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Reproductive Labor or Trafficking: The Effect of Disparate Power on Consent in Transnational Surrogacy Agreements

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Cover Page Footnote

Student Comment

**REPRODUCTIVE LABOR OR TRAFFICKING:
THE EFFECT OF DISPARATE POWER ON CONSENT IN
TRANSNATIONAL SURROGACY AGREEMENTS**

AMY PARKER*

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I. INTRODUCTION

Ajala spends most of her days walking around her clinic's dormitory, although her steps are becoming slightly more labored each day. The dormitory is filled to capacity with pregnant women like Ajala, and they often talk with each other about their lives, both before and after the babies they are carrying are born. Ajala misses her husband and two young daughters, and daily assures herself—and anyone else who will listen—that she is doing this for them. After all, what other way does a thirty-year-old woman who quit school at ten years of age have to provide this kind of money for her family?

When a young, pretty, Indian woman came to Ajala's impoverished neighborhood and told each of the families how they could earn \$3,000 (roughly five years income for Ajala's family) by providing the loving and compassionate service of carrying a baby for another couple, Ajala's husband was quite intrigued. As a Hindu family, they are very familiar with the mythological tale of Lord Krishna, and his childhood spent with Yashoda, his devoted surrogate mother. The young recruiter reminded them of the joy Yashoda took in providing this service for the young Lord and told Ajala that she could have the same happy experience. This was a compelling idea, as Ajala's faith had kept her strong through the past two years of her husband's unemployment and her eldest daughter's constant sickness. Even though Ajala and her husband are both nearly illiterate and couldn't read the recruiter's documentation in any great detail, the sheer desperation and

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obligation Ajala felt when she contemplated her family's financial state prompted her to comply with her husband's decision to go to the surrogacy clinic and learn more.

Everything beyond that first meeting still seems a blur to Ajala—because of her relatively young age, good health, and previous successful pregnancies, Ajala is a prime candidate for surrogacy. A barrage of injections, pills, interviews with potential parents, and implantation quickly followed, and three months into her pregnancy, Ajala moved into the clinic's residential facilities to wait for the impending birth under the constant eye of the clinical staff.

Stories like Ajala's have been told a hundred times, and will be told many more times. Today transnational surrogacy agreements, considered a form of "medical tourism," are being entered into in ever-increasing numbers.¹ Surrogacy agreements are a contract between the prospective parents and the surrogate mother (with third parties such as recruiters and surrogacy clinics as intermediaries).² The agreement is subject to the laws of both the intended parents' country and the country in which the surrogacy takes place, which often results in conflict between the two countries' incompatible norms on surrogacy and surrogacy related issues like parentage and birth registration.³ To further complicate matters, many countries have not taken an official position regarding surrogacy, or have left the matter to their judicial bodies to deal with on a case-by-case basis.⁴ This unsettled legal environment is one that is ripe for human trafficking violations, specifically in the labor trafficking context.

Part II of this note discusses transnational surrogacy agreements, especially focusing on commercial surrogacy, and the state of domestic surrogacy laws in nations where surrogacy is most prevalent. It also discusses the prospect of international regulation by virtue of the norms and policy questions implicated in surrogacy agreements. Part III addresses human trafficking with a specific focus on labor trafficking in developing countries, and highlights the international and domestic legal frameworks criminalizing such

1. GLOBALIZATION AND TRANSNATIONAL SURROGACY IN INDIA: OUTSOURCING LIFE ix (Sayantani DasGupta & Shamita Das Dasgupta eds., 2014).

2. SECOND INTERNATIONAL CONFERENCE OF THE SOUTH ASIAN SOCIETY OF CRIMINOLOGY AND VICTIMOLOGY (SASCV) CONFERENCE PROCEEDINGS 167 (K. Jaishankar & Natti Ronel eds., 2013).

3. Yasmine Ergas, *Babies without Borders: Human Rights, Human Dignity and the Regulation of International Commercial Surrogacy*, 27 EMORY INT'L L. REV. 117, 138-39 (2013).

4. See Michael Edwards & Colin Rogerson, *Surrogacy: National Approaches and International Regulation*, FAM. L. WK. (last visited Dec. 14, 2015), <http://www.familylawweek.co.uk/site.aspx?i=ed87773>.

arrangements. Part IV provides a summary of the current case law on disparity in power as it relates to labor trafficking, and Part V applies the power disparity analysis to the socio-economic inequality present in developing country surrogacy agreements and suggests that such disparate power should subject these agreements to human trafficking regulation. This note's discussion will focus on the developing country of India.

II. REGULATION OF SURROGACY AGREEMENTS

Surrogacy has been practiced throughout recorded history, with ancient documents such as the Bible recording famous surrogacy arrangements like Sarah and Abraham's agreement with Sarah's handmaiden, Hagar.⁵ However, the medical procedures underpinning surrogacy have constantly evolved over the years in a direct reflection of evolving societal norms.⁶

There are two types of surrogacy arrangements: the "traditional" arrangement in which the surrogate donates her egg and the use of her uterus for gestation of the child, and the "gestational" arrangement in which the surrogate is implanted with an egg that has been fertilized *in vitro*.⁷ In the traditional arrangement, the surrogate is also the biological mother of the child. The problems resulting from such an arrangement were never clearer than in the famous 1988 American case of "Baby M."

