

# The Gestational Surrogate's Autonomy

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## Abstract:

The necessary consent of the surrogate mother is a safeguard of both her autonomy and her self-disposition and guarantees not only the protection of human value (article 2, paragraph 1 of the Greek Constitution) but also the protection of her personality (article 5 paragraph 1 of the Greek Constitution and article 57 the Greek Civil Code). It is worth noting, after all, that sometimes it is necessary to restrict the freedom of some people, in order to ensure the freedom of others. The gestational surrogate expectant is not forced for her act. Autonomy presupposes the possibility of formulating and implementing a decision, as a form of personal freedom, having as a result that pressure opposes the obstruction of the surrogate mother and the future parents to do what they want and therefore feel free and not be oppressed indirectly. On the other hand, Ronald Dworkin reports on the importance of autonomy in reproduction. According to the liberal view of human value, a behavior is not characterized as inhuman and degrading, nor immoral, in case it is not perceived as such by the subject who participates in it or accepts it. Otherwise, an objective approach to this principle would be in case that a behavior is considered to be inhuman by social criteria and regardless of the expression of the individual's free consent and her possible desire to continue in activities offensive to the individual.

**Keywords:** Surrogacy, autonomy, freedom, human right, individual.

The necessary consent of the surrogate mother is a safeguard of both her autonomy and her self-disposition and guarantees not only the protection of human value (article 2, paragraph 1 of the Greek Constitution) but also of her personality (article 5 paragraph 1 of the Greek Constitution and 57 of the Greek Civil Code). Although her decision is entirely up to her, her self-determination may isolate her as an individual from the community, which, the latter,

would likely want to define responsibilities and obligations. Autonomy is particularly important, but it must be understood in terms of the relevance of community and any other obligations.<sup>1</sup>

The expectant has been fully informed and has given her consent so that, in this way, the issue of insulting or violating her autonomy is not raised. "The freedom of self-controlled judgment and ac-

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1. Immanuel Jakobovits, *Jewish medical ethics: a comparative and historical study of the Jewish religious attitude to medicine and its practice*, (New York: Bloth Pub. Co., 1959 and 1962).

tion is in itself a commodity, and along with the right to persuade rather than force, they are inherent qualities of a morally mature personality.”<sup>2</sup> It is worth noting, after all, that sometimes it is necessary to restrict the freedom of some people, in order to ensure the freedom of others. The gestational surrogate expectant is not forced to her action. Any intervention, from a simple advice to pressure, offends the idea of the individual’s moral autonomy<sup>3</sup>, according to which an individual must determine her behavior based on her judgment and conscience and not after any external pressure, which derives from the law<sup>4</sup>. According to Joseph Raz, autonomous individuals “are the ones who can shape their lives and determine their route”, “they are the creators of their own moral world.”<sup>5</sup>

However, it is not possible to force the surrogate mother to use her uterus despite her opposition. Such an act would be contrary to constitutional freedom and cannot be imposed by any civilized society. Autonomy presupposes the possibility of formulating and implementing a decision, as a form of personal freedom, having as a result that pressure opposes the obstruction of the gestational surrogate and intended mother and the intended future parents to do whatever they want.<sup>6</sup> Any such pressure at the level that naturally frustrates the human desire to have a child is bad and would raise the issue of circumventing their autonomy.<sup>7</sup>

On the other hand, the surrogate intended mother must compromise to live under certain conditions and, of course, follow certain medical instructions and tips. According to the above, therefore, there is discussion about the reduction of her personal autonomy, which exists because she has accepted the gestational surrogacy agreement on her own free will.

