AND J. SON, TRENDS IN PUBLIC ATTITUDES TOWARDS ABORTION, NORC FIN. REP. (2013).

<sup>81</sup> See generally Alexis Williams, *State Regulatory Efforts in Protecting a Surrogate's Bodily Autonomy*, 49 SETON HALL L. REV. 205 (2019).

<sup>82</sup> See Martha C. Nussbaum, "Whether From Reason or Prejudice": Taking Money for Bodily Services, 27 J. LEGAL STUD. 693 (1998).

<sup>83</sup> United Nations, Women's autonomy, equality, and reproductive health in International Human Rights: Between recognition, backlash and regressive trends, October 2017. Found in <https://www.ohchr.org/Documents/Issues/Women/WG/WomensAutonomyEqualityReproductiveHealth.pdf>.



well as safe and healthy working conditions.<sup>84</sup> Additionally, C.E.D.A.W. recognizes that *the right to work is an inalienable right of all human beings*.

The right to free choice of profession and employment is guaranteed for women. This also includes the choice to become a surrogate mother. C.E.D.A.W. acknowledged that in countries such as India, rural and poor women frequently serve as surrogates.<sup>85</sup> For this reason, it is suggested that surrogacy should be regulated in a way that does not make it impossible for women to make a living.<sup>86</sup> It supports the right of rural and poor women to become surrogate mothers as this is an important method for these women to give their contribution to the economic survival of their families.<sup>87</sup> The I.C.E.S.C.R. protects a woman's right to work, which covers the opportunity to gain her living by work which she freely chooses or accepts.<sup>88</sup>

### 3. VIOLATION OF THE RIGHT TO DIGNITY OF THE SURROGATE MOTHER IN COMMERCIAL SURROGACY

#### 3.1. EXPLOITATION

In the 2015 Annual Report on Human Rights and Democracy in the World, the European Parliament concluded that it

condemns the practice of surrogacy, which undermines the human dignity of the woman since her body and reproductive functions are used as a commodity, considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments.

<sup>84</sup> Committee on Economic, Social and Cultural Rights, General Comment No 23 (2016) on the right to just and favorable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights) *See also* para. 47 (j) (2016).

<sup>85</sup> *See, e.g.*, G.A. Res. 34/180, Annex, Convention on the Elimination of all Forms of Discrimination Against Women (Dec. 18, 1979), at art.11 (1) (c).

<sup>86</sup> *Id.* art.14 (1).

<sup>87</sup> *Id.*

<sup>88</sup> *See generally* G.A. Res. 2200A (XXI), Int'l Covenant on Econ., Soc. & Cultural Rights, (Dec. 16, 1966), at art. 6 (1).

The Hague Conference on Private International Law has addressed some concerns on cross-border surrogacy contracts.<sup>89</sup> In a Hague study of 2014 it was emphasized that the legal parentage and the nationality of the child must be as having paramount importance rather than the rights of surrogate mothers.<sup>90</sup> Similarly, the European Court of Human Rights in its first Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother recognized that whenever the situation of a child was at issue, the best interests of that child were paramount.<sup>91</sup>

Some gestational mothers in Europe and the U.S. have autonomy and legal rights in making healthcare decisions (for example abortion), however women from poor countries do not enjoy such guarantees. The role of the surrogate mother in the market of surrogacy has been highly contested by scholars and institutions. Due to the view that surrogate mothers are used as a “means of production” in order to maximize the number of babies, surrogacy arrangements raise questions on the argument of exploitation of women. Often gestational mothers are referred to as glorified incubators participating in industrialized reproduction. To treat a woman as a simple incubator undermines her dignity and worth as an individual person. Exploitation is to be understood as taking unfair advantage, such that one individual or party gains at another’s expense.<sup>92</sup> Dignity prohibits the use of another person merely as a means to one’s own ends. According to the Kantian concept of dignity, human beings have no price and must not be considered for commercialization.<sup>93</sup> It is to be determined if the practice of surrogacy undermines the human dignity of the surrogate mother. Some authors fear that the commercialization of reproductive services could undermine personhood as it turns unique individuals into entities with monetary values.<sup>94</sup>

