ETHICAL ISSUES IN SURROGACY ARRANGEMENTS-PERSPECTIVES, DIMENSIONS AND SPECTRUM OF LEGAL QUESTIONS

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***Abstract*:** Surrogacy, as a form of Assisted Reproductive Technology (ART), raises complex ethical, legal, and moral questions. This study delves into the multifaceted ethical concerns surrounding surrogacy, which have been magnified by advancements in medical technology. The dichotomy within surrogacy is particularly pronounced, as it simultaneously facilitates human procreation and provokes moral ambiguities related to the disintegration of the child-bearing process. Traditional surrogacy, wherein the surrogate contributes genetically, differs from gestational surrogacy, where the surrogate bears no genetic connection to the child. These advances highlight new ethical challenges, including control, consent, and potential commercialization. This paper examines the moral dilemmas and legal inconsistencies surrounding surrogacy, advocating for a balanced regulatory framework to address competing concerns and ensure the protection of all parties involved, particularly in the context of human dignity and procreation.

Keyword: Surrogacy ethics; Assisted reproductive technology (ART); Gestational surrogacy; Legal framework for surrogacy.

INTRODUCTION

Discourses and state policy on human procreation have entered a new era with the development of the Assisted Reproductive Technologies. These technologies are marked by some glaring questions of morality and a potential to bring about legal inconsistencies. Surrogacy poses itself as one of the biggest challenges within such discourses raising pertinent questions of morality that are inherently consumed by

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dichotomous possibilities[4]. The most difficult feature of surrogacy is the *duality* that is inherent in its very character and this *dual* character is what makes it one of the loaded contemporary issues encapsulating several moral ambiguities of the present times.[5] The unique feature of surrogacy is not so much about its inconsistency with other social values; it is more about the discord that it generates within itself. In this work, the researcher aims to bring about the wide-ranging and over-lapping ethical concerns that surrogacy generates. The idea is to locate the issues, identify the moral questions and dilemmas that they are laden with and determine a path of regulatory framework that will create a space for balancing the competing concerns in this regard.

Surrogacy as a practice although was never devoid of an ethical uncertainty but the major difference that technology has brought forth within the surrogacy rhetoric is the disintegration of child-bearing process in different stages and between distinct set of individuals. In the cases of traditional surrogacy, the surrogate mother contributed her own genetic material along with her gestational service[6]. The medicalised version of surrogacy (also known as gestational surrogacy) does not require the surrogate to donate her own eggs; rather, physicians implant the surrogate with an embryo consisting of the combined gametes of two others who might be third-party donors, the husband and wife seeking the surrogacy services, or a combination of the two.[7] This coupling of technology and surrogacy paved the way for a refined and passive format of reproduction wherein the hired surrogate conceived and gestated a child with the intention of giving that child

[4] Ugbe, Rose Ohiama, Anne Uruegi Agi, and Justine Bekehnabeshe Ugbe. "A critique of the Nigerian Administration of Criminal Justice Act 2015 and challenges in the implementation of the Act." *AFJCLJ* 4 (2019): 69.

[5] Friedman and Squire, *Morality* (Minnepolis, University of Minnesota Press, 1998) in Surrogate Motherhood: International Perspectives, Cook (ed.), Hart Publishing, 2003 pg. 4

[6] It was possible both with or without Artificial Insemination

[7] Suzanne Griffiths & Logan Martin, *Assisted Reproduction and Colorado Law: Un-answered Questions and Future Challenges,* 35 Colorado Law Review 2006 pg 39,40

up to the genetic father and his partner, if any, at birth[8]. With this set-up, the paradoxes in the surrogacy phenomenon become almost apparent.

As the "practice of surrogacy predated the technology" it becomes equally logical therefore to presume that public concern about surrogacy also predated the advent of IVF surrogacy as even in the contemporary context such concerns are not, only technology specific. Anne Maclean[9] has identified surrogacy as complex and difficult because it raises not one issue but a cluster of issues, and issues of different sorts at that. "It is easy to confuse considerations relevant to one of these issues with considerations relevant to another, or to misunderstand the character of a particular claim or a particular objection." In order to visualize largely about the conflicting narratives of surrogacy, the researcher attempts to examine the modern-day issues surrounding the practice.

SURROGACY: COMMERCE & SURROUNDING CONCERNS

The beginning of a discussion on surrogacy essentially calls for identification of the problem- elements that brings the practice to scrutiny and arouse public anxiety. Is it "the arrangement" that is deemed problematic in general? Or… is it "the technological inroads" into the private realm that makes surrogacy an uncomfortable set-up? Is it the "economic dimension" that triggers the morality debate or is it simply the ambiguity with respect to identifying owners of gametes (that are seeds of human life) and creating newer avenues that challenge the family framework?