However, in the case of gestational surrogacy, two opposing views are expressed, one in favor of banning the institution and one in favor of retaining it. The negative view is mainly based on the argument that gestational surrogacy conflicts with the surrogate mother’s individual perception of freedom. It is characterized not also as the creation of a new kind of slavery and as commercialization of the individual but also as a danger of creating a new and different kind of women’s exploitation. This argument is reinforced mainly by the various underlying financial motives and any transactions that could lead women to offer their body, and in this case their uterus, as a “service” in order to give birth to a child on behalf of its intended parents. Although, of course, none of the parties is harmed but instead they all receive what they wish, the opponents of surrogacy highlight their view by quoting John Stuart Mill’s principle of restriction of individual liberty in which “The liberty of the individual must thus be very restricted; (s)he must not make herself/himself a nuisance to other people”. Paid pregnancy is often compared to both prostitution and trafficking of infants, as the newborn child is treated as an object while lurks the risk of the commercialization of the woman’s characteristics and reproductive abilities.<sup>8</sup> On the other hand, however, the view is expressed that the practice of gestational surrogacy paid maternity cannot be compared to the infant trade, as this term presupposes that the object of the transaction belongs to the private property of the trader. This fact does not apply in the case of surrogacy as the object of the gestational surrogacy agreement is not the child but the parental rights and obligations.

2. Isaiah Berlin, *Four Essays on Liberty*, (Oxford: Oxford University Press, 1969) και *Τέσσερα δοκίμια περί ελευθερία*, (Αθήνα: Εκδόσεις Scripta, 2001), 257-271

3. Isaiah Berlin, *Four Essays on Liberty*, (Oxford: Oxford University Press, 1969) και *Τέσσερα δοκίμια περί ελευθερίας*, (Αθήνα: Εκδόσεις Scripta, 2001), 267

4. Charles Taylor, *Philosophy and the human sciences, Philosophical Papers*, volume 2, (Harvard: Harvard University Press, 1985).

5. Joseph Raz, *The Morality of Freedom*, (Oxford: Oxford Clarendon Press, 1986), 154

6. Isaiah Berlin, *Four Essays on Liberty*, (Oxford: Oxford University Press, 1969), 257-271

7. Isaiah Berlin, *Four Essays on Liberty*, (Oxford: Oxford University Press, 1969), 267,

8. Jane Margaret Radin, “Market-inalienability”, *Harvard Law Review*, (1987):1929-1932

As for the commercialization argument, those arguing in favor of gestational surrogacy claim that the law has taken into consideration the commercialization concerns and condemns paid surrogacy as, according to J.S. Mill, “the only freedom worthy of its name is the freedom to pursue our own benefit in our own way”. “Since, according to the dictations of justice, every individual must have a minimum of freedom; all the other individuals must be prevented, if necessary by force, when they try to deprive it of him/her”.<sup>9</sup> Nevertheless, they consider that paid surrogacy is out of bounds and indicate that in the case of altruistic offering, a woman's free decision to help a couple cannot be considered contrary to the constitutional principles of protection of liberty or human dignity. The element of selflessness, however, is not only difficult to be proved but also to be controlled. Such agreements are contrary to good morals (Greek Civil Code 178) as on the one hand they conflict with the “unwell” status of motherhood and family relations (Greek Civil Code 175, 1) and on the other hand this method is not compatible with the family model (article 21 paragraph 1 of the Greek Constitution).<sup>10</sup> Paid surrogacy verifies Coase's theory<sup>11</sup> that law cannot influence the distribution of rights. According to this theory, the rights will ultimately not belong to the one to whom they were granted by law but to the one who values them the most. If the theory falls into the case of surrogacy, then a family will be created through purchase and not through love. Furthermore, surrogacy agreements promote a world of “private assignments”, in which family relationships are a matter of choice.

