

Surrogacy: Jurisprudential Aspect

*Abstract*¹

Nature has honoured the beautiful capacity to generate a new life within women and every woman has the right to enjoy motherhood. Unluckily, some women cannot give birth to their own child due to some physiological conditions. The desire to motherhood drives them for some alternative solutions and surrogacy is the most feasible option for their enjoyment of motherhood. Here, in this paper I am going to discuss some crucial issues involved in surrogacy.

The first and the foremost issue is the Morality. Morality, to me means something that our own inner soul sanctions us to do. Morality differs from person to person. If morality is questioned then comes what is right or wrong under the ambit of Natural law. In consideration to natural law surrogacy is immoral to do. As natural law is the divine law and the birth process should be natural whereas in surrogacy it's not a natural process but an artificial one. As a human being a woman has her own rights to do whatever she wants, she has the liberty to take decisions for herself, her body.

Introduction

The increase in the Artificial Reproductive Technology (ART) methods is sign of the fact that infertility as a medical condition is a huge problem in the overall wellbeing of couples and cannot be ignored especially in a patriarchal society like India. In a patriarchy form of society, a woman in marital knot is valued as a wife only if she is mother of a child, so that her husband's masculinity and sexual potency is proved and the heredity continues. Some authors put it as follows: 'The parents construct the child biologically, while the child constructs the parents socially'. The difficulty however arises when the parents are unable to make the child through the usual biological means. Sterility is seen as a major problem as relationship and family ties are dependent on offspring.

Herein surrogacy comes as an ultimate savior to have one's own genetic child. The word 'surrogate' has its origin in Latin 'surrogatus', past participle of 'surrogare', meaning a substitute, that is, a person appointed to act in the place of another.

The Black' Law Dictionary categorizes surrogacy into two classes: 'Gestational surrogacy' and 'Traditional surrogacy'. They are defined as follows:

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1. Gestational surrogacy. A pregnancy in which one woman (the genetic mother) provides the egg, which is fertilized, and another woman (the surrogate mother) carries the fetus and gives birth to the child.
2. Traditional surrogacy. A pregnancy in which a woman provides her own egg, which is fertilized by artificial insemination, and carries the fetus and gives birth to a child for another person.

Surrogacy: A Jurisprudential View

Surrogacy is an “arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a ‘surrogate mother’ is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents(s)”². It is an arrangement of inter-dependence of one person to another of their individual interests. It can be taken as an example of ‘*social solidarity*’ of Leon Duguit. According to him, the outstanding fact of society is the interdependence of the people. This interdependence has always been there, but it has increased in modern times on account of the increasing knowledge of man and his mastery over the physical world. In modern society we cannot live without the services provided by us to our fellowmen. Social interdependence is not a theory but it’s a fact. It is an all important fact of human life. All human activity and organization should be directed to the end of ensuring the harmonious working of man with man.

Woman, as being a human, has an autonomous status in society. It’s her choice what to do with her own body and no one can compel her to do anything against her will. As they are also a part of the society, so they cannot be kept neglected. They have their own reproductive rights. Whether to reproduce or not and when and for why they carry their pregnancy, to carry the pregnancy without any obstruction and to be healthy and safe during the term, all this comes in the ambit of a woman’s reproductive rights.

² The Assisted Reproductive Technologies (Regulation) Bill-2010, Indian Council of Medical Research (ICMR), Ministry of Health & Family Welfare, Govt. of India, pg. 4 (aa).

There are different feministic approaches regarding surrogacy in feminism as it's an emerging issue. If we go with liberal feministic approach we can justify that surrogacy is the issue of autonomy of a woman and she has the complete right what she has to do with her reproductive rights. As far as radical feminists are regarded, they would see surrogacy as the ultimate form of medicalization, commodification and technological colonization of the female body, resulting from the economic and patriarchal exploitation of women.

If a critical analysis is done with regard to the morality aspect that revolves around the issue of surrogacy then, it is upon the women who want to be a surrogate for another. If her inner conscience allows her to be a surrogate and if she thinks that nothing is wrong in it, then there is no question of morality on her behalf but for society or the persons who thinks that it is morally wrong can be against of legalizing surrogacy. This can be justified by the words of Vinogradoff, "Law is clearly distinguishable from morality. The object of law is the submission of the individual to the will of the organized society while the tendency of morality is to subject the individual to the dictates of his conscience", if the intention is to help an infertile couple to make them happy by helping them to get a child then what is wrong in the act? And to fulfill one's interest is not an immoral act. Here the commissioning parent's interest is to have a child of their own and if the lady who wants to be a surrogate and in return of her service she is paid then her interest lies in the money she gets from her service.

According to Rudolf von Ihering, the purpose of law is the protection of the interests. He defines interest as the pursuit of pleasure and avoidance of pain. Individual interest is made partly of a social purpose by connecting one's own purpose with the interest of other people. By converging interests for the same purpose, cooperation is brought about. The object of society is to secure the satisfaction of human wants. After all the real force for which moves the human will is interest.