In *Baby M.*, the Sterns, a married couple, contracted with Mrs. Whitehead, a poor, married woman, to be inseminated with Mr. Stern's sperm.⁸ After giving birth, Mrs. Whitehead became distraught at the prospect of giving up the child.⁹ In the resulting case, the New Jersey Supreme Court found that such a surrogacy contract was "contrary to the objectives of our laws . . . it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this . . . through the use of money."¹⁰ Nonetheless, the court granted sole and permanent custody of the child to the Sterns, as that arrangement was in "the best interest of the child."¹¹

Traditional surrogacy agreements lead to a potential host of legal problems, as exemplified in *Baby M.* Because of this, and

5. Sharyn L. Roach Anleu, *Reinforcing Gender Norms: Commercial and Altruistic Surrogacy*, 33 ACTA SOCIOLOGICA 63, 63 (1990).

6. *Id.*

7. Joshua Halpern, *Commercial Surrogacy and Social Norms, On the Legal and Moral Limits of the Free Market*, 3 WILLIAMS C. L.J. 1, 1 (2013).

8. *In re Baby M.*, 537 A.2d 1227, 1235 (N.J. 1988).

9. *Id.* at 1236.

10. *Id.* at 1250.

11. *Id.* at 1259.

because of advancing medical technologies, gestational surrogacies have become more commonplace.¹² This note's discussion of gestational surrogacy is focused on paid gestational surrogacy agreements, or "commercial surrogacy." An alternative to this approach is the unpaid surrogacy agreement, or "altruistic surrogacy," where the surrogate mother donates her services.¹³ Legislation is often more permissive of altruistic surrogacy agreements, as the gestational service provided by the surrogate appears less like a "baby-selling" scheme.¹⁴

Domestic governments around the world vary widely in their treatment of gestational surrogacy agreements. This treatment ranges from outright bans to absolute freedom of contract.¹⁵ Domestic approaches can fall into three broad categories, (1) countries that ban surrogacy agreements, (2) countries that have yet to create legislation on surrogacy, and (3) countries that are neutral/permissive in their treatment of surrogacy agreements.¹⁶

France, Germany, and China have traditionally been some of the strongest opponents to surrogacy in any form.¹⁷ The French Civil Code explicitly nullifies any agreement for procreation or gestation on behalf of another, although this firm stance was significantly weakened by a recent European Court of Human Rights decision ordering France to recognize the legal status of two children born abroad via surrogate to French parents.¹⁸ The German courts have found surrogacy to be a violation of public policy, comparing a gestational surrogate and the child she bears to "objects of contract."¹⁹ However, a 2014 German high court decision has loosened this regulation as applied to transnational surrogacy agreements; now, surrogate children born abroad to German parents will be legally recognized as German citizens.²⁰ China's Ministry of Health, on the other hand, took a more administrative

12. Ergas, *supra* note 3, at 125-26; Angie Godwin McEwen, *So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy*, 32 VAND. J. TRANSNAT'L L. 271, 273 (1999).

13. McEwen, *supra* note 12, at 276.

14. Anleu, *supra* note 5, at 65.

15. Ergas, *supra* note 3, at 163.

16. Edwards & Rogerson, *supra* note 4.

17. *Id.*

18. CODE CIVIL [C. CIV.] art. 16-7 (Fr.); Joshua Melvin, *France Told to Recognise Kids Born to Surrogates*, THE LOCAL FR (June 26, 2014 5:13 p.m.), <http://www.thelocal.fr/20140626/ruling-could-undo-surrogacy-ban-in-france>.

19. EUROPEAN CTR. FOR LAW AND JUSTICE, *Surrogate Motherhood: A Violation of Human Rights* 21 (2012), <http://www.ieb-eib.org/en/pdf/surrogacy-motherhood-icjl.pdf>; Ergas, *supra* note 3, at 155.

20. *Limited Win for Surrogacy, Gay Parenthood in Germany*, DW (DEUTSCHE WELLE): SOCIETY (Dec. 19, 2014), <http://www.dw.de/limited-win-for-surrogacy-gay-parenthood-in-germany/a-18142883>.

approach by issuing three administrative rules prohibiting medical institutions and staff from performing such procedures, and establishing penalties when such crimes have been committed.²¹

Ireland is among the countries that, as yet, have no formal regulation of surrogacy agreements.²² The Children and Family Relationships Bill currently being considered by the Dáil Éireann (the Irish lower house and principal chamber of the legislature) addressed regulation of surrogacy in its initial draft, but the provisions have since been taken out as a result of promises from the Health Ministry to draft a later bill dealing solely with the issue of assisted reproduction.²³ Sweden also lacks surrogacy legislation, but the Swedish government has undertaken an official study into the issue, and is expected to report on its findings within the year.²⁴

The countries of India and Ukraine are powerhouses in legal surrogacy services, especially in transnational surrogacy agreements. India's proposed Assisted Reproductive Technology (Regulation) Bill has been in development for five years, but in the meantime, the government has been content to apply the Indian Council for Medical Research (ICMR) Guidelines regulating Assisted Reproductive Technology Procedures.²⁵ This is not surprising; the Indian commercial surrogacy industry was valued at an approximate \$2.5 billion in 2012.²⁶ However, in 2013 the Indian Bureau of Immigration established rules limiting visas for foreign nationals visiting India for the purposes of surrogacy to a married man and woman.²⁷ The Family Code of Ukraine expressly allows surrogacy agreements and allows near absolute freedom of contract

21. Chunyan Ding, *Surrogacy Litigation in China and Beyond*, 2 J. L. & BIOSCIENCES 33, 35 (2015).

22. *Surrogacy*, CITIZENS INFO. (July 3, 2013), http://www.citizensinformation.ie/en/birth_family_relationships/adoption_and_fostering/surrogacy.html.

