

State, Surrogacy and Settlement: A Question of personal liberty or public policy

Shubhangi Gaur¹

Varun Raina²

Synopsis

Introduction	51
To do or not do: The dilemma of Right to procreation extending to artificial reproduction..	52
Personal Liberty and right to procreate	52
Jurisprudential philosophy behind right to procreation and State interference	53
Contracting out of Surrogacy Agreement: Enforcing unnatural arrangements or Insufficiency of Contract Law?	55
Looking for solutions: Surrogacy as a fiduciary Relationship.....	58
Conclusion	59

¹ Student, Army Institute of Law, Mohali

² Student, Army Institute of Law, Mohali

Abstract

In the modern contemporary society each individual has been afforded with a constitutional guarantee of right to personal liberty. The present paper seeks to examine the depth of this right so as to explore whether it can extend to validate 'commercial surrogacy agreement'. A balance between an individual's right to procreate to further a genetic lineage and society's perception of public interest and morality is a central point while considering validity of surrogacy contracts. We approach the idea of neither banning nor criminalizing 'commercial surrogacy' by treating such arrangements as settlements rather than contracts. The primary reason for such an approach lies in the fact that by treating them as settlements it becomes a fiduciary relationship between the parties. It is an arrangement of non-specific performance and is voidable at the instance of surrogate mother i.e. to say there is no guarantee that surrogate mother would waive her parental rights. The fundamental reason for providing such rights to surrogate mother lies in the argument that commercial surrogacy occurs due to economic compulsion forcing women to become surrogate mothers, which is degradation of their human rights. This implication of unequal bargaining power is sought to be balanced by providing the surrogate mother such rights and also preserving her free consent while keeping in mind her physical, psychological and sociological health. Such safeguards place her on a higher footing than the commissioning parents. Moreover, treating commercial surrogacy as a settlement between the parties distances it away from the idea of treating surrogacy as mere 'baby selling and purchasing' activity or regarding surrogate mother as mere 'foetal incubator'. Such a reference to surrogacy arrangements brings it much more closer to public policy and there by avoids the question of invalidating surrogacy on grounds of immorality as provided in section 23 of The Indian contract act, 1872. We further delve into the idea of state intervention over a woman's right to be able to use her body for gestational services. We examine the aforesaid proposition jurisprudentially, in context of the Indian Constitution and in accordance to the already laid down judicial precedents on personal liberties. Due consideration has also been accorded to the draft bill on

Artificial Reproductive Technology, 2016. The State being a welfare state should not ban or criminalize commercial surrogacy for another important reason that where there is meeting of minds and it favors everybody it should be promoted rather than being discouraged. In furtherance of this we present a stakeholder analysis in favor of commercial surrogacy. A pressing concern arising out of such an analysis is the aspect of human trafficking. However, it is the prerogative of the state to keep in check of such mafias from existing or thriving. What needs to be criminalized is the manner in which commissioning agents or middlemen earn through surrogacy arrangements. Lastly, we propose a settlement agreement which may be enforceable by courts only in cases to protect the best-interest-of-child.

Introduction

The grey area of surrogacy contracts and their validity becomes a complex cobweb of laws ranging from Human Rights jurisprudence to State interference in autonomy of such rights. Owing to such reasons, legality of surrogacy arrangements becomes more difficult. This is primarily why it had been left untouched by legislators. Another important reason for avoiding the Pandora's Box is because of a lack of consensus on balancing the right to reproductive self-determination and enforceability of contractual obligations in such an arrangement. Much of the views presented on the issue of validating surrogacy contracts rest on a wrongful presentation of constitutional rights versus contractual obligations. In the present paper we clear the mist from the issues by presenting that the enforceability of commercial surrogacy contracts flows from constitutionally guaranteed reproductive rights. The aforesaid proposition rests on a careful analysis of right to procreate and how it extends to waiver of contractual obligations. In furtherance of such an analysis we advocate the validity of commercial surrogacy and why State interference in such a regard is to be diluted, from a jurisprudential standpoint. Thereafter, we explore the issues and arguments raised against commercial surrogacy contracts, which mostly regard surrogacy arrangements as being opposed to public policy and immoral. In view of commercial surrogacy violating the Indian Contract Act, 1872, on grounds of vitiating free consent we offer solutions to the same in the last part of the paper. We further address the issue of commercial surrogacy breeding human trafficking and offer solution to the same. We advocate commercial surrogacy agreement as a fiduciary relationship between the parties entering into it. This arrangement hereby is treated as a settlement between the parties and is of the nature of a non specific performance. The reason for providing such a solution is twin-fold; firstly, it preserves the free consent of the surrogate mother, who shall waive her parental rights on her prerogative, thereby, balancing the bargaining capacity of the parties. Secondly, this shift of balance of bargaining capacity also solves the issue exploitation of women and human trafficking which