If we look surrogacy according to 'Utilitarianism', pleasure is one what alleges that we ought to do something because it will produce more total happiness than doing anything else would. Act utilitarianism (AU) is the moral theory that holds that the morally right action, the act that we

have a moral duty to do, is the one that will maximize “utility” (happiness, welfare), then surrogacy can be done for the pleasure of infertile couples.³

On the natural law account, all persons have a profound, inherent, and equal dignity, the interests- that is, the well being of each and every person must be taken into account and no one’s interests may be unfairly or otherwise unreasonably favored or disfavored. The common good is not the utilitarian’s “greatest net good” or “greatest good of the greatest number”, rather it is the shared good of all, including the good of a living in community where dignity and rights of all- including the right to have one’s equal basic dignity respected- are honored in the exercise of public authority.⁴

Therefore the dignity and reputation of the surrogates irrespective of married or unmarried should be protected by law. Also right to reproduce comes under the right to privacy which is a very basic right of a person. So, a surrogacy arrangement comes as an option for the infertile couples to exercise upon their right to reproduce.

‘Do Surrogacy contracts amount to baby selling ’ is the most crucial question while determining the validity of such contracts in relation to the argument of autonomy of women while rendering her services in terms of child bearing. This can be answered from two angles, firstly, surrogacy arrangements that do amount to baby selling and which can be termed as commercial surrogacy ; secondly, surrogacy arrangements that do not amount to baby selling, known as Altruistic Surrogacy.

Such arrangements are considered to be coercive and exploitative as they require the gestational mother to give up certain lawful moral claims in relation to her pregnancy and the child. There can be general view that the reason for surrogate mothers participating in such arrangements is economic inducement especially in less developed countries like India, where poor women consider their wombs as a source to support their living. Such arrangements can be considered to be exploitative in nature as they are not only encouraging baby selling but also diminish the dignity of women’s reproductive capacities.

³ Bentham’s Utilitarian Theory.

⁴ Robert P. George, Natural Law, Harvard Journal of Law & Public policy.

The jurisprudential argument supportive of commercial arrangements is that in a rights based society a woman has a right to procreate and can in furtherance of that right claim financial reward for the gestation period from the commissioning parents. Such an argument can be justified in the light of Dworkin's interpretation of the concept of right that an individual has a 'right to do a wrong' i.e. to commit mistakes and thereafter correct himself/ herself without any requirement of state interference.

By perspective of the child also if one of the commissioning parents is the child's biological parent then it does not amount to the child to a commodity. We also get instances similar to the issues of surrogacy in our mythology as well. In Mahabharata it is written that Krishna was biological son of Devaki and Vasudev but was handed over to Yashoda and Nandlal for upbringing. In return Nandlal gave his daughter to Vasudev. It amounted to barter system but there was a fair reason behind it and it was not regarded as commodifying the child.

The liberal argument for surrogacy is autonomy and free choice. As long as one does not harm others, one has a wide sphere for doing what one wants. This relates to the intended parents as well as the surrogate mothers.

As far as the legality of the concept of surrogacy is concerned it would be worthwhile to mention that Article 16.1 of the Universal Declaration of Human Rights 1948 says, inter alia, that "men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family". The Judiciary in India too has recognized the reproductive right of humans as a basic right.

Conclusion

your intellectual friend...
In conclusion I would like to critically analyze those aspects that whole surrogacy arrangement has in it. Firstly, as in my view it is no where immoral on part of surrogate as well as commissioning parents. If the inner voice or the conscience of both the parties to this arrangement agrees then it will not be morally wrong on either side of the parties.

Secondly, there is full liberty to every human being to what he/she wants to do with themselves. It is the right of a woman to decide what is has to do with her body and no one can take any objection over it. But as every right comes with a duty so, there is a duty of a surrogate to take

prior permission from his husband, if she is married and from parents if she is unmarried and these permissions will also keep a check whether the surrogate is being exploited. As every human being is a rational animal. Our integral good not only includes our bodily well being, but also our intellectual, moral and spiritual well being. We are individuals, but friendship and sociability are constructive aspects of our flourishing. Therefore it is essential to maintain a balance between collectivism and individualism. For creating this balance it is very important to make people aware about what surrogacy arrangement in actual and why it is not an immoral act to be a surrogate.

Thirdly, the very argument that comes before this is that only altruistic surrogacy should be promoted and not commercial one. Then I would like to argue that if altruistic surrogacy is accepted then there would be more exploitation of women. Because in most cases, an altruistic surrogacy is done in compulsion of family members and if the woman's wish is absent then also she has to do it for the family relations. And in commercial surrogacy at least the surrogate is getting paid for the labor that she did for another person. And if surrogacy is a contract then in altruistic form the consideration is absent as there will be no monetary or other form of consideration where as in commercial form the monetary compensation from commissioning parents is the consideration for the contract.

Fourthly, a surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child. A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.

One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily comes from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. But in no case the surrogate should be allowed to donate her egg i.e. traditional surrogacy should not be allowed otherwise the surrogate mother will be the genetic mother of the child and can automatically get emotionally bonded with the child and will create more complexities.

All over it's a good arrangement for infertile couple to get their dream come true and to enjoy their right to reproduce through artificial reproductive technology as per their liberty.