23. Órla Ryan, *What Is the Children and Family Relationships Bill and Who Will It Affect?*, THE JOURNAL.IE (Feb. 17, 2015, 5:40 PM), <http://www.thejournal.ie/children-and-family-relationships-bill-1943129-Feb2015/>.

24. Swedish Women's Lobby, *Surrogacy: A Global Trade in Women's Bodies*, MERCATORNET (Oct. 27, 2014), http://www.mercatornet.com/articles/view/surrogacy_a_global_trade_in_womens_bodies.

25. Priyattama Bhanj, *The Assisted Reproductive Technologies (Regulation) Bill, 2010: A Case of Misplaced Priorities?*, J. INDIAN L. & POLY BLOG (July 17, 2014), <https://jilsblognujs.wordpress.com/2014/07/17/the-assisted-reproductive-technologies-regulation-bill-2010-a-case-of-misplaced-priorities/>.

26. Caroline Vincent & Alene D. Aftandilian, *Liberation or Exploitation: Commercial Surrogacy and the Indian Surrogate*, 36 SUFFOLK TRANSNAT'L L. REV. 671, 675 (2013).

27. *Surrogacy*, BUREAU OF IMMIGR., <http://boi.gov.in/content/surrogacy> (last visited Mar. 20, 2015).

in surrogacy.²⁸ However, as in India, the Ukrainian Family Code bars homosexual couples and single parents from entering into surrogacy agreements.²⁹

Although the United States has not chosen to address surrogacy on a federal level, the states have responded to surrogacy agreements in markedly different ways. However, because of the Full Faith and Credit Doctrine, each state is bound to recognize the judgments made in another state regarding surrogacy (within the bounds of the recognizing state's public policy).³⁰ California has a well-established reputation in both commercial and altruistic surrogacy, with newly effective state legislation providing guidance on the execution of surrogacy agreements and an abundance of case law establishing intent of the contracting parties as the determining factor in surrogate parentage.³¹ New York and the District of Columbia have taken the opposite position—in these states, surrogacy is prohibited as “against public policy.”³² The state of Michigan has not only prohibited surrogacy agreements, but also criminalized them in an effort to “serve the best interests of children” and prevent “the exploitation of women.”³³

If this analysis of the various domestic reactions to surrogacy indicates anything, it is that an international response to surrogacy is necessary. In 2011, the Hague Conference on Private International Law (HCCH) began a project entitled “The Parentage/Surrogacy Project,” which resulted in HCCH's “A Study of Legal Parentage and the Issues Arising From International Surrogacy Arrangements.”³⁴ This study is the nearest we have come to an international response, and it is entirely focused on the private regulation of surrogacy agreements.³⁵ It identifies key issues arising

28. СІМЕЙНИЙ КОДЕКС УКРАЇНИ [FAMILY CODE] art. 123-2 (Ukr.).

29. *Surrogacy Legal Process in Ukraine*, THE CRADLE: IVF AND SURROGACY IN UKR., <http://surrogacyukraine.com/programs/surrogacy-legal-process> (last visited Mar. 21, 2015).

30. Steven H. Snyder, *National Approach to Surrogacy in the United States*, UNION INTERNATIONALE DES AVOCATS, http://www.uianet.org/sites/default/files/safe_uploads/clients/39054/rapports/SNYDER,%20Steven%20-%20US%20Surrogacy%20Law.pdf (last visited Mar. 20, 2015).

31. CAL. FAM. CODE § 7960 (West 2014); INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL 450 (Katarina Trimmings & Paul Beaumont eds., 2013).

32. Leora I. Gabry, *Procreating Without Pregnancy: Surrogacy and the Need for a Comprehensive Regulatory Scheme*, 45 COLUM. J. L. & SOC. PROBS. 415, 424 (2012).

33. 3 PROUD HERITAGE: PEOPLE, ISSUES, AND DOCUMENTS OF THE LGBT EXPERIENCE 1020 (Chuck Stewart ed., 2015).

34. *The Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements*, HAGUE CONF. ON PRIV. INT'L L., <http://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (last visited Mar. 21, 2015).

35. HAGUE CONFERENCE ON PRIVATE INT'L LAW, A STUDY OF LEGAL PARENTAGE AND THE ISSUES ARISING FROM INTERNATIONAL SURROGACY AGREEMENTS, Prel. Doc. No. 3C of March 2014 (2014).

out of surrogacy cases, such as the status of surrogate children and their welfare, but only briefly touches on the criminal activity resulting from such arrangements.³⁶ Not surprisingly, considering HCCH's private law focus, the human rights concerns inherent in surrogacy are not discussed at all.

Therefore, considering the fact that private international law is not the proper framework for addressing human rights, and that surrogacy agreements are often outlawed by domestic legal frameworks because of public policy concerns, it seems natural that this area is one that would be properly regulated by an international treaty with a human rights focus. Furthermore, there are trends developing concurrent with the growing popularity of transnational surrogacy agreements that demand attention by international regulation; one of these trends is the victimization of vulnerable social and economic groups by parties with greater power and resources.