The risk of exploitation is highlighted when considering the effect of compensation in commercial surrogacy. Surrogates are compensated in amounts that are well above the average living wage within their communities.<sup>95</sup> A Californian surrogate is paid around 55,000 dollars whilst a surrogate from India makes the

<sup>89</sup> Hague Conference on Private International Law, A preliminary report on the issues arising from International surrogacy arrangements 1, 3 (Mar. 2012).

<sup>90</sup> Hague Conference on Private International Law and Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements, para. 122, Preliminary. Doc. No. 3C (Mar. 2014).

<sup>91</sup> Grand Chamber Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, P16-2018-001(2019).

<sup>92</sup> See Kirby, *supra* note 17.

<sup>93</sup> See Adam Schulman, *Bioethics and the Question of Human Dignity*, in HUMAN DIGNITY AND BIOETHICS: ESSAY COMMISSIONED BY THE PRESIDENT’S COUNCIL ON BIOETHICS (2008).

<sup>94</sup> See Margaret Ryznar, *International Commercial Surrogacy and Its Parties*, 43 J. MARSHALL. REV. 1009 (2010).

<sup>95</sup> See Raywat Deonandan, Samantha Green & Amanda van Beinum, *Ethical Concerns for Maternal Surrogacy and Reproductive Tourism*, 38 J. MED. ETHICS 742 (2012).

equivalent of ten years of salary in one surrogacy.<sup>96</sup> Considering that thirty-five percent of Indians live on less than one dollar per day, many Indian women take the decision to become surrogates.<sup>97</sup> The possibility of financial coercion can create the conditions of putting some women in involuntary servitude. Surrogacy might constitute an option for last resort for financially desperate women.<sup>98</sup> Additionally, between the surrogate mother and the intended parents there exists the potential for an unequal bargaining power.<sup>99</sup> In most cases, the intended parents reflect a higher economic privilege than the surrogate. The bargaining process between the parties can become compromised due to absence of regulation for this practice and the vulnerability of the gestational mothers.<sup>100</sup> Surrogacy agreements are based on a financial advantage given by the wealthy individuals who participate as intended parents, however it should be noted that they are vulnerable to exploitation too. Intended parents might be overcharged by surrogacy agencies, which leverage the desperation of the intended parents to have a child.<sup>101</sup> Nevertheless, the high difference in financial power shows that the practice of surrogacy is overwhelmed by the presence of class hierarchy. It must be taken into account that the compensation in commercial surrogacy does not take place in a neutral market environment but one in which there is a clear subordination between men and women in the shape of gender hierarchy.

### 3.2. REINFORCEMENT OF GENDER INEQUALITIES

Various authors support the argument that surrogate motherhood maintains gender inequality of women as they are perceived as belonging to a “breeder”-class, defined by their reproductive capabilities. Due to the view that surrogate mothers are used as a “means of production” in order to maximize the number of babies, surrogacy arrangements facilitate the increased control over women’s bodies, as surrogate mothers are often required to take various tests and maintain a certain lifestyle. Additionally, racial hierarchies are found in the process of choosing the surrogate mother as the

<sup>96</sup> See Nicola Smith, *Inside India’s International Baby Farm*, CENTER FOR GENETICS AND SOCIETY (May 9th, 2010), <http://www.geneticsandsociety.org/article.php?id=5192>.

<sup>97</sup> Thirty-five percent of Indians live on less than one dollar per day, while a surrogate mother earns between six and ten thousand dollars. See in: Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 203-05 (2009).

<sup>98</sup> See Sara Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077 (2014).