will be minimal, since now the surrogate mother has been legally placed in the driver's seat.

To do or not do: The dilemma of Right to procreation extending to artificial reproduction

Personal Liberty and right to procreate

Every living organism on this planet relies on procreation for continuation of their species. It, therefore, is not a mere social need, rather, is a natural desire. A desire to have a genetic legacy which shall be recognised by the society as reflection of one's self for all political, social and legal purposes. Procreation is fundamental to formation of a society since it is of utmost importance in founding a family and since a family is the nucleus of a society, procreation becomes of great importance to society and its being. Thereby, meaning that the Right to procreate is not only a fundamental right, but is more of a natural right, on which the pillars of society and more importantly continuity of human race stand.

Procreative rights, include reproductive rights such as right to reproductive self-determination, right to reproductive healthcare and family planning, 'right to reproductive education', right to 'means of choosing family size'³. Such claims of procreative freedom logically extend to every aspect of reproduction ranging from conception, gestation & labor, and childrearing.⁴ These bundle of reproductive rights are what we generally mean by right to procreation. These rights as mentioned earlier are essential to society and individual, both and are a part of Right to life and Personal Liberty as provided in the Indian Constitution.

The Supreme Court of India holds a similar view to the extent of including Right to procreate as a Fundamental Right within the purview of Right to life. Right to life as enshrined under Article 21 of the Constitution of India guarantees "*a life with dignity*

³Carter J. Dillard, —Rethinking the Procreative Right, 10 *Yale Human Rights and Development Law Journal*, (2007), p.1.

⁴John A. Robertson, —Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth, 69 *Virginia Law Review*, 405 - 414 (1983), at p.409.

and not a mere animal existence"⁵. The Hon'ble Court in *R. Rajgopal v. State of Tamil Nadu*, has acknowledged that Right to procreation is a facet of right to privacy and held that "A citizen has a right to safeguard not only his own privacy but also of his family, marriage, procreation, motherhood, child bearing and education among other matters." The Hon'ble Court in *Javed v. State of Haryana*,⁶even though upheld that having two children can debar a person from contesting elections yet, it reaffirmed its position on right to procreation being a fundamental right.⁷ Moreover, the Court has held that in *Suchita Srivastava & Another v. Chandigarh Administration*,⁸that a woman's right to reproductive choices is a part of her right to life and personal liberty under Article 21 of the Indian Constitution. Moreover, her right to 'bodily integrity' and 'personal liberty' must be respected.⁹

From the above discussion of judicial precedents a necessary implication which can be inferred is that right to procreation is a fundamental and a basic human right within the ambit of Right to life and personal liberty. However, since no right is absolute in nature and since every right has corollary duties attached to it. In the subsequent segment we explore as to whether, and if yes, to what extent can the State restrict the reproductive autonomy of an individual.

Jurisprudential philosophy behind right to procreation and State interference

In the present segment we analyse whether the State can invalidate a commercial surrogacy arrangement from a jurisprudential viewpoint. The Constitution's promise and protection of personal liberty and bodily integrity is not absolute and is

⁵Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 2 S.C.R. 516, para. 8.