III. REGULATION OF HUMAN TRAFFICKING

In comparison with the widely divergent and unsettled landscape of surrogacy regulation, current national laws regarding human trafficking are extremely uniform. This uniformity is a direct result of international treaties on trafficking that were subsequently applied through anti-trafficking legislation on a domestic level.

The primary international law on human trafficking is the United Nations Convention against Transnational Organized Crime (the "Convention") and its two Protocols (the "Palermo Protocols")—the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air.³⁷ There are 186 parties to the Convention against Transnational Organized Crime.³⁸ The two Protocols have 169 parties and 142 parties, respectively.³⁹

36. *Id.* at 88-89.

37. *Human Trafficking: The Facts*, POLARIS, <http://www.polarisproject.org/facts> (last visited Mar. 29, 2015).

38. *Signatories to the U.N. Convention against Transnational Organized Crime*; UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en (last visited Mar. 29, 2015).

39. *Signatories to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized, adopted by resolution* Nov. 15, 2000, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003), <https://treaties.un.org/doc/Publication/MTDSC/Volume%20II/Chapter%20XVIII/XVIII-12-a.en.pdf> [hereinafter *Signatories to the U.N. Trafficking Protocol*]; *Signatories to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted by resolution* Nov. 15, 2000, 2241 U.N.T.S. 507 (entered into force Jan. 28, 2004),

The large number of parties is not the only strength of these instruments—the Trafficking Protocol is a law enforcement instrument, which places an obligation on its parties to implement its provisions at the domestic level (as opposed to the more “aspirational” nature of most United Nations treaties).⁴⁰

The primary purpose of the Trafficking Protocol is “[t]o prevent and combat trafficking in persons, paying particular attention to women and children,” and “protect and assist the victims of such trafficking, with full respect for their human rights.”⁴¹ The Trafficking Protocol defines “trafficking” as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.⁴²

This definition can be broken down into three elements: (1) an ‘action’ (e.g. recruitment, transportation, transfer, etc.); (2) a ‘means’ to achieve that action (e.g. threat or use of force or other forms of coercion, abuse of power or a position of vulnerability, etc.); and (3) a ‘purpose’ for the action: exploitation.⁴³ Article 3(b) explains that, if any of the means articulated in 3(a) are used, consent of the victim will be deemed irrelevant.⁴⁴ Furthermore, in prosecutions of child trafficking, consent will never be a factor.⁴⁵

<https://treaties.un.org/doc/treaties/2007/12/13/xviii-12-b.en.pdf> [hereinafter, Signatories to the U.N. Protocol Against the Smuggling of Migrants by Land, Sea and Air].

40. Lindsey King, *International Law and Human Trafficking*, 2008 HUM. RTS. & HUM. WELFARE 88, 88, <http://www.du.edu/korbel/hrhw/researchdigest/trafficking/InternationalLaw.pdf>.

41. G.A. Res. 55/25, annex II, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime art. 2(a)-(b), (Nov. 15, 2000), [hereinafter U.N. Trafficking Protocol].

42. U.N. Trafficking Protocol, *supra* note 41, art. 3(a).

43. U.N. Office on Drugs and Crime, *Issue Paper: The Role of ‘Consent’ In the Trafficking In Persons Protocol 5* (2014), http://www.unodc.org/documents/human-trafficking/ing/2014/UNODC_2014_Issue_Paper_Consent.pdf.

44. U.N. Trafficking Protocol, *supra* note 41, art. 3(b).

45. U.N. Office on Drugs and Crime, *supra* note 43, at 5.

The United States is a party to the Convention and to both Palermo Protocols.⁴⁶ As a result, the United States enacted the Trafficking Victims Protection Act (“TVPA”) in 2000.⁴⁷ This legislation not only criminalizes trafficking in the United States, but also imposes a sanctions regime that holds other nations accountable to the standards outlined in the TVPA.⁴⁸

In the TVPA, the crime of “trafficking in persons” is divided into two subtypes—sex trafficking and labor trafficking.⁴⁹ The second subsection is relevant to this note’s discussion; that subsection defines labor trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”⁵⁰ Therefore, to prove that an individual has been subjected to severe labor trafficking pursuant to the TVPA, one must show four elements: (1) that a person has been recruited, harbored, transported, provided, or obtained; (2) for their labor or services; (3) through the use of force, fraud, or coercion; and (4) resulting in their involuntary servitude, peonage, debt bondage or slavery.⁵¹

When the statutory provisions of the Trafficking Protocol and the TVPA are compared, an important distinction may be made. Within its ‘means’ element, the Protocol provides an exhaustive list of ways in which a trafficker may obtain control over their victim, including the use of force, abduction, fraud, the abuse of power and positions of vulnerability, and more.⁵² The TVPA, however, provides only three options—force, fraud, or coercion.⁵³ The necessary result of this limitation is that American prosecutors are limited to three methods by which they can prove that a trafficking victim’s consent was nullified, when the Trafficking Protocol clearly authorizes more.

It is not surprising that the United States has interpreted the Trafficking Protocol in a way that is unique to its legal system. The Model Law against Trafficking in Persons prepared by the United Nations in 2009 specifically permitted a “domestic process” in which individual parties could craft their trafficking laws in accordance

46. *Signatories to the U.N. Convention against Transnational Organized Crime*, *supra* note 38; *Signatories to the U.N. Trafficking Protocol and Signatories to the U.N. Protocol against the Smuggling of Migrants by Land, Sea and Air*, *supra* note 39.

47. Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101–7113 (2000).

48. Laura L. Shoaps, *Room For Improvement: Palermo Protocol and the Trafficking Victims Protection Act*, 17 LEWIS & CLARK L. REV. 931, 935 (2013).

49. 22 U.S.C. § 7102(9) (2014).

50. *Id.* at § 7102(9)(B).

51. *Id.*

52. U.N. Trafficking Protocol, *supra* note 41, at art. 3(a).

53. 22 U.S.C. § 7102(9)(B).

with their own understanding of the Palermo Protocols.⁵⁴ This has resulted in a variety of domestic trafficking regimes among the Palermo parties. For example, Moldova built upon the Palermo requirements to create an expansive definition of exploitation, including such acts as compelling to engage in prostitution, compelling harvesting of organs or tissues for transplantation, and even compelling to engage in begging.⁵⁵ The Bahamas, a nation whose legislation appears to mirror the Trafficking Protocol on its face, shows distinct differences upon closer examination by virtue of its expansion of behavior constituting “sexual exploitation.”⁵⁶

Because the variation in means requirements implemented by the well-meaning Trafficking Protocol members could lead to confusion and disagreement on a domestic level, case law is well suited to address the issue by creating guidelines and providing clarification of the Protocol’s provisions.⁵⁷ In fact, both international judicial bodies and domestic courts have addressed the “abuse of power or of a position of vulnerability” means requirement found in the Trafficking Protocol and lacking from the TVPA provisions and have issued findings addressing the effect of power disparity on consent. The following discussion will highlight two such decisions.

IV. CURRENT LAW ON DISPARITY OF POWER

In 2002, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia issued a decision in support of conviction for three Bosnian Serb soldiers who had participated in the “ethnic cleansing” of the Bosnian Muslims during the armed conflict in Bosnia and Herzegovina in the early 1990’s.⁵⁸ Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković were part of a military campaign that sought to rid Foča, a municipality of Bosnia and

54. U.N. Office on Drugs and Crime, *Model Law Against Trafficking in Persons* (2009), http://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf.

55. Privind Prevenirea și Combaterea Traficului de Ființe Umane [Law on Preventing and Combating Trafficking in Human Beings], No. 241-XVI of 20 Oct. 2005 art. 2(3) (Mold.), <http://www.hsph.harvard.edu/population/trafficking/moldova.traf.05.pdf>.

56. Jean Allain, *No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol*, 7 ALB. GOV’T L. REV. 111, 124-25 (2014). The Bahamian 2008 Trafficking in Persons (Prevention and Suppression) Act includes a provision regarding “any other sexual activity.” Within the context of sexual exploitation, this provision criminalizes “any other sexual activity, as a result of being subjected to threat, coercion, abduction, the effects of narcotic drugs, force, abuse of authority or fraud.” Trafficking in Persons (Prevention and Suppression) Act (No. 27 of 2008), ch. 106, pt. I(2) (2008) (Bah.).

57. KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW* 4 (2014).

58. Prosecutor v. Kunarac, Case Nos. IT-96-23, IT-96-23/1-A, Judgment (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002).

Herzegovina, of its non-Serb residents.⁵⁹ They used murder, rape, and other tortures including imprisonment to further this goal.⁶⁰ Kunarac, Kovač, and Vuković specifically worked in detention facilities in which Bosnian Muslim women were imprisoned, and repeatedly tortured and raped.⁶¹

In its opinion, the Tribunal Appeals Chamber reexamined the definition of rape and the elements involved and responded to the defendants' argument that the crime of rape requires, among other elements, a showing of force or threat thereof, and a "continuous" or genuine resistance by the victim.⁶² The Chamber disagreed with the defendants' assertion that a victim must have resisted their attacker for the crime to be defined as rape, and found that such a requirement was neither based in law nor justified by the facts of the case.⁶³

Furthermore, the Chamber found that the coercive circumstances—in this case, the imprisonment and resulting vastly disparate power of the parties involved—made consent impossible.⁶⁴ Specifically, the Chamber agreed with the Trial Chamber's Statement that "force, threat of force or coercion—are certainly the relevant considerations in many legal systems but . . . the true common denominator which unifies the various systems may be a wider or more basic principle of penalising violations of sexual *autonomy*." ⁶⁵ Therefore, by violating their victims' right of autonomous choice, the defendants nullified any "consent" their victims might have offered. The Chamber extended this case's analysis of consent to most crimes against humanity by stating that "the circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible."⁶⁶

In its judgment, the Tribunal Appeals Chamber discussed how unequal positions of power can lead to coercive behavior, and referenced German criminal code and American case law to extend this reasoning beyond the "war context."⁶⁷ The German code

59. Press Release, Int'l Crim. Trib. for the Former Yugoslavia, Sentencing Judgment in the Kunarac, Kovac and Vukovic (Foca) Case, U.N. Press Release CVO/P.I.S./679-E (June 12, 2002).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. Prosecutor v. Kunarac, Kovac, & Vukovic, Case Nos. IT-96-23-T, IT-96-23/1-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

66. Prosecutor v. Kunarac, Case Nos. IT-96-23, IT-96-23/1-A, Judgment, ¶ 130 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

67. *Id.* at ¶ 131.

defining sexual coercion and rape was amended in 1998 “to explicitly add ‘exploiting a situation in which the victim is unprotected and at the mercy of the perpetrator’s influence’ as equivalent to ‘force’ or ‘threat of imminent danger to life or limb.’”⁶⁸ In the 1989 American case of *State of New Jersey v. Martin*, the court came to a similar conclusion.⁶⁹

