

Surrogacy and human reproductive biology

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Introduction

Recently, the headline 'Rent a womb' highlighted the plea of a woman from Chandigarh to legitimise her surrogacy for a woman who could not conceive. The couple was so anxious to have a child that they were ready to adopt one. Nirmala Devi, who worked for them as a maid, decided to offer her womb on hire. She desperately needed money for the treatment of her paralytic husband and to secure the future of her own child.

Pandora's box

With artificial insemination a reality, Pandora's box was already open. As happens so often, the experimental scientist has remained unconcerned with the future philosophical, theological, emotional, demographic or even social implications of this development. The chief concern has been solving the technological problem, letting the chips fall where