⁶Javed v. State of Haryana

⁷ (2003) 8 SCC 369; "It may be permissible for Muslims to enter into four marriages with four women and for anyone whether a Muslim or belonging to any other community or religion to procreate as many children as he likes".

⁸(2009) 9 S.C.C. 1.

⁹*Id.* at para.11 and 15

restrictive to the extent that it does not take away someone else's right to enjoy and live peacefully. However, a commercial surrogacy arrangement in no way is an intrusion upon someone else's rights, rather is an arrangement which provides for extending the right to procreation to those can't naturally benefit.

The State being a welfare State should not render such contracts unenforceable on grounds of it leading to exploitation of woman and being immoral or opposed to public policy. Keeping in check exploitation of women and their trafficking is the duty of the State to undertake. Restricting surrogacy by criminalizing it is an infringement on the right to autonomy of women and her personal liberties. A 'woman's body is hers and hers alone unless he consents to some particular use of it'.¹⁰ Further, in a rights based society an individual has a 'right to do a wrong'.¹¹ More than an infringement on the right to autonomy of women it is an infringement on the freedom of personal liberty.

A human being has a right to contract with another to be paid for the performance of services. The women's work of conception, gestation and birth is highly arduous and has a high social worth. For the State to prohibit payment of such work would deprive the women of compensation for valued labour.¹² Moreover, it also unjustly takes away a person's freedom of contract, whereby, adults can by *consensus ad idem* contract for their welfare and in pursuance of their rights. The freedom of contract has been linked to the principle of private autonomy, long recognized as necessary in our society¹³. Freedom of contract benefits society by maximizing the welfare of the parties involved and by granting individuals a sphere in which they can act

¹⁰See, Elizabeth Anderson, "Is Women's Labor a Commodity?", 19 *Phil. & Pub. Aff.* 71 (1990);

Richard J. Arneson, "Commodification and Commercial Surrogacy", 21 *Phil. & Pub. Aff.* 132 (1992).

¹¹ Ronald Dworkin, *Philosophy of Law*.

¹²L. Gostin, "A Civil Liberties Analysis of Surrogacy Arrangements," *Law, Medicine and HealthCare*, 16 (1988):7-17

¹³See, Jessica H. Munyon, "Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions", 36 *Suffolk University Law Review*, 744 (2002-2003).

freely. Freedom of contract is an important liberty that recognizes the importance of allowing individuals to reliably order their own affairs.¹⁴

In addition to above commercial surrogacy is in fact a mechanism whereby, right to equality is promoted. Since, Right to procreate, being part of right to life and personal liberty is a fundamental right and should extend to all. Therefore, those who are unable to naturally become beneficiaries of such a right, due to infertility, it offers them a right to equality as provided under Article 14 of the Constitution. Therefore, the State should instead of banning commercial surrogacy promote such a practice in lieu of the fact that the State being a welfare State should strive for equality of all individuals. Thus, we see that criminalizing commercial surrogacy arrangements pose more questions than answering.

Contracting out of Surrogacy Agreement: Enforcing unnatural arrangements or Insufficiency of Contract Law?

Surrogacy is effectuated when the commissioning parents enter into a contract with the surrogate mother. A contract as understood under the Indian Contract Act, 1872, “is an agreement enforceable by law”¹⁵. An agreement enforceable by law would be one which is legally recognised or not prohibited by law. This legal recognition or validity of surrogacy agreements can only known by examining the purpose of such contracts. Therefore, in order to be able to ascertain the legality of Surrogacy contracts it is imperative to know of the object of a surrogacy contract. Furthermore, in the present section we shall dig deep into debate concerning *whether or not surrogacy contracts are immoral and against public policy?*

The primary object of entering into a surrogacy arrangement is to beget a child for those who are naturally incapable of doing so. These include not only infertile couples but also divorced spouses, unmarried individuals, gay and lesbian couples. Therefore, in an attempt to extend the principle of equality for all as a matter of right to procreate and found a family, surrogacy comes across as a boon for all such

¹⁴E. Allen Farnsworth, *Farnsworth on Contracts*, Aspen Publishers, New York (2nd edn. – 2001).