In *Martin*, the Appellate Division of the New Jersey Superior Court found that “unequal positions of power and inherent coerciveness . . . could not be overcome by evidence of apparent consent.”⁷⁰ Robert Martin III, a prison supervisor in a juvenile facility, engaged in sexual conduct with a resident in his facility in violation of state law prohibiting such relations.⁷¹ After being charged with various crimes of and relating to sexual assault, Martin argued that the resident’s consent to his conduct “precluded the harm or evil sought to be prevented by the law defining the offense,” and thus constituted a valid defense.⁷² In response to Martin’s argument, the court recognized and reasserted the intent of the statute; in creating the statutory prohibition, the legislators “reasonably recognized the unequal positions of power and inherent coerciveness of the situation which could not be overcome by evidence of apparent assent.”⁷³ Thus, the harm or evil that the statute seeks to prevent is the coercion of individuals with lesser power by individuals with greater power; consent may not vindicate such behavior.

The language of the courts in the *Kunarac* and the *Martin* decisions is reminiscent of the “abuses of power and of positions of vulnerability” language in the Trafficking Protocol. Both decisions discuss how unequal power between two parties may affect consent, and thus, the holdings in both are extremely relevant to a discussion of evolving international and domestic law standards in trafficking situations.

In his article entitled “Anatomy of a Sex Trafficking Case,” Professor Terry Coonan references the decisions in *Kunarac* and *Martin* in his development of a new legal model for trafficking called “Commercial Sex as a Compromised Choice.”⁷⁴ Professor Coonan argues that this model is necessary in the United States as the current models dominating the debate surrounding sex trafficking are prescriptive rather than descriptive—the key players in the

68. *Id.* at n.162.

69. *State v. Martin*, 561 A.2d 631, 636 (N.J. Super. Ct. App. Div. 1989).

70. *Id.*

71. *Id.* at 632.

72. *Id.* at 636.

73. *Id.*

74. Terry Coonan, *Anatomy of a Sex Trafficking Case*, 5 INTERCULTURAL HUM. RTS. L. REV. 313, 315 (2010).

fight against human trafficking argue positions based on an established viewpoint or agenda as opposed to a realistic view of trafficking as it exists in the United States (and internationally) today.⁷⁵ One result of the prescriptive approach is the limited means by which trafficking victims may prove nullified consent; under the TVPA, relief may very well be precluded if force, fraud, or coercion are not present to negate a victim's consent. For example, where a trafficking victim proffered their consent because of a dominant individual's influence, or out of sheer desperation to escape their unfortunate circumstances, the TVPA would not seem to authorize relief.

Professor Coonan suggests that the United States adopt the provisions of the Trafficking Protocol that acknowledge trafficking may arise out of an "abuse of power or of a position of vulnerability."⁷⁶ In so doing, it would recognize that certain coercive power relationships between sex traffickers and their victims are sufficient to invalidate consent, in much the same way that the courts in *Kunarac* and *Martin* found disparate power sufficient to nullify consent in the highly synonymous sexual assault context. I would extend Professor Coonan's argument beyond sex trafficking and assert that an abuse of power or vulnerability is sufficient to negate consent in a labor trafficking situation as well. After all, neither the Trafficking Protocol nor the TVPA makes a distinction between the two types of trafficking when discussing the means utilized to obtain control over a victim. Rather, sex and labor trafficking are different types of exploitation achieved through the same means.

V. DISPARATE POWER IN INDIAN SURROGACY AGREEMENTS

Let's return to our introduction, and Ajala, for a moment. Ajala's circumstances are not unique; while numbers are inexact, the estimated 3,000 surrogacy clinics operating in India and the astronomical industry figures suggest India's status as the world's most favored surrogacy destination.⁷⁷ India caters to foreign clientele by offering a multitude of options at an affordable price.⁷⁸ But rather than increasing access to local jobs and resources, this globalization of capital has further marginalized impoverished women by encouraging their work in reproductive labor.⁷⁹ As

75. *Id.* at 356.

76. *Id.* at 357-58.

77. SAMA-RES. GRP. FOR WOMEN AND HEALTH, BIRTHING A MARKET: A STUDY ON COMMERCIAL SURROGACY 7 (2012).

78. *Id.*

79. *Id.* at 7-8.

a result, extreme concerns with surrogate autonomy, agency, and exploitation have arisen, concerns that necessarily demand an examination of commercial surrogacy from a trafficking perspective.⁸⁰

The surrogacy contracts we see being drafted and fulfilled in India have an extremely unequal power dynamic.⁸¹ It is not uncommon for the contracting parents to hold most or all of the power while negotiating the agreement and during its pendency.⁸² The resulting arrangement places the surrogate in an extremely vulnerable and desperate position, a position that surrogacy clinics seem only too happy to exploit for cheap reproductive labor. The circumstances that have led to so many women becoming surrogates in India aptly illustrate why such desperation exists. The reality of a surrogate's life while performing reproductive labor provides even more indicators of the skewed power relationship between surrogates, clinics, and contracting parents—a relationship that frequently leads to exploitation.