<sup>99</sup> See Caroline Vincent & Alene D. Aftandilian, *Liberation or Exploitation: Commercial Surrogacy and the Indian Surrogate*, 36 SUFFOLK TRANSNAT’L L. REV. 671, 679 (2013).

<sup>100</sup> See generally Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 ANNALS HEALTH L. 191 (2012).

<sup>101</sup> See Stephen Wilkinson, *Exploitation in International Paid Surrogacy Arrangements*, 33(2) J. APPLIED PHIL. 125 (2015).

dominant choice of the intended parents in global surrogacy is “lighter-skinned women”. The choice of the intended parents marks lighter-skinned women as good mothers and stigmatizes darker-skinned women as bad mothers, which presents a violation of dignity.<sup>102</sup> This leads to the argument that the practice of surrogacy might lead to race-based and class-based discrimination due to fact that the intended parents have more access to greater resources than the surrogate mothers.<sup>103</sup> The intended parents have the choice of using the market of surrogacy to make the child as similar as possible to the non-biological family. It can be assumed that this action can perpetuate racial hierarchies and lead to the commodification of genetic material. As this practice is mostly used by white colored people, the dominant genetic material chosen by them is mostly white material.<sup>104</sup> To reflect this situation, there is the example of individuals from China who are keen on choosing the United States as the destination for surrogacy not only for the genetic characteristics of the surrogate mother but also out of the attraction of the U.S. citizenship that the child would receive.<sup>105</sup>

Secondly, these factors present concerns on the existence of informed consent. Exploitation is existent when there is a defect in consent. Informed consent relates to the clear communication of medical risks and benefits in order to avoid coercion. It enhances the rights of self-determination and privacy. The difference in power between the parties, the high demand in the market, the multi-million dollar industry based on surrogacy and the limited options for sufficiently paid work in low-resource states create the conditions for not having a truly available power of consent.<sup>106</sup> It is doubtful whether surrogate mothers are aware of their rights in terms of their own health. This concern is valid when taking under consideration the circumstances in which women from poor states find themselves, such as extreme poverty, limited education, high complexity of the surrogacy process, low socio-economic background of the surrogate and linguistic obstacles.<sup>107</sup> The majority of surrogacy contracts are in English and the only access to information the surrogate has is what is communicated to her orally.<sup>108</sup> Many of the contracts given to surrogate mothers are inadequate.

<sup>102</sup> See Cherry, *supra* note 1.

<sup>103</sup> See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 150-201 (1st ed. 1997).

<sup>104</sup> See DOV FOX, *Racial Classification in Assisted Reproduction*, 118 *YALE L.J.* 1844, 1846 (2009).

<sup>105</sup> See Kalee Thompson, *Whoa, Baby! Why American Surrogates are in demand for Chinese Families*, *THE HOLLYWOOD REPORTER* (Nov. 4, 2016), <https://www.hollywoodreporter.com/news/general-news/whoa-baby-why-american-surrogates-are-demand-chinese-families-942832/>.

<sup>106</sup> See Nicole F. Bromfield & Karen S. Rotabi: *Global Surrogacy, Exploitation, Human Rights, and International Private Law: A Pragmatic Stance and Policy Recommendations*, 1 *GLOB. SOC. WELFARE* 123, 123-35 (2014).

<sup>107</sup> See Aneeta A. Minocha, *The Socio-Cultural Context of Informed Consent in Medical Practice*, in *UNDERSTANDING INDIAN SOCIETY: PAST AND PRESENT*, NEW DELHI 231-53 (Orient Blackswan ed., 2010).

<sup>108</sup> See Mohapatra, *supra* note 100.