The variety within the trends of public outcry on surrogacy suggest that there is not one composite moral issue called surrogacy; the moral concerns varies greatly depending on the type of surrogacy in question, the relationships of the parties involved to one another, and whether or not it is a commercial transaction[10]. This variety engages

[8] In traditional surrogacy, the surrogate contributes the egg and carries the pregnancy to term. She is both genetic as well as gestational mother of the child. IVF surrogacy on the other hand, requires only a surrogate‟s gestational services, thus establishing no genetic link with the child.
[9] Maclean. A, *The Elimination of Morality* (London, Routledge, 1993) in Morgan Derek, Enigma Variations: Surrogacy, Rights and Procreative Tourism, Hart Publishing, 2003, p.122
[10] *Ibid*.

wider concerns that culminates into bringing out differing sorts of objections that carry different force in different circumstances[11]. Established literature on surrogacy bring out some circumstances that the researcher categorizes into these: one woman can give birth to her own sibling, or a grandchild, or a nephew or a niece and this is acceptable in many societies as a straightforward substitution or a help to another family member towards fulfillment of her procreative intent. This kind of set up, which is also designated as altruistic surrogacy is generally accepted in many societies for it presumably, signifies noble intentions and well-thought out decision making on the part of both the parties rendering the arrangement relatively free of legal entanglements. Also, this kind of arrangement within the family makes it more inclusive, less alienated and keeps it away from the public glare. It is thereby the consolidation of an industry around surrogacy and the monetary dimensions that figure in the newer, more passive and alienated versions of surrogacy is what opens it up for a critical legal examination.

The first sparks of public concern therefore flew with the prominent attempts to "commercialize surrogacy arrangements" by means of brokering agencies in the Britain and America in the 1980s[12]. Contract surrogacy in the U.S. emerged around 1976 and by the end of 1981 it resulted into approximately 100 children born of these arrangements.[13] Contract surrogacy imbibed the features of commercial surrogacy, wherein the women would consider becoming a surrogate for a fee, and the movement towards surrogacy is said to have been snowballed further since then.[9] This trend of attaching commerce with this private human activity created the first ripples of anxiety that were to cling on to the surrogacy phenomenon for as long as it exists. There is a four-pronged explanation to reason out why surrogacy became controversial when it did, despite the fact that in its initial decades or rather centuries it did not necessarily involve any of the new advanced reproductive technologies.

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[11] Okom, Michael P., and Rose Ohiama Ugbe. "The right of establishment under the ECOWAS protocol." *International Journal of Law* 2.5 (2016).
[12] Lane Mellisa, *Ethical Issues in Surrogacy Arrangements*, in Surrogate Motherhood: International Perspectives, ed. Cook and Sclater, Hart Publishing, 2003, p. 121.
[13] Field, Surrogate Motherhood, p.5, Harvard University Press, Expanded Edition, 1990.

First, was the introduction of commercialization itself?[14] This "added" aspect to the "practice" of surrogacy seemed to convert it into an "enigmatic phenomenon" that further lead to a roaring "industry". Visualizing the possibility of this remarkable growth in human assisted reproduction several committees and commissions were established that highlighted the prospects of exploitation inevitable with commercialization. Commerce in a procreative context aroused corollaries with organ trade, baby selling and drew comparisons with the existing anti-trafficking legislations.

Second is the fact that since the new reproductive technologies, involved the "manipulation" and "handling" of "human gametes and embryos outside of the body", which "raised the problem of moral responsibility and legal ownership"[15]. Surrogacy instantaneously raises the property rights arguments with the populist slogans of "renting the womb". The common law traditions explain the property arguments over human body however many of these influences fall in the category involving issues such as slavery, exploitation, commodification (of women and children) and degradation of humanity.[13] These discussions over property in the human body are also inextricably entwined with a spectrum of moral values that have intruded into the surrogacy debate. Alongside this issue of reproduction across traditional bodily boundaries, surrogacy also seems to have stirred an inchoate anxiety about a *third* issue: reproduction across traditional social boundaries relevant to procreation[16]. Unlike the anonymous donation of gametes where the birth mother intends to raise the child, surrogacy explicitly puts birth outside the boundary of the marriage and allows a child to be intentionally procured from beyond that boundary. This [third] issue shall be exclusively dealt with in detail in the subsequent chapter on Parentage. This issue deserves a worthy mention as it entails a striking contrast: that stems from the fact that the common law regimes across the globe have evolved, in the context of marital presumptions and abandoned the difference

[14] *Supra* note 7 at p. 122.
[15] See *Supra* note 7
[16] Owa, Dr Owa Egbara, et al. "Nigeria's External Relations: Dynamics And Challenges." *Journal of Namibian Studies: History Politics Culture* 33 (2023): 3019-3038.

between legitimacy and illegitimacy by rendering the birth mother as the natural mother and her husband as the father[17]. This disparity creates a difference in the understanding of the meanings appended to father and mother in the legal sense.