The principle of human dignity primarily expresses the essence of the individual. Human dignity is absolute and inviolable. Using the term “absolute” is intended to emphasize the impossibility of limiting the principle of human dignity. The individual's val-

ue is not subject to limitations and does not come at the expense of any other constitutional principle or right. Nevertheless, there is also the perception that the principle of human dignity outweighs the other principles and rights and, above all, personal freedom. It is legitimate for human dignity to impose some restrictions on human rights, but it is inadmissible to restrict or omit human value from the constitutional rights. Human dignity is a principle that demands respect for the human value and characterizes it as a valuable constitutional good. Every individual, therefore, has the inherent characteristic of belonging to the human species from the moment that they display the interconnected characteristics of an individual, social and biological-genetic. The human value must function as an inviolable principle according to which, no one will be able to challenge the human condition/situation of the person nor, of course, be deprived of the right to freely enjoy all the rights granted to her/him by the legal order of her/him. All this, of course, always in the context of respecting the other's rights and the rules of the orderly/smooth social coexistence. According to Kant<sup>12</sup>, the central idea in ethics is not only the respect for human beings but also the feeling that everyone should behave with the appropriate dignity. We must show our moral responsibility, which is considered to be non-existent if we do not respect the dignity of other people. The opponents of this view argue that the intended couple uses the surrogate mother in order to achieve their purpose, and this invokes the value of life in its instrumental sense. The value of life is violated and at the same time the dignity of the gestational surrogate as an individual is affected. The personal perceptions of the intended parents are inevitably transferred to the “psychosynthesis” of the surrogate mother, at the same time cancelling her own subjectivity. The marginalization of the personality of the surrogate mother turns her, as a person, into an object of exploitation and the intended parents exercise their freedom at the expense of the autonomy and the dignity of the surrogate mother, thus at the ex-

9. Isaiah Berlin, *Four Essays on Liberty*, (Oxford: Oxford University Press, 1969), 265

10. Marianos Karasis, “The Anthropological Dimension of Biotechnology Law”, *Artificial Insemination and Genetic Technology: The Moral and Social Dimension*, (2003): 126

11. Ronald H. Coase, “The Problem of Social Cost”, *Journal of Law and Economics*, no 3, (1960): 1-44

12. Immanuel Kant, *Metaphysical Foundations of Natural Science*, (Athens-Giannena: Dodoni 1984): 108-111

pense of the characteristics which, as such, are non-negotiable and are presented unconditionally. The opponents of this method argue that although there is an element of donation, the surrogate mother, actually rents her uterus and presents herself as a reproductive machine.

In the case of gestational surrogacy, however, a crucial issue is the limit of human dignity, which is ensured only by the surrogate mother's non-profit participation in the process. The human body is an integral part of the human essence, hence, at least according to various interpretations, any form of commercialization would be considered negative for the individual. Humans are conscious and rational beings, while at the same time the inner freedom of our conscience would be characterized as inextricably linked to our human value and existence. To what extent, then, does the restriction of this freedom of conscience imply a degradation of human value? Dignity and freedom of conscience are interrelated concepts; it would be possible to raise objections as to how to protect these individuals, in case she does not have the ability to realise the limits of the respect of her own dignity.

A particular issue that is worth noting about surrogacy as a method of reproduction is the view of feminists. A typical example is the case of Sweden. Swedish feminists have published a policy document against the commercial use of surrogacy, calling on their government to ban the practice. The Swedish Women's Lobby (Sveriges Kvinnolobby) claims that surrogacy poses a health risk and violates the human rights of poor women and children. Discussions about surrogacy and its consequences for the surrogate mother are relatively recent. Most European countries do not have regulations or legislation on this issue. There is a need to exchange information and experiences to strengthen our knowledge and arguments. The Swedish Women's Lobby strongly opposes surrogacy. Their position is that surrogacy is a trade of women's bodies and children as well as a threat to women's basic human rights and physical integrity. In a joint statement in their General Assembly in 2011, the Swedish Women's Lobby and its member organizations stated their support to the European Parliament Resolution of 5 April 2011 on the