Although India has one of the world's largest economies, it is still labeled as a developing country, in large part due to its rampant poverty.⁸³ The surrogacy industry in India is heavily dependent on the impoverished and vulnerable, as that segment of society produces the vast majority of surrogates.⁸⁴ These surrogates are typically motivated by “emergent conditions of survival or deprivation.”⁸⁵ To those who are so desperate, a payment of \$3,000 is beyond tempting—it would be virtually impossible to turn down. For example, when asked why she chose to become a surrogate, an Indian woman named Nisha could only reply that she was helpless and “had no other alternatives.”⁸⁶

It would be illogical to assume that a surrogacy clinic would not recognize a potential surrogate as especially vulnerable or desperate. In fact, it is a distinct possibility that surrogacy clinics

80. *Id.* at 23.

81. *Id.* at 47.

82. *Id.* at 136.

83. Vincent & Aftandilian, *supra* note 26, at 675.

84. See Kishwar Desai, *India's Surrogate Mothers Are Risking Their Lives. They Urgently Need Protection*, THE GUARDIAN, <http://www.theguardian.com/commentisfree/2012/jun/05/india-surrogates-impooverished-die> (June 5, 2012 3:30 p.m.); Raywat Deonandan et al., *Ethical Concerns for Maternal Surrogacy and Reproductive Tourism*, 38 J. MED. ETHICS 742, 742 (2012); Priya Shetty, *India's Unregulated Surrogacy Industry*, 380 THE LANCET 1633, 1633 (2012).

85. SAMA-RES. GRP. FOR WOMEN AND HEALTH, *supra* note 77, at 135.

86. Erica Tempesta, *'They Tried to Sell Us a Baby over Dinner': American Journalist Reveals Heartbreaking Details About the 'Dark Underbelly' of India's 'Embryo Outsourcing' Industry*, DAILY MAIL (Apr. 7, 2015, 10:05 AM), <http://www.dailymail.co.uk/femail/article-3028043/American-journalist-reveals-heartbreaking-details-dark-underbelly-India-s-embryo-outsourcing-industry.html>. Nisha was an Indian surrogate interviewed by American journalist Gianna Toboni for the HBO documentary series *Vice. Id.*

have taken advantage of the hopelessness of impoverished women to bolster their business. If this was found to be the case, any resulting surrogacy agreements would be subject to the Trafficking Protocol's provision on abuse of power or "of a position of vulnerability."⁸⁷

Indian clinics take advantage of the vulnerability of impoverished surrogates by creating a disparate power relationship during the formation and completion of the surrogacy agreement. An examination of the Indian surrogacy experience will show consistent problems with informed consent. Even surrogacy advocates acknowledge the very nature of surrogacy as one that is difficult to understand until it has been experienced.⁸⁸ Because lack of understanding leads to a lack of power, it is vitally important that a surrogate is fully informed of her rights, and of the risks and potential complications of the work she is about to perform, prior to entering into a surrogacy agreement.

After the surrogate has been recruited by an Indian surrogacy clinic, a legally binding agreement is drawn up by the clinic or the commissioning parents' attorney, which the surrogate then signs without the services of an attorney.⁸⁹ The vast majority of agreements are in English, a language most Indian surrogates do not understand. Therefore, the only information the surrogate receives regarding the agreement—including the payment for her services—is what is conveyed to her orally.⁹⁰ This arrangement only protects the interests of the contracting parents and completely disregards the rights of the surrogate to information, representation, and negotiation.⁹¹

Once pregnant, an Indian surrogate moves into clinical facilities where her every moment can be supervised. Every aspect of the surrogate's life during her pregnancy is controlled, from the food she eats to the amount of time she spends with her family.⁹² Because the signed agreement eliminates any ability on the part of the surrogate to object to the clinical mandates and the constant

87. U.N. Office on Drugs and Crime, *supra* note 43, at 22.

88. *Getting Started as a Surrogate: What You Need to Know*, ALL THINGS SURROGACY, <http://allthingsurrogacy.org/getting-started-as-a-surrogate-what-you-need-to-know> (last visited Apr. 29, 2015).

89. SAMA-RES. GRP. FOR WOMEN AND HEALTH, *supra* note 77, at 90.

90. *Id.* at 93.

91. *Id.* at 91.

92. Shetty, *supra* note 84, at 1634.

oversight restricts movement, the surrogate is left with no option but to comply.⁹³ Threats of non-payment are often used to ensure this compliance.⁹⁴

India offers contracting parents a significant discount; one news source found a commercial surrogacy agreement in India costs nearly one-sixth the amount that it would in a western nation.⁹⁵ To make up for this discount in price, the ICMR Guidelines allow surrogacy physicians to implant surrogates with up to three embryos (although some clinics have been reported to implant surrogates with up to six).⁹⁶ Multiple embryo implantations are both an ethical concern and a health concern, as complications often lead to nightmarish experiences for the surrogate. In virtually all cases, the surrogate is not informed about the potential risks of multiple implantations, including multiple births, multi-fetal reduction (abortion of a fetus), organ strain, and risk of premature birth.⁹⁷ In fact, a surrogate will generally only learn of these complications after they have occurred.⁹⁸

Furthermore, due to the nature of the surrogacy contract, the surrogate has no voice in the decision as to an unanticipated fetus. The choice regarding abortion, whether for health or convenience purposes, belongs to the contracting parents, and the potential psychological impact of such a procedure (or lack thereof) on the surrogate is not considered.⁹⁹ Instead, the entire process is focused on the alienation of the surrogate from the fetus to enable smooth relinquishment of the child.¹⁰⁰

Unlike other countries, Indian surrogacy clinics do not provide counseling to address psychological impact, either during or after birth.¹⁰¹ As a result, numerous psychological health consequences—stress regarding family, community opinion, loss of a child—remain unaccounted for. Furthermore, because the system refuses to acknowledge such effects, it is certain that standard surrogacy agreements will not anticipate or account for such dilemmas through care or additional wages.¹⁰² Thus, not only is a surrogate's physical well-being at risk, but her psychological well-being as well.