The *fourth* element is concerned with the nature and value of the ***intentions*** which surrogacy involves, and in particular uneasiness about the intentionality displayed by a woman who chooses to allow herself to be made pregnant for the specific purpose of giving up the child to others to raise. This view was reported by the British Warnock Committee: "in such an arrangement of surrogacy a woman deliberately allows herself to become pregnant with the intention of giving up the child to which she will give birth, and this is the wrong way to approach pregnancy."[1819] The moral pedestal on which pregnancy is rested and valued by a civilized society is deeply rooted within the surrogacy rhetoric. In one of the pioneer English judgments on surrogacy famously called the Baby Cotton[20] case, the inherent dichotomy that surrogacy offers has been articulated as follows:

> "It is a strange phenomenon that a woman bearing a child from a donated egg convinces herself that she is the true mother as she gives birth to the child, whereas it is the exact opposite in host [here, "IVF"] surrogacy, when the surrogate mother is pregnant with a transferred embryo. After the birth she is just as positive she is not the true mother."[17]

This strangeness of the phenomena bothers most of the writers and researchers even now. They are divided on this very notion of strangeness, which makes in for the first issue for our examination. "IVF" surrogacy, in which both egg and sperm are provided by the intended/commissioning parents, shares these fundamental features with "traditional" surrogacy. For the purposes of this research however, the focus shall be on "IVF"

[17] *Ibid.*
[18] Report of the Committee of Inquiry into Human Fertilisation and Embryology, Para 8.18, and Para
[19] .19, pp.44-45, 1985
[20] State of Maine v. Sherrie R. Cotton 673 A.2d 1317 (1996)

(gestational) surrogacy as that is the prevailing version in most of the countries including Nigeria.

For de-constructing the ethical dilemma the researcher shall take each element distinctly and build an argument for placing surrogacy under strict legal scanner of the state. So far, the definition of surrogacy has been seen in relation to similar practices of gamete donation and adoption. The impact of surrogacy however is beyond the definitional bounds where the social and cultural questions are based. This and the following segment will consider these questions but before that it is imperative to view the global political craftsmanship over this surrogacy in order to determine the legal space within which surrogacy can or may dwell.

SURROGACY AND LAW: A BIRD"S EYE VIEW OF THE GLOBAL POLICIES AND POLITICAL APPROACH

Proliferation of ARTs and surrogacy practices across the globe has rendered the various countries to endorse their respective political views by either recognizing surrogacy as a matter of public policy, or prohibiting it or by simply maintaining the status quo in this regard.[21] There is a growing acceptance in India about the fact that surrogacy has an ethical agenda and difficulty in determining the exact contents and parameters of such agenda seems to have been a major factor in the failure to develop a full-fledged law on surrogacy. The emergence of the refined format of IVF (gestational) surrogacy is still considered as an off-shoot of the more condemnable traditional (full) surrogacy, thereby making the legislators hesitant in laying the legal foundations, for the phenomenon to be governed. This, coupled with other socio-political factors encapsulates surrogacy with several legal apprehensions.

[21] Refer the World Map, displaying various political positions with respect to commercial surrogacy by the countries.

There is no uniform position on surrogacy and the global policy seems to be starkly divided. The political stance on surrogacy is witnessing unprecedented dynamism as newer problems or situations are unfolding causing multi-dimensional waves in the political scenario of the world. It is changing by every passing day. After the completion of the first draft of this research, so many newer situations arose, such newer forms of exploitation or discrimination came to light that the countries (which remained silent about the issue) had to eventually take a stand or amend their political opinion in a certain direction[22]. The surrogacy phenomenon across the countries seems to be governed by a collage of contrasting political stances which fall into various categories of legal policy- one can, for example, understand the U.S position to gather the spectrum of legal values a country can offer. At the global level, the position oscillates from out-right "prohibition" to "permitting" the practice in its altruistic and sometimes even commercial formats, thereby inviting the wrath of the "ethics" brigade. Within the extremes of "permission" and "prohibition", there also lie a variety of subtler positions (of countries) that cover a varying range like state "inaction", maintaining the status quo, passive resistance, tacit agreement, *et. al*[23]. The position also differs on the category of Surrogacy, like some countries regulate only gestational and altruistic forms of surrogacy, for the other civil as well as penal sanctions are imposed for commercial services. Then there are some countries which clearly ban surrogacy for homosexual partners and are silent on the heterosexual ones[24].

Within the United States for instance, there are found a variety of positions pertaining to surrogacy in different states[25], some recognize it; some proscribe it. In the global

[22] Thailand is the latest country to have witnessed the down-side of transnational surrogacy, thereby declaring a ban on the practice as recently as September, 2014. For further information *see* Times Global, Dated: October: 10, 2014.

[23] Owa, Owa Egbara, et al. "Impact of the 2014 Pension Reform Act on Workers' Commitment, Retention and Attitude to Retirement in Cross River State, Nigeria." *Ianna Journal of Interdisciplinary Studies* 6.2 (2024): 293-301.

[24] For pictorial depiction *see* World Political Map for further clarification.