¹⁵Section 2(h) of the Indian Contract Act, 1872.

people. However, this arrangement is weighed down as being equivalent to baby-selling and treating women as ‘incubators’ and ‘breeding machines’.¹⁶ Further, it is felt that surrogacy contracts undermine, commodify and devalue parenthood.¹⁷ On the other hand, the supporters of surrogacy argue that, the use of one person for the benefit of another does not necessarily mean that, the person is treated as a commodity and the dignity and worth of an individual is reduced in such situations. This objection of surrogacy and whether it actually amounts to baby selling/purchasing came to the fore in The Waller Report of Victoria in 1984.¹⁸ To explore this issue in depth we need to see whether a surrogacy contract amounts to ‘sale’ of baby.

A ‘sale’ has been defined as, ‘a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price’.¹⁹ In order to be a ‘good’ ‘as a subject matter of sale’, such ‘good’ must be in existence. Likewise to constitute an agreement to sell, the seller should have a right over the subject matter of sale. However, as discussed above in case of a surrogacy contract, the subject matter of such contract i.e., the child is not in existence at the time of contract. So, the surrogate mother is also not having any parental rights over the future child. Thus, surrogacy contracts cannot be termed as a sale under the sale of goods Act, 1937.

¹⁶See, Lee Quinby, *Women’s Studies Quarterly: Women and New Technology*, The Feminist Press, New York, (2001), p.23; Elly Teman, *Birthing a Mother: The Surrogate Body and the Pregnant Self*, **University of California Press, U.S.A.** (2010), p.32.

¹⁷See for more, Jay R. Combs, “Stopping the Baby - Trade: Affirming the Value of Human Life Through the Invalidation of Surrogacy Contracts: A Blueprint for New Mexico”, 29 *N.M. L. Rev.* **407** (1999), at p. 409

¹⁸In May 1982 the State of Victoria appointed a Committee to consider the social, ethical and legal issues arising from in vitro fertilization. This Committee is popularly known as Waller Committee and its report (Waller Report) was published in August 1984. See, Louis Waller, *Victoria- Committee to Consider the Social, Ethical and Legal Issues Arising from In-Vitro Fertilization*, Govt. Printer. Melbourne, (1986).

¹⁹ Section 4(3) of the sale of goods Act, 1937.

The whole premise of banning commercial surrogacy rests on the commodification argument and from it flows the argument of why and how it is against public policy and thus immoral. To regard surrogacy arrangements as immoral we need to know what the court regards as immoral. In *Gherulal Parakh v. Mahadeodas Maiya and Others*²⁰ The Court has stated that, the word “immoral” is very comprehensive and varying in its contents and no universal standard can be laid down¹⁴¹. The Court observed that, the provisions of Section 23 of the Indian Contract Act indicated that the Legislature intended to give that word a restricted meaning. The court further stated that it was also a branch of the common law and should, therefore, be confined to principles recognized and settled by courts. As far as the courts in India are concerned they do not regard surrogacy contracts as “immoral”. This can be inferred from the judicial reasoning in Baby Manji’s case²¹ and Jan Balaz’s case.

With regard to surrogacy contracts being opposed to public policy it is submitted that public policy is very closely related to public interest and public good.²²

In the case of *Maharashtra Apex Corporation v. Sandesh Kumar and Others*²³, the Court held:

“a contract which has the tendency to injure public interest or public welfare is a contract opposed to public policy. What constitutes an injury to public interest or welfare would depend upon the times and the claims. The social milieu in which the contract is sought to be enforced would decide the factum, the nature and the degree of the injury. The concept of public policy is not immutable, since it must vary with the changing needs of the society.”

Hence, we clarify as to why surrogacy is not against public policy and rather in public interest.

²⁰A.I.R. 1959 S.C. 781, 1959 S.C.R. Supl. (2) 406.