Nevertheless, even if the surrogate mother as a patient cannot fully understand all the information, she still has a right to information that allows her to make an informed choice.<sup>109</sup> For a choice to be informed, the individual must be aware of all the risks that are connected to his/her action and the longer and more involved the arrangement, the greater the risk is. Due to the lack of information, surrogate mothers often agree to sign contracts in which protection of the fetus prevails over their own life, by admitting that in serious cases, they will be “sustained with life-support equipment to protect the fetus”.<sup>110</sup> Furthermore, surrogates find pressure and potentially conflicting interests coming from the environment and community around them. In various cases surrogate mothers find themselves being exploited by their families, as at times it is the spouse or other family member that pushes the surrogate mother in taking the decision to carry a child for others.<sup>111</sup> Surrogates may be coerced by their husband, with them thus exercising control over their bodies. Often, they have no say in deciding about the number of embryos to be implanted nor on the number of children to be born. Concerns about the exploitation of surrogate mothers are based on the debatable access to legal representation. It is doubtful whether they have access to legal consultation to become aware of the terms of the contract and to be advised for protecting their individual rights.<sup>112</sup>

The tension arising between the surrogate mother and the intended parents, based on the fact that the intended parents are concentrated on the health of the fetus as opposed to the health of the woman who is carrying them is concerning. Her informed consent could be compromised due to various reasons: her vulnerability and responsibility for the health of the fetus, the contract, the doctors and the intended parents could present some of the reasons that could push the surrogate in taking decisions that prioritize the well-being of the fetus and not herself.<sup>113</sup> Surrogacy establishes the challenge of balancing the interests of the intended parents with the surrogate mother. On the one side the interests of the surrogate mother such as her right to personal health, human dignity and financial interest that can only be accomplished by delivering a baby and on the other side the interests of the intended parents for obtaining a healthy baby that overcomes the health of the surrogate mother as well as

<sup>109</sup> See Pamela Laufer-Ukeles, *The disembodied Womb: Pregnancy, Informed Consent, and Surrogate Motherhood*, N. C. J. INT'L L. COMM.L REGUL., July 2018, at 96.

<sup>110</sup> Neeta Lal *Pitfalls of Surrogacy in India Exposed*, ASIA TIMES (May 24, 2012), [http://www.atimes.com/atimes/South\\_Asia/NE24Df02.html](http://www.atimes.com/atimes/South_Asia/NE24Df02.html).

<sup>111</sup> See, e.g., Ryznar, *supra* note 94.

<sup>112</sup> See Eric A. Feldman, *Baby M Turns 30: The Law and Policy of Surrogate Motherhood*, FACULTY SCHOLARSHIP AT PENN LAW 2000 18, 26 (2018), [https://scholarship.law.upenn.edu/faculty\\_scholarship/2000](https://scholarship.law.upenn.edu/faculty_scholarship/2000).

<sup>113</sup> See Katherine Drabiak-Syed, *Currents in Contemporary Bioethics: Waiving Informed Consent to Prenatal Screening and Diagnosis? Problems with Paradoxical Negotiation in Surrogacy Contracts*, 39 J. L. MED. & ETHICS 559 (2011).

financial interests in minimizing costs.<sup>114</sup> In International Surrogacy, it is likely that the intended parents are disconnected from the surrogate mother as they might not even meet her once.<sup>115</sup> The surrogate mother might be pressured into complying with the decisions of the other parties by compromising her own human dignity.

## CONCLUSIONS

The practice of surrogacy can promote important rights of women pertaining to their self-determination, reproductive choice, bodily autonomy, and non-discrimination. Certain aspects of surrogacy can, in specific situations, impair the rights of surrogate women. Women have the right to be free from abusive surrogacy arrangements that violate their autonomy, endanger their health, or target them to unjust working conditions. The conflict of values of protection and freedoms is confronted based on the argument of the right to dignity of the surrogate mother.