[25] Rao, *Surrogacy Law in the United States: The Outcome of Ambivalence*, in Surrogate Motherhood: International Perspectives, ed: Cook & Sclater, Hart Publishing, 2003, p.23.

scenario, the surrogacy phenomenon as a political question could be categorized into essentially four broad categories of legal policy: (1) prohibition; (2) maintaining the *status quo*; (3) regulation[26]; (4) private contractual arrangements. There are however, other subtler positions as well on the same.

(I) Prohibition or Abolition:

Many countries the world over have abolished the practice of surrogacy either by means of an outright ban on the practice or by imposing civil and criminal penalties on persons who enter into or facilitate surrogacy contracts.[27] States like France, Hong Kong, Hungary, Iceland, Italy, Japan, Belgium, Netherlands, Pakistan, Saudi Arabia etc. ban almost all forms of surrogacy and declare the practice as illegal. During the course of this research, Thailand and Australia, among others were the prominent countries that banned commercial surrogacy and brought about legislations on the same.

Within the United States, there are some states that flatly prohibit all forms of surrogacy, whether for compensation or not, though it is unclear whether a blanket prohibition that is unaccompanied by civil sanctions or criminal penalties differs in any significant respect from the mere refusal by the state to enforce surrogacy contracts. More common are the statutes that proscribe only commercial surrogacy; a number of these also impose civil sanctions or criminal penalties upon those who participate in or procure such agreements. The prohibition of *commercial* surrogacy has been hailed by a "significant some"[2829] to be constitutionally valid. In *Doe v. Kelley*,[29] for example, the court considered the constitutionality of a statute prohibiting the exchange of money in connection with adoption. A married couple challenged the law on the grounds that it interfered with their right to reproduce by means of surrogacy, but the court found the

[26] These states include Florida, New Hampshire, and Virginia.
[27] *Supra* note 7 at p. 24
[28] Tuininga Kevin, *The Ethics Contracts and Nebraska's Surrogacy Law*, Creighton Law Review, Vol. 41, p. 185, 2008.
[29] N.W.2d 438 (Mich. Ct. App. 1981).

law to be constitutional[30] because it did not forbid conception of a child- it merely precluded the payment of a consideration to transfer parental rights over the child.

Similarly, countries like France and Germany, two of the most competitive nations with respect to scientific research also prohibit all forms of surrogacy and render any contract in this regard as unenforceable almost using the same rationale. The U.S and Germany, with almost similar economic patterns, have reached two polarizing conclusions on how to best balance the benefits and risks of surrogacy. The U.S. believes that the *good* of giving those otherwise unable the chance to have a family outweighs any drawbacks resulting from free market regulation alone. Germany believes that the harm of commodifying women and children, along with the eugenic implications outweighs any of the benefits.[31] A large number of countries prohibit all forms of surrogacy citing these reasons; they have been depicted in red. However, there are some countries that only proscribe the monetary transaction in such services; these states have been depicted in yellow in the Map.

(II) Maintaining the "status-quo":

Although a clear political approach proscribing and even criminalizing surrogacy exists in many states, the predominant attitude across some countries appears to be one of stateinaction or simply maintaining the *status quo*. These states are awaiting a concrete political will to legislate on the issue. These states neither provide for an outright prohibition nor unequivocal permission, but rather maintain silence on the issue by declining to enact specific rules that would allocate parental rights and responsibilities.[32] There is no clear policy and political will to deal with the subject. In fact, this category involves many different positions indicating *state inaction.* Even the statutes that simply

[30] *Id.* at 441.

[31] Mc Dermott Hannah, *Surrogacy Policy in the United States and Germany: Comparing the Historical, Economic and Social Context of Two Opposing Policies*, Senior Capstone Projects, Paper 137, 2012, pg. 3

[32] Rao, *Surrogacy Law in the United States: The Outcome of Ambivalence*, at p.30 in Surrogate Motherhood: International Perspectives, ed: Cook & Sclater, Hart Publishing, 2003.

prohibit surrogacy without imposing civil sanctions or criminal penalties are consistent with this pattern.

There are few other state courts that find surrogacy contracts to be legal but unenforceable, and even state legislatures fail to prescribe specific rules governing the allocation of parental rights and responsibilities in this context. New York represents such a position. New York law holds that surrogacy contracts are not penalized, but neither are they enforced. Sweden, among some others is one such country where surrogacy is not clearly regulated. The legal procedure most equivalent to it is making an adoption of the child from the surrogate mother. However, the surrogate mother thereby has the right to keep the child if she changes her mind until the adoption. Ireland is another such state where there is practically no regulation. Yet, the biological father may claim right to the child. It is however, illegal for Swedish fertility clinics to make surrogacy arrangements. As a result, courts must look to background principles of family law to assign parental rights when a surrogacy arrangement sours. The second approach thus consists of a struggle to maintain the status quo: the state seeks to withdraw its support by refusing to enforce surrogacy contracts and by declining to prescribe specific rules governing the allocation of parental rights and responsibilities in this context- a visible inaction by the stateUnder the third approach, individuals may enter into state-approved surrogacy contracts that contain mandatory terms and create pre-ordained status relationships.[33] This allows the state to channel surrogacy into particularly favored forms and to encourage voluntary compliance with its regulations by facilitating legal recognition of those surrogacy arrangements that comply with the statutory requirements. Most of these laws set limits upon the age and marital status of the parties to a surrogacy arrangement, require the intending mother to be incapable of gestating the pregnancy without physical risk to herself or the fetus and mandate that the parties be physically fit and psychologically suitable to parent a child. Unlike adoption however, many (most) of these statutes emphasize genetic ties, enforcing surrogacy contracts only when one of the