priorities and outline of a new EU policy framework to combat violence against women (2010/2209 (INI)). The resolution that was adopted states that surrogacy is an exploitation of a woman's body and her reproductive organs. Surrogacy is not currently legal in Sweden. However, there is no legislation regulating the fact that Swedish citizens use surrogate mothers abroad and that children born in this way are raised in Sweden. The issue has been debated for the past two years and the Swedish government is conducting an investigation to look into the possibility of surrogacy in Sweden. The research is ongoing. Even before the investigation, a certain tendency of framing the issue was observed in the public debate. In March of this year, the Swedish Council for Medical Ethics commented on the report. The majority of its members said they welcomed the possibility of surrogacy without financial compensation in Sweden. The Swedish Women's Lobby reacted to this position. They have expressed their concern about the problematic understanding of surrogacy without financial compensation as well as the fact that the preparation of the investigation into the regulation of who is considered as parent has been entrusted to the Ministry of Justice. There is a lack of perspective on women's human rights. The Swedish Women's Lobby has been active in the public debate on this issue and has sent several letters to the Ministry of Justice as well as the Ministry of Social Affairs and the Medical Ethics Council. Together with other women's organizations they have launched the campaign Feministiskt nej till surrogatmödraskap (feminists say no in surrogacy). Through the campaign they provide an alternative space for dialogue on a feminist basis. The consequences of pregnancy, both physical and psychological, are impossible to predict. Every pregnancy is unique, just like every woman and child is unique. But what they do know is that getting pregnant and giving birth is one of the most dangerous things a fertile woman can commit herself to. A pregnancy is never safe. According to the European Women's Lobby's investigation on surrogacy globally, some of the risks, apart from death, are fecal incontinence (3%), depression (12.5%), preeclampsia (7%) and Graves' disease (6%). These statistics refer to Swedish women under the conditions prevailing in

their country, and not the conditions that prevail, for example, in India.

Babies born from surrogate mothers in India are born with caesarean section, as they are too big for the mother to give birth to. This carries further risks of complications, both in the current situation and in future pregnancies. The right to enter into an agreement with another person is not absolute, and it never was. It is forbidden to commit a crime, for example murder, and you cannot enter into an agreement by which you can surrender yourself as a slave to another person, even if both parties are fully aware. The freedom of agreement has its limitations. The Swedish Women's Lobby considers surrogacy as a temporary slavery agreement, by which the surrogate mother waives her right to physical integrity during pregnancy and, therefore, the agreement must be considered invalid. The basis of an agreement is the ability to enforce its performance. What will happen if the surrogate mother changes her mind? Will they involve the police to force her to fulfill her agreemental obligations? Can they deprive her of the right to an abortion? Can buyers demand a refund or compensation if she does not continue her pregnancy or has a miscarriage? The judiciary body cannot and should not enforce an agreement under which a woman waives her human rights. The aspect of social and economic insecurity, though tangible, is not the main reason why surrogacy should be illegal. Authorizing surrogacy means using the female bodies and their reproductive organs for the pleasure of another to the detriment of the woman herself. They outweigh the right to physical integrity and fundamental human rights over the right to have children, which is not really a human right, but has been treated as such in the debate on surrogacy. They reject both the view of the liberal market approach to surrogacy and the right of paying buyers, which take precedence at a time when women's rights are being negotiated. The Swedish Women's Lobby highlights this issue because they see a trend towards the abolition of these fundamental rights in favor of the will and desire of some people to become parents in the name of their individual fulfillment. The issue of surrogacy has been addressed in the debate over

reproductive rights and the means available to childless parents to have a baby, when the human rights perspective is the only credible one to address this issue. They believe that the current investigation in Sweden is being carried out on the wrong basis and that all the voices calling for it to be conducted are deprived of the human rights perspective. We therefore call on the Swedish government to ban surrogacy.

A feminist approach to surrogacy means that people reject the idea that women can be used as a mean and that their reproductive potential can be purchased. The right to physical integrity is a right, which should not be negotiable in any form of agreement. Despite the importance of the regulation or the nature of the agreement, there still remains a trade of female bodies and children. The rights of women and children, and not the buyer's interest, must be at the heart of the debate over surrogacy.