Dignity as rights-supporting presents arguments in favor of the participation of surrogate mothers in surrogacy based on women's right to self-determination and freedom of contract. As fewer discussions and restrictions have taken place in the cases of men selling their sperm, it is questionable whether this regulation is differentiated by gender.<sup>116</sup> The resistance to international surrogacy could be based on the paternalistic assumption that women must be protected from their own decision-making ability.<sup>117</sup> The hypocrisy of paternalism is clearly seen when large fees are allowed for other assisted reproductive services, but denied for surrogate mothers under the claim that this is for "the own benefit of the woman".<sup>118</sup> Therefore, the right to enter surrogacy should not be subject to governmental control. The market of surrogacy is not constituted by human beings, namely "baby-selling". Surrogate mothers establish a market in their rights to body products and labor and the practice is therefore an arrangement in which the surrogate is paid for her gestational services and reproductive labor. Commercial surrogacy implicates the rights of the intended parents and the bodily integrity of the surrogate to contract freely.<sup>119</sup> Framing commercial surrogacy as an exploitative practice in difference to altruistic surrogacy violates women's right to

<sup>114</sup> See Kristiana Brugger, *International Law in the Gestational Surrogacy Debate*, 35 *FORDHAM INT'L L. J.* 666 (2012).

<sup>115</sup> See generally Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy, Surrogacy, Adoption*, 88 *IND. L. J.* 1223 (2013).

<sup>116</sup> See Ergas, *supra* note 56.

<sup>117</sup> See Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 2 *WIS. L. REV.* 297 (1990).

<sup>118</sup> Ronli Sifris, *Commercial Surrogacy and the Human Right to Autonomy*, 23 *J. L. & MED.* 365 (2015).

<sup>119</sup> See generally Katherine B. Lieber, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 *IND. L. J.* (1992).

bodily autonomy and reproductive self-determination. It leads to reinforcing the gender stereotype that the role of the woman should be that of a “natural selfless mother”.<sup>120</sup>

Women have the right to autonomously make decisions about their reproductive life. This right has been established in the international human rights treaties grounded in the rights to dignity, health, privacy, equality, and non-discrimination, among others.<sup>121</sup> During their role as surrogate mothers, women hold their fundamental right to autonomy and decision-making.

Surrogacy laws must not discriminate against the participants of surrogacy, specifically surrogate mothers.<sup>122</sup> They must protect the right to equality and

<sup>120</sup> Rep. of the Working Group on the issue of discrimination against women in law and in practice, U.N. Doc. A/HRC/32/44 (2016), para. 76. These stereotypes operate to deny women information to make informed decisions about their reproductive health, substitutes the decisions of others for their own, and deprives them of control over their own bodies. Working Group on discrimination against women has recognized, *patriarchal negation of women’s autonomy in decision-making leads to violation of women’s rights to health, privacy, reproductive and sexual self-determination, physical integrity and even to life* (para. 63).

<sup>121</sup> See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted Nov. 4, 1950, art. 8, 213 U.N.T.S. 222, Eur. T.S. No. 5, entered into force Sept. 3, 1953: *Everyone has the right to respect for his private and family life...there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law e.g.*, International Covenant on Civil and Political Rights adopted Dec. 16, 1966, arts. 3, 17, G.A. Res. 2200A (XXI), U.N. GOAR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976:

The States Parties ... undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant; No one shall be subjected to arbitrary or unlawful interference with his privacy, family ... everyone has the right to the protection of the law against such interference;

e.g., International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, art. 1, G.A. Res. 2200A (XXI), U.N. GOAR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976: *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*; e.g., C.E.D.A.W. Committee, General Recommendation No. 24: Article 12 of the Convention - Women and Health, (20th Sess., 1999), para. 31(e), U.N. Doc. A/54/38/Rev.1, chap.1 (1999) [hereinafter C.E.D.A.W. Committee, *Gen. Recommendation No. 24*], urging that States parties should *require all health services to be consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice*; e.g., C.E.D.A.W. Committee, Concluding Observations: Sierra Leone, para. 32, U.N. Doc. CEDAW/C/SLE/CO/6 (2014): *The right to autonomy [for women] requires measures to guarantee the right to decide freely and responsibly on the number and spacing of their children... and that reproductive rights include “the right of women to autonomous decision-making about their health.”*