[33] Rao, *Surrogacy Law in the United States: The Outcome of Ambivalence*, in Surrogate Motherhood: International Perspectives, (ed.) Cook, Taylor & Kaganas, Hart Publishing 2003, p. 28

intending parents possesses a genetic connection with the child. Countries like India (although still does not have a statute), Israel, Florida (in the U.S.) etc. advocate for such an approach of status regulation. In fact Israel is credited as one of the first countries in the world to have introduced a fully-fledged regulatory regime for approving surrogate motherhood. The main intention behind establishing such a regime is the realization of vulnerabilities involved and extending optimal measure of protection for each group[34]. Such regimes endeavor at achieving the right balance between the interests and rights of each group and then examine the areas of tension between the interests and rights of each group.

(IV) Governed by a Contract:

This could also be termed as the neo-liberal approach, wherein the *laissez faire* state takes the rear seat and agnostically enforces whatever individual agreements are negotiated in the free market, limiting its own role to that of enacting regulations to provide for complete information and ensure true consent. In this format, the contractual arrangement between the parties becomes the foremost instrument of governing the rights and obligations of the parties.[35] This approach has brought in a lot of wrath from the ethical front as the state seems minimalist in the entire sequence of events and leaves everything in the hands of private players especially the medical fraternity, furthering the vulnerabilities of the parties. The state of Nevada has enacted a statute that provides that "a person identified as an intended parent in such a contract…must be treated in law as a natural parent under all circumstances." In so doing, it appears to authorize enforcement of any terms of the contract to which the parties agree, rather than ordaining in advance the results of all surrogacy contracts. However, even in such situations there may be problems with respect to enforcement of a surrogacy contract that is completely governed by the will of the parties. For example, is difficult to envisage enforcement of a

[34] Edet, Joseph Ekpe, et al. "From Sovereign Immunity to Constitutional Immunity in Nigeria: Reappraising the Gains and Pitfalls." *Migration Letters* 21.S2 (2024): 615-625.
[35] *Id* at p.30

contract that would require a surrogate to carry the pregnancy to term or force her to have an abortion on request of the parties who intend to rear the child, for such a consequence would likely be unconstitutional. And although other states appear to achieve outcomes that are identical in their effect to enforcement of the surrogacy contract, they generally reach this result by applying principles of family law- which are largely status-based- rather than principles of contract law. California symbolizes this position.

Thus, one is forced to agree that surrogacy as a medical technique represents many view points; it is however, the social value of the technique that is differently perceived in different countries. The basic points of difference in the legal positions arise out of the concerns of "commercialization" (in other words, vulnerability of women and children), issues of bodily autonomy, validity/legality of contracts, and proprietary interests over human body. All this put together presents ethical paradoxes that crosses over from the domain of medicine and enter into the moral fabric of the society.

It is now appropriate to begin with examining some of the dimensions within which surrogacy arrangement operates and identify the ethical questions within the same. The foremost tangible instrument in this regard is the Contract that determines the rights and obligations of the parties in the scheme.

SURROGACY CONTRACTS: A LEGAL ANALYSIS

The dramatic possibilities that the historic Baby M case offered, brought forth in a big way the vulnerabilities of the people involved and the necessity of a clear mechanism to handle surrogacy arrangements. Although the afore-mentioned case reflects an instance of traditional surrogacy where the surrogate is also the egg donor, the rights and emotional entanglements in a surrogacy arrangement are nonetheless well known. In the debate over surrogacy, the different perspectives about the nature of human choice tend to become entangled with moral judgments about the mother"s decision to relinquish all her claims over the child.

With the rise of surrogacy as an industry, the practice and the parties involved, and their specific interests, is becoming all the more streamlined. In simple terms, surrogacy involves *a promise* or [tacit] *understanding* between the *commissioning parent/s and the surrogate* to ***surrender***[36] the *baby* and *all the rights arising thereon* to the former. A standard definition of surrogacy offered by the American Law Reports state: "*a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child"s birth*." [37] This was generally *in lieu* of an understanding that the commissioning parents will shoulder the responsibility of the medical expenses of the surrogate in this regard. Since the arrangement tends to be so private and almost secretive in nature, it becomes next to impossible to de-mystify the structure of the arrangement between the parties. Now, since the law of contract falls in the domain of commerce and industry surrogacy falls more in the domain of family as it entails creation of a family relation, makes a surrogacy contract unique from other contracts.