93. SAMA-RESOURCE GRP. FOR WOMEN AND HEALTH, *supra* note 77, at 93; Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 ANNALS HEALTH L. 191, 194 (2012).

94. *E.g.* SAMA-RES. GRP. FOR WOMEN AND HEALTH, *supra* note 77, at 85.

95. Tempesta, *supra* note 86.

96. Shetty, *supra* note 84, at 1634.

97. SAMA-RES. GRP. FOR WOMEN AND HEALTH, *supra* note 77, at 65-66.

98. *Id.*

99. *Id.* at 27.

100. *Id.* at 95.

101. *Id.* at 126; Vincent & Aftandilian, *supra* note 26, at 676 n.42.

102. SAMA RES. GRP. FOR WOMEN AND HEALTH, *supra* note 77, at 126; Vincent & Aftandilian, *supra* note 26, at 676 n. 42.

These issues within India's surrogacy process cannot be viewed as mere "problems with the system," nor can they be written off as a choice the surrogate has willingly made; consent is not sufficient to excuse abuse of a vulnerability to achieve exploitation.¹⁰³ There are simply too many violations of the surrogate's agency and autonomy while the agreement is being drafted, while the implantation procedures are being performed, while the pregnancy is being monitored and controlled . . . almost too many to name. When the average surrogate's fragile economic status is added to the equation, these multiple violations become a clear case of labor trafficking under the Trafficking Protocol.

As previously discussed, the Trafficking Protocol's definition of trafficking requires three elements: an 'action,' a 'means' to achieve that action, and a 'purpose' for the action, which is exploitation. In the context of Indian commercial surrogacy, the violative action would be the recruitment and contractual bondage of surrogate mothers. Surrogacy clinics (and in some situations, contracting parents) use their disparate position of power as a means to prey on vulnerable and economically susceptible women in an effort to implement highly abusive contractual provisions. The purpose of these contractual provisions is to obtain exploitative reproductive labor at a cheap price.

Because the means used to obtain this labor are prohibited by Art. 3(a) of the Trafficking Protocol, any consent given by the surrogate victim is irrelevant.¹⁰⁴ Professor Coonan's proposed trafficking model supports this analysis, as the model suggests that disparate power relationships (here, the relationship between a surrogacy clinic or contracting parents and the surrogate mother) is sufficient to invalidate consent.

It is less clear whether the TVPA would find the surrogacy agreements discussed in this note to constitute trafficking. Because the TVPA limits the means through which consent can be invalidated to force, fraud, or coercion, an American court would necessarily have to find that the surrogacy agreement was either fraudulent or coercive in nature (as force would not seem to apply). This would not be unreasonable; the *Martin* court found that unequal positions of power could be coercive to the point of negating consent.¹⁰⁵ However, as the *Martin* decision was made in a sexual assault context, an American court would first have to choose to extend this coercion reasoning to a sex trafficking context and then subsequently find the analysis to equally apply to reproductive labor

103. U.N. Office on Drugs and Crime, *supra* note 43, at 22.

104. U.N. Trafficking Protocol, *supra* note 41, at art. 3(b).

105. *Martin*, 561 A.2d at 636.

trafficking. Assuming elimination of exploitation is the ultimate goal, the United States would be much better served by adopting the full provisions of Trafficking Protocol as opposed to using a convoluted (thus less likely to succeed) *Martin* analysis to prove coercion.

VI. CONCLUSION

Transnational surrogacy agreements are the “new international adoption.” Today, medical tourism has enabled families who were once limited in their reproductive capacity to not only have biological children, but also have them without incurring massive amounts of debt. However, incompatibility between the various domestic systems’ regulation of surrogacy has led to complications in contract and even questions of statehood. As a result, unregulated developing countries such as India have become havens for surrogacy services—and reproductive labor trafficking.

Indian surrogacy agreements are extremely problematic for many reasons. They seek out and almost exclusively employ impoverished, desperate women. They create a disparity of power between the contracting parents and the surrogate mother that precludes the surrogate from giving valid, informed consent. They fail to adequately inform surrogates of the potential physical and psychological trauma that may occur as a result of the services they are being asked to provide. They threaten non-payment if the surrogate does not comply with any and all contractual and clinical mandates. They place the surrogate’s life in jeopardy through dangerous and questionable medical procedures. The end result is exploitation of reproductive labor.

This note focused on commercial surrogacy agreements in India. However, the argument as to negation of consent would equally apply in any surrogacy situation with disparate power between the contracting parties, whether that situation was in a developing country such as India or a developed country such as the United States. The Trafficking Protocol has established a framework that could appropriately address exploitation wherever it may occur. If fully implemented, this framework would enable the United States, and other countries whose citizens utilize the services of surrogates, to subject surrogacy agreements to a disparate power analysis. This will ensure that disparate power between the contracting parties has not negated consent. Such a process would not only serve the best interests of all parties involved, but would also prevent the exploitation of women, a policy goal already established in several countries and American states.