<sup>122</sup> See C.E.D.A.W., arts. 1, 2, 12(1):

[t]he term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field; States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women;

I.C.C.P.R., arts. 2(1), 3, and 26:

The States Parties...undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant; All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination;

E.C.H.R., art.14 (Prohibition of discrimination).

non-discrimination of all parties to a surrogacy contract including persons acting as surrogates. Nationality-based discrimination under Article 14 E.C.H.R. in surrogacy is clearly seen when in the domestic level this practice is prohibited for the protection of women, but recognized when it takes place cross-border, leaving foreign women exposed to the risks of exploitation from which domestic women are protected from.<sup>123</sup>

Dignity as rights-constraining frames international surrogacy as a risky process for its participants, specifically for the surrogate mother. The practice of surrogacy undermines internationally protected rights and violates the integrity of the surrogate mother.<sup>124</sup> This practice is in violation with Article 3 of the E.U. Charter of Fundamental Rights and Article 21 of the Council of Europe Convention on Human Rights and Biomedicine, which forbids making the human body and its parts as a source of financial gain. When contextualized, surrogacy reflects concerns for the commodification of women's bodies, particularly women from poor countries.<sup>125</sup> The practice of surrogacy is seen as a last resort for desperate women who are economically disempowered. Surrogacy contracts reflect heavy regulations for the body of surrogate mothers and her conduct, including her mobility, diet, medication, and the ability to end the pregnancy. This constant surveillance is a threat of the loss of control which will be placed in the hands of the intended parents and third parties.<sup>126</sup> Opportunities for abuse rise in cases when women are isolated in surrogacy hostels and controlled by third parties. As such, these contracts violate the personal autonomy of the surrogate mother and commodify women for their reproductive abilities.

Arguments relating to exploitation are strengthened by the existence of an unequal power-balance between the parties. The wealth of the intended parents can motivate the third parties or other actors to prioritize the interests of the intended parents for having a healthy baby and not those of the surrogate mother (compromising her right to physical integrity). The impact of surrogacy arrangements could be the propagation of inequality. It is assumed that women who work as surrogate mothers

<sup>123</sup> See JENS M. SCHERPE, *THE PRESENT AND FUTURE OF EUROPEAN FAMILY LAW* (2016). Nila Bala, *The Hidden Costs of the European Court of Human Rights' Surrogacy Decision*, 40 *YALE J. INT'L L. ONLINE* 11.

<sup>124</sup> See International Covenant on Economic, Social, and Cultural Rights recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, art 12, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, (entered into force Jan.3, 1976, in accordance with article 27; see also Article 3 of the European Convention on Human Rights, Article 5 of the U.D.H.R. and Article 16 of the United Nations Convention against Torture, are absolute rights which prohibit acts of cruel, inhuman, or degrading treatment; Article 4 of the E.C.H.R. prohibits slavery, servitude, and forced labor; Convention on the Elimination of all Forms of Discrimination Against Women (C.E.D.A.W.), art 6 obliges state parties to *take all appropriate measures, including legislation, to suppress all forms of trafficking in women.*

<sup>125</sup> See Joanne Ramsey, *Regulating Surrogacy - A Contravention of Human Rights?* 5 *MED. L. INT'L* 5 (2000).

<sup>126</sup> See Karen Busby & Delaney Vun, *Revisiting the Handmaids Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 *CAN. J. FAM. L.* 13 (2010).



would not be able to afford the service of surrogacy themselves. Couples in the role of intended parents who enjoy an economic privilege are likely to have access to this service. These arrangements could lead to the exploitation of lower income women by wealthy couples. In this context, international surrogacy is seen as particularly problematic when wealthy couples perform at “bargain prices” which exploit women with poor backgrounds.<sup>127</sup> This reinforces the idea of fertility tourism, in which poor women serve as child breeders for wealthy couples.