"UNIQUENESS" OF A SURROGACY CONTRACT:

The essence of contract law is based on the assumption that the most effective way to govern certain types of relationships is through private agreements.[38] Principally therefore, contracts envisage diversity and flexibility in the nature of the agreements to be enforced, and where there is an underlying confidence that the parties, left to their own devices, will reach *acceptable* bargains.[39] Therefore, contracts between parties with similar bargaining power are regarded as the clearest expressions of socially desirable

[36] Emphasis Supplied
[37] American Law Reports, *Validity and Construction of Surrogate Parenting Agreement*, 77 A.L.R. 4th (1989).
[38] Carbone., *The Role of Contracting Principles in Determining the Validity of Surrogacy Contracts*, Santa Clara Law Review, Article 3, Vol. 28, Number 3, 1988, pg. 581.
[39] *Ibid*.

agreements.[40]Enforcement of such private agreements therefore, offers an effective way to encourage productive exchanges.

The reach of contract nonetheless was limited to commercial exchanges and was difficult to envisage in a family scenario. Within the family law scenario, the term contract has traditionally been heard of in a limited capacity with respect to Muslim *Nikah*[41] however, the *Nikah* institution has significant religious overtones as well. In most of the other aspects concerning the family, the contract law has not been applied. Most of the agreements within the familial zone were held to be void due to public policy concerns and the difficulty in finding a real legal intent. Even pre-nuptial agreements faced an uphill battle for recognition,[42] in India they have been criticized for being fundamentally against the sacramental nature of marriage.

Far from encouraging diversity and flexibility, the law has fixed family relationships and obligations, treating these matters as too important to be left to the whims of private individuals. Another important aspect of contract that did not fit well within the family structure was the aspect of "equality of bargaining power".[43] With a patriarchal structure of a family, the contract law recognized its limitation in placing the interests of individual family members on an equal footing making it rather difficult for constructing a foundation for a contract.[44] It is status, rather than contract that has governed the family.

However, in the latter part of the twentieth century, due to industrialization and economic re-structuring, the structure of the family has seen some major changes. The family no longer governs the major source of wealth and it is employment that has replaced property as the most important source of income.[45] The formation of newer kinds of families not strictly confined to marriage and kinship ties have rendered visualizing families in the traditional notions as redundant. The law now, to an extent,

[40] *Id.* at 583
[41] *Abdul Kadir* v. *Salima*, (1886), ILR 8 All 149
[42] See *Supra* note 38.
[43] *Ibid.*
[44] *Ibid.*

balances the interests of individual family members on a far more equal scale and to an increasing degree, diversity and flexibility characterize intimate relationships generally and reproductive matters in particular. These changes suggest that the law of contract can play an increasingly important, though as yet undefined, role in managing such private matters.

Now, locating surrogacy within this context, the discussion emerges with an eclectic mix of fiscal possibilities, familial dimensions and moral elements directly addresses the question of whether intimate matters such as those concerning human reproduction can be completely left to the parties to the agreement. The basic question here is about the state interest in governing surrogacy and to what extent can it be left to the parties for their private governance.

Surrogacy contract, as understood is a *pre-fertilization arrangement* made between a couple and a surrogate, with the intent of relinquishing the child at its birth. Therefore, enforcing a surrogacy contract like any other would bring in an underlying presumption that such relinquishment would lead to proper results for the child and is in consonance with the state's interest in fostering a rightful family for the child. Since, a child is the *"object"* of this kind of an agreement and a familial (mostly a biological) relationship created via contract, is what makes it a peculiar set-up.

Though proponents of freedom to contract suggest an unbridled freedom (of contract) in the absence of significant harms caused by that practice, and they presume that no such harms are caused in the case of surrogacy.[45] A contract that provides for the conception of a child through a surrogate arrangement is consistent with the state interest in ensuring that the child will be adequately cared for. In surrogate arrangements, the child is conceived through a process involving clear thought and consideration by the commissioning parents; the pregnancy is well planned and is neither unintended nor accidental. Thus, this view suggests that the overall intent of surrogate contracts is consistent with the traditional notions of family responsibility.

[45] See *Supra* note 7 at p. 128

Principally speaking, the surrogacy contracts need not involve payment of a significant fee; a private arrangement for a meager consideration (medical and other miscellaneous) expenses would qualify (the way it is done in altruistic surrogacy), and one might argue that the general freedom to transact includes the freedom to make non-commercial arrangements of the same kind as any permitted contractual arrangement. The freedom to transact through surrogacy and the freedom to contract of a woman with another on this view derive from a common source in freedom of contract and the freedom to exercise her autonomy. This is more specifically so, in cases of gestational surrogacy contracts.[46] Considering the societal interest in giving a child to the most appropriate care-givers and failure to locate significant harms in such transactions, the proponents of contractual freedoms justify the sanction of such contracts.