The development of Biotechnology and Life sciences has led to a confrontation between the research effort and human dignity. According to the Article 16 (1) of the Convention, the protection of freedom is not unconditional. However, it seems that it cannot exist in conflict with human dignity. This is also reflected on the Article 25 (3) of the Convention, in which the abuse of rights is prohibited. Nevertheless, issues have been raised about biotechnological practices, which are aimed not only at treatment but also at research purposes. Genetic technology refers to methods that make possible the interference in the gene's structure found in the cell's nucleus. The body of all this information forms the individual's genome<sup>13</sup>. During in vitro fertilization-procedures, either on the natural mother, or on the surrogate, more than one ovum are fertilized, to avoid any inconvenience or health problems that could be caused by the excessive genetic material intake. It is observed that doctors take the initiative to choose the finest ova from the surplus fertilized for implantation through pre-implantation control. By mapping the genome, it is now possible to diagnose hereditary

13. Kriari-Katrani, I., *Biomedical development and Constitutional Law*, Athens: Sakoulas, (1994)

diseases and abnormalities that humans might develop after their birth and during their lifetime<sup>14</sup>. Such techniques and investigations lead not only to some negative eugenics by excluding fetuses with abnormalities, but also to positive eugenics by selecting perfect humans for implantation. Therefore, here law views life as a harm. The individual ought to create ideal patterns in a world where diversity will disappear, while children will become objects that will serve different parenting needs. This is an early-stage process and aims to protect parents from giving birth to “defective” children. Nevertheless, this attitude transforms the child into a means of satisfying personal, selfish needs and it is treated as an unworthy life. It is worth noting that doctors bear civil liability if the child is born with a genetic disorder<sup>15</sup>. Such cases have led to the enactment of a law<sup>16</sup> which states that life is worth *per se* and the recognition of the individual’s right not to be born with the value of individual is incompatible. On the other hand, it is argued that neither the individual may surrender to a transcendent value of the human species, nor the individual’s right to resort to Justice for a health problem that makes his life difficult, could be banned. Nevertheless, it appears that such a process leads to the hetero-definition of the human species and inevitably to the degradation of human dignity, since the principle of dissimilarity is abolished, and healthy patterns are created.

The problem in the case of assisted reproduction by a surrogate mother is the excessive deprivation of her free will. In fact, this is justified because the social mother is constantly worried about her pregnancy either about its progress or about the health of the fetus.<sup>17</sup> However, if the deprivation of the mother’s freedom is excessive, then there is a question of invalidity of the agreement something which the court does not grant. The surrogate mother may have an artificial pregnancy interruption, especially during the first trimester of preg-

nancy, if her life or her health, are at risk. However, if the reason for which she revokes is not proved to be serious, then there is a question of liability on the part of the carrier. According to the law, an unmarried or unaccompanied man cannot act upon artificial reproduction procedures, because this process exists due to pathological conditions, and the male’s inability to be pregnant is due to the nature of his sex. In the case of surrogate mothers, the freedom of reproduction is limited. Through the agreements between the pregnant mother and the social mother, the surrogate mother is assigned to fertilize the fetus and to give it to the woman who is interested in the child by either fertilizing her own ovum or by giving birth to an already fertilized ovum. However, the following legal and ethical issues emerge in specific cases: The first concerns whether the potential of the gradual development of the fetus and its transformation into a human being justifies the imposition of conditions for its protection which are imposed on the lifestyle of the surrogate mother during the pregnancy and affect the core of self-definition<sup>18</sup>. The second concerns the right of the mother to artificial pregnancy interruption. It is difficult to answer these questions, as these are issues that are encountered in cases of implementing the tri-lateral action of constitutional rights. The example of surrogate mothers concerns us even more because these are private agreements with quite significant implications on fundamental rights, such as the development of personality, free movement and freedom of labor. We ought to consider that the surrogate mother chooses with her own free will an agreement with particularly important legal consequences on her way of life (Manesis, 1982). Such an exploitation of the surrogate mother, with the imposition of restrictive conditions, stems from importunate needs either economic or emotional (the carrier has in some way a relationship with the “social” mother to whom she will give the