Additionally, the practice of surrogacy raises concerns about human trafficking of surrogate mothers. Due to the fact that international surrogacy often takes place in unregulated environments and affects vulnerable women, these concerns are especially salient. Most importantly, context that makes women of this practice potentially exploitative and exposed to human trafficking is connected to the ability of the surrogate to enter freely in such arrangements.<sup>128</sup> This ability could be undermined by force, coercion, or other forms of deception. Similarly, women with high vulnerability could be pressured into surrogacy or forced to continue this practice against their will. Concerns of forced or compelled labor are heightened due to the required long time in which they serve as surrogates (nine months of pregnancy).<sup>129</sup> Human trafficking of women and their forced labor are prohibited by many international and human rights instruments.<sup>130</sup> The Council of Europe refers to human trafficking as “an offense to the dignity and integrity of the human being” and therefore violates the human rights of the victims.<sup>131</sup>

Legal clarity is essential in surrogacy matters. A legal vacuum in the national level for surrogacy matters means that surrogate mothers have no guarantee that their reproductive rights will be protected. The potential for exploitation of surrogate mothers raises due to legal uncertainty.<sup>132</sup>

<sup>127</sup> See Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT'L L. 1429 (2009).

<sup>128</sup> See *Sex Workers at Risk: A Research Summary of Human Rights Abuses Against Sex Workers*, AMNESTY INTERNATIONAL (May 26, 2016), <https://www.amnesty.org/en/documents/pol40/4061/2016/en/>.

<sup>129</sup> See *What Is Forced Labor, Modern Slavery, and Human Trafficking*, I.L.O., <https://www.ilo.org/global/topics/forced-labour/definition/lang-en/index.htm> (last visited Oct. 30, 2021).

<sup>130</sup> I.C.C.P.R., art 8, I.L.O. Forced Labor Convention, and regional treaties such as E.C.H.R., art 4, Charter of Fundamental Rights of the E.U., art 5, American Convention on Human Rights, art 6, Principle 13 of the Association of Southeast Asian Nations Human Rights Declaration.

<sup>131</sup> The Council of Europe Convention on Action against Trafficking in Human Beings entered into force on 1 February 2008, following its 10th ratification: Its Preamble defines trafficking in human beings as a violation of human rights and an offence to the dignity and integrity of the human being.

<sup>132</sup> See Vida Panitch, *Global Surrogacy: Exploitation to Empowerment*, JOURNAL OF GLOBAL ETHICS, 9:3, 329-343 (2013).

Criminalizing surrogacy violates the rights of surrogate mothers to life, privacy, health, and autonomy.<sup>133</sup>

This might lead to compromising legal protection for women acting as surrogates due to the creation of underground markets, making them more vulnerable to exploitation. This means that those women who are most vulnerable to society, will most likely be subjected to infringements of their human rights. Human trafficking concerns will raise with the criminalization of surrogacy, as surrogate mothers will not undertake the risk of coming forward after suffering abuses in the underground markets in fear of being prosecuted.

Surrogate motherhood is full of legal complexities. Until now, jurisprudence has been built on the doctrine of prioritising “the best interests of the child”, disregarding the role of the surrogate mother. The international community should not have to choose between protecting children or women. An efficient answer to the current reality of surrogacy must take under consideration the potential of this practice to empower women and at the same time, to harm them.

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<sup>133</sup> See Working Group on the Issue of Discrimination Against Women in Law and in Practice, *Rep. of the Working Group on the Issue of Discrimination Against Women in Law and in Practice*, para. 32, U.N. Doc. A/HRC/38/46 (May 14, 2018) [hereinafter *Rep. W.G.D.A.W.*] (“Criminalization of behavior this is attributed only to women is inherently discriminatory. So is denying women’s autonomous decision-making and access to services that only women require and failing to address their specific health and safety, including their reproductive and sexual health needs.”).