THE ENFORCEABILITY OF SURROGACY CONTRACTS:

There has been no case precedent that finds a detailed analysis on the validity and enforceability of the surrogacy contracts, therefore predicting a hypothetical scenario and analyzing the probable problematic areas in surrogacy contracts becomes an imperative task. Enforcing surrogacy contracts like any others like contracts for ordinary commercial services or for the exchange of a chattel would, to simply put, benefit the commissioning father and his wife. But it is strongly argued that contract law should not apply or should apply differently when a transaction involves conceiving, delivering, and surrendering a baby than when it involves barter of commercial services, or a chattel or a piece of land. Under traditional contract law, surrogacy arrangements would appear to be enforceable. But contract law makes exceptions for exploitation or unconscionability, and it is a familiar principle of contract law that public policy sometimes dictates that the parties" bargain not be followed or that it not be binding. Constitutional arguments can be formulated both to support the position that surrogacy contracts must be enforced and

[46] Lascarides, *A Plea for the Enforcement of Gestational Surrogacy Contracts*, Hofstra Law Review, Vol.25, Issue 4, 1997, p.1224

to support the position that they cannot be. Moreover, existing laws prohibiting babyselling could be interpreted to encompass surrogacy arrangements and even to make them criminal; or they could be held not to apply at all.

The most forceful arguments against surrogacy arrangements are that they violate public policy that the balance of interests is such that society should invalidate the contracts. Reasons of public policy will probably also govern whether baby-selling provisions are interpreted to apply to surrogacy. Policy determinations involve balancing society's perceived needs against the interests of the parties in making their own bargain, a process that requires both identifying those needs and evaluating their import.

As far as surrogacy contracts are concerned, proponents of surrogacy often defend the contracts as involving pay for services in conceiving and carrying the child to term and not for the surrender of the child. Others say that the arrangement involves "rent" and not the sale of a product (here, child). Obviously therefore, surrogacy contracts can be characterized either as contracts for services or as exchanges of money for a child. Whether a particular arrangement is punishable as baby-selling, organ selling and the like, should depend on something more substantial than the wording of any given contract.

THE HUMAN BODY: TRANSACTING IN A COMMERCIAL SENSE

In this part of the segment, a yet another important aspect of ethical concern shall be dealt with pertaining to the human body- its identity, value and normative questions that come along with it. The most difficult dilemma that surrogacy creates, is with regards to permissible ways to use human body. This makes it rather essential to analyze the dichotomy between usages of a human body for fulfilling another's procreative requirements with the historic argument of property and autonomy over the body. The relationship between the concept of "self" and physical entity known as the "human body" brings about several examples of moral, ethical and legal recognition. In particular, the central position in medical law which is articulated in the principle of respect for patient's autonomy determines that the individual patient has the ultimate right to

control his or her body and what is done with it or to it.[47] Primarily, that control is exercised through the concept of "consent to" and its correlate, "refusal of", say…treatment or what is to be done to his/her body. Therefore, in this part of the discussion, the researcher undertakes to examine this concept of *consent and freedom to use one's body* in surrogacy for money or otherwise.

In a basic market scenario, as Martha Nussbaum puts it "*all of us, with the exception of the ones who are independently wealthy and the ones that are unemployed, take money for the use of our body. Professors, factory workers, lawyers, singers, prostitutes, doctors, legislators everyone does things with parts of their bodies for which they receive a wage in return*."[48] Some people get good wages, and some do not; some have a relatively high degree of control over their working conditions, and some have little control; some have many employment options, and some have very few. And some are socially stigmatized, and some are not.[49] There are some such professions that fall in the border-line category between acceptance and stigmatization. In the earlier days, women who performed on stage as opera singers or danced in clubs were stigmatized. In the contemporary scenario, taking bar dancing for example, howsoever it may be stigmatized, the apex court in India, in a recent ruling has upheld the rights of the bar dancers lifting the ban on bar dancing in the State of Maharashtra. Likewise, there have been many activities that are stigmatized by the society, thereby causing one to evaluate the social and moral values that the activity/profession entails. The use of woman's body as a commodity is a consequence that the feminists have resisted as well as debated consistently. So therefore, many of the moral questions that are raised in the surrogacy scenario are specifically because of the commerce that is involved in the process.

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[47] Skene, *Arguments Against People Legally "Owning" Their Bodies, Body Parts and Tissue*, 2, MacQuarie LJ, 2002, p. 165

[48] Nussbaum, *"Whether From Reason or Prejudice": Taking Money for Bodily Services*, Journal of Legal Studies, Vol. 27, January 1998, p. 693-694

[49] *Ibid.*

For women to earn money through the use their bodies or the the products of their bodies is not unique to surrogacy or even prostitution[50]. During the eighteenth and nineteenth centuries, poor Frenchwomen "*often sold not only their bodies, but, as their charms began to fade, even their teeth-to be made into dentures for the wealthy elite*."[119] Barbara Katz Rothman has suggested that reproductive technology, including surrogate motherhood, is the first step toward a "*developing ideology in which we are learning to see our children as products, the products of conception"; moreover, "when we talk about the buying and selling of blood, the banking of sperm, the costs of hiring a surrogate mother, we are talking about bodies as commodities. The new technology of reproduction is building on this commodification*"[120].