14. Kriari-Katrani, I., *Biomedical development and Constitutional Law*, Athens: Sakoulas, (1994)

15. Papachristou, Th., “Life as damage”, *Vima Ideon* (greek), 2007, p.18

16. L. 2002 – 303 article. 11

17. Article 335 C.L

18. Vidalis, T. *Life without face – The Constitution and the usage of the human genetic material*, (Athens: Sakkoulas, 2003) and Papachristou, Th., *In vitro Fertilization in Civil Law – Law and Society in 21st century*, Athens-Thessaloniki: Sakkoulas, (2003)

child), which leads her to accept a reduction of her personal autonomy. Therefore, something like this proves that the agreement is not usually accepted with the free will of the surrogate mother, but it is easy to recognize when the terms of such an agreement lead to exploitation.<sup>19</sup> It is worth noting that the private agreements of the mothers with the couple are made before the start of pregnancy and this is why the conditions that can be included are only those who are limited to a minimum of precautions. These precautions are recommended by medical science as a *sine qua non* condition for the smooth development of the fetus. Otherwise, should complications during the pregnancy be predicted medically, stricter conditions are guaranteed. However, any interference and personal or subjective evaluation of the social, "ordering" mother should be considered of minor importance even if she imposed herself on similar strict restrictions in case she was pregnant. Such an action would impose the personal perceptions of the "ordering individual" on the surrogate mother and at the same time her special personality would be sidelined and would be turned into an object of exploitation, by affecting her human value and violating the decree 2 (1) of the Constitution.

However, we ought to keep in mind that the Greek legislator sought to make any adjustments to the method of using the loaned uterus and to regard it as a permitted method with the basic aim the child's birth. Moreover, it is remarkable that children can be born, even in violation of the law by means of surrogacy either it is legally accepted or not. It is worth noting that the issue of surrogate motherhood is viewed positively, and the acceptance of this method is preferable in countries such as England, the Netherlands, Israel, Hungary and some States of the United States. Surrogacy is accepted under strict conditions that aim to prevent immorality by regulating the issue of establishing kinship with the woman who desires the child (article 1464 Civil Code – the principle of socio-emotional kinship).

The ultimate goal of Bioethics is to apply bioethical principles and to inform about the possible repercussions that human consent may have on the new technology and especially on surrogate pregnancy. It does not seek to set obstacles in achieving human reproduction. Instead, it aims at making humans responsible for their decisions. When it comes to the moral dilemmas that arise concerning the moral tolerance of surrogacy, it is proper to apply a particular ethical theory that will be used as a method of justifying a certain decision. Philosophy does not aim at providing an elixir of medical ethics but, instead, to analyze specific situations that appear in any medical dilemmas for the purpose of helping with the problem of surrogacy. It also aims at contributing to the prioritization of moral principles and to the violation of the uncompromising human rights. According to the era and following their own criteria, each society determines what is right once the moral values change. Nevertheless, in order for Philosophy to be able to answer to any arising problems and moral dilemmas, there should be taken into account the fact that life is the highest commodity in the world (Theory of the Sanctity of Human Life) and that human is the ultimate form of life evolved on the planet. Freedom is the basis for any putative commonweal recognizing the fact that it also includes the choice of evil. Any deprivation of liberty, however, may be the worst evil. Philosophy must take into account that no one has the right to damage the health of another person either directly or indirectly, and that the use of biotechnology achievements has to be done for the benefit of the human. Consequently, economic benefit comes second in relation to life and individual freedom. However, exclusive utilization and marketing of any form of life must not be granted to anyone. Scientific research must not be hindered. Nevertheless, the view that anything artificial is not always for the benefit of human ought to be taken into account. There are various cases in which extreme implementations of knowledge are forbidden, but, in no case, can we forbid the search for a factual truth that the human is trying to understand. Philosophical and biological education is an essential prerequisite so that citizens are involved in various decisions based on knowledge rather than the fear of the new and the unknown.

19. Wertheimer, Al., "Two Questions About Surrogacy and Exploitation", *Philosophy and Public Affairs*, 21, 1992, p.212.