²¹Baby Manji Yamda v. Union of India & Another, A.I.R. 2009 S.C. 84

²²Central Inland Water Transport Corporation Limited v. Brojo Nath Ganguly, A.I.R. 1986 S.C.

²³A.I.R. 2006 Kant. 138.

Looking for solutions: Surrogacy as a fiduciary Relationship

A fiduciary relationship is one which primarily stands on the pillars of mutual trust and benefit. This has a striking similarity to the needs and obligations in a surrogacy arrangement. "[T]he fiduciary principle is fundamentally a standard term in a contract."²⁴ "Fiduciary duties are not special duties; they have no moral footing; they are the same sort of obligations, derived and enforced in the same way, as other contractual undertakings."³⁹ The objective of fiduciary law is the same as that of contract law, they say: namely, to "promote the parties' own perception of their joint welfare."

A fiduciary relationship as defined by the Supreme court of India in the Bihar case, states:

"The term 'fiduciary' refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term 'fiduciary relationship' is used to describe a situation or transaction where one person places complete confidence in another person in regard to his affairs, business or transaction."

The reason of treating surrogacy arrangements as fiduciary relation is because not only does it empower the surrogate mother but also keeps her in check. This happens since the surrogate mother acts as a trustee of the commissioning parents entrusted with providing them with a child. However, in case of a breach she needs to prove her intention in upholding the arrangement in good faith. The Hon'ble Apex Court has stated in this regard stated:

"when fraud, misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position, he has to prove that there was fair play in the transaction and that the apparent is the real, in other words that the transaction is genuine

²⁴Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698,702(1982)

and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence. The instant case is required to be exercised in the light of the aforesaid settled proposition of law.”²⁵

Thus, such an arrangement forms the perfect balance much needed to avoid disputes in case of surrogacy arrangements.

Conclusion

An agreement depends on the principle of reciprocity of promises.²⁶ Such reciprocal promises lead to the creation of rights and duties arising out of a contract and is binding on each of the parties entering into it. A surrogacy contract is a private contract based on which a woman (single or married), acts as a surrogate, agrees to become pregnant through artificial reproductive techniques, carry the foetus to term, give birth to the baby, and relinquish her rights over the baby and hand it over to his/her intended parent/parents.²⁷ Herein, lies the debate on primacy of rights, that being, the right of a gestational mother over her child and the contractual right of the intended parent. This dichotomy of rights human rights versus contractual obligations is where majority of the disputes centre around. However, to be able to relinquish parental rights of the gestational mother over to the intended parents is easier said than done. Furthermore, from a legal point of view payment of money in return for a binding waiver of parental rights is where the ‘commodification’ argument of the critics of surrogacy gain strength. Rather a distinction needs to be made between payment of gestational services and payment for waiver over the rights of a child. It is inhuman and cruel to make a binding obligation over the

²⁵Krishna Mohan Kul @ Nani Charan Kul v. Pratima Maity; AIR 2003 SC 4351; 2003 Indlaw SC 729; cited in Joseph John Peter Sandy v. Veronica Thomas Rajkumar; Supreme Court of India; 12 March 2013; (2013) 3 SCC 801; AIR 2013 SC 2028

²⁶R. K. Bangia, Indian Contract Act, ALLAHABAD LAW AGENCY, Haryana (14th edn.- 2009), p.1.

²⁷Amir Samavati Pirouz & Nassrin Mehra, “Legal Issues of A Surrogacy Contract Based on Iranian Acts continuation”, 2 JOURNAL OF FAMILY AND REPRODUCTIVE HEALTH, Vol. 5, 41, June (2011), at p.43.

surrogate mother to waive her parental rights over the child completely. In an attempt to solve this we propose that surrogacy arrangements should be treated as fiduciary relationships. So that not only claim to the child rests with the intending parents but also with the surrogate mother and in case of a breach it is the responsibility of the surrogate mother to prove her intention as acting in good faith.