This commodification argument features at the core of a quintessential ethical question and draws flak for its disrespect to the physical or precisely "reproductive" being of the woman. With this premise, the researcher proceeds onto investigate upon the dual questions of "bodily autonomy" and "exceptions to the rule of individual self-determination" through the lens of commercial surrogacy. Therefore, amongst several unique features of a surrogacy arrangement, in this section, the focus shall be upon two of them: *first*, is the medical stance of patient autonomy as far as usage of her body is concerned. For the present purpose, the researcher claims that the body *in which* gestation occurs and the body *from which* the genetic material has been extracted both qualify for the purposes of claiming (proprietary) interests over the (biological and other) components of each (i.e. their bodies and bodily materials).

Secondly, there is a need to focus upon the potential of commerce over the body or part of such body. If a human being is allowed to use his or her body for attainment of self-fulfillment in keeping up with the principle of autonomy- can this use extend and cater to the legal argument about body as "property" and thereby commercial usage of the same be permitted?

[50] The researcher is not stating that surrogacy and prostitution are the same. She is only using the two phenomenon to draw the analogy pertaining to the commodification argument.

SURROGACY & CONSTRUCTION OF THE HUMAN BODY:

When modern day surrogacy gained a sudden prominence in the *Baby M* controversy in 1986, one of the underlying questions that the case brought forth is of autonomy over one's body (here reproductive) and bodily materials (in such cases eggs and sperms). *Baby M* raised a subtle but crucial question of bodily autonomy and proprietary potential of a product of one's body. As the parties to the dispute, Sterns and Whiteheads went ahead with their contractual arrangement, the surrogate (Mrs. Whitehead) had reported to have stated "…seeing her, holding her, she was my child." "I signed on an egg. I didn't sign on a baby girl, a clone of my other little girl."[51] Later on she explained to the court that "she would not feel whole" if she gave up her child. Deeply anguished by all the proceedings, Mrs. Whitehead suffered heartache and claimed to have stated that "she has been chosen by God to show people not to do surrogate mothering."[52]

Taking a literal interpretation of Mrs. Whitehead's statement goes on to infer a certain/deeply valued interest over a part and product of her body i.e. the womb, the egg (in this case both of which was hers) and the resultant outcome- a full grown embryo, to her sense of being. Although *Baby M* represents a case of full surrogacy (where she served as both the genetic and gestational mother), it is still pertinent case on the point of submitting one's reproductive autonomy by virtue of a contract and for money. She makes a very poignant statement whereby a tender yet affirmative connection is indicated of the classical common-law slogan of "I own my body"[53] and *all that "is" and "from" my body is my own*[54] in a modern technologically advanced context.

In a surrogate arrangement, the use of a female's womb for a temporary period in a contractual understanding (in lieu of a monetary compensation) brings in a lot of similarities with say, a trade in organs, with an added possibility of emotional entanglements. The womb of a gestational carrier is "hired" for a particular period by the

[51] Michele Galen, "Surrogate Law: Court Ruling," *National Law Journal,* September 29, 1986, p. 8.
[52] Report of Phyllis R. Silverman for use in *Baby* M litigation, October 23, 1986, p. 3.
[53] George, *Property in the Human Body & Its Parts: Reflections on Self Determination in Liberal Society*, EUI Working Paper Law No. 2001, p. 20
[54] Emphasis Supplied by the Researcher

commissioning parent/s and she is thereby expected to adhere to the contractual requirements with respect to the usage of her own body for the stipulated period. In this transaction, part of the human body (womb or uterus) is transacted upon in a very temporary setting unlike an organ transplant kind of a set-up, which is more permanent in nature.

CONCLUSION

The theme pervading this segment of the discussion, to be precisely put, is about control. Property is a powerful control device for the bundle of rights that it confers. It also carries a particular message of the potential for commerce, trade, market oriented advantage and disadvantage. To recognize a property claim to a material is to support a normatively strong connection to that material and accordingly, to establish, a strong, justiciable legal interest. The recognition of these interests will, it is largely understood, go a long way in preventing exploitation or other harm which can include the "harm" of disrespect for the dignity of the procreative code of conduct, human organism and the being at large. Arguments and instruments such as contract and requirement of consent are more often used to delineate rights and resolve conflicts. However, there is still some force in the property perspective especially when there is a deadlock within the other legal concepts in finding appropriate solutions and resolve the ethical dilemma. Surrogacy has some elements of how laws on organs operate, some features of the traditional contract regime and some very sharp ethical questions, besides, of course conflicting positions of parties and states. It is thereby imperative for the state to carve a comprehensive framework and establish a uniform political will with respect to the rights and extent of permissibility of this practice, which is also in consonance with the larger constitutional scheme of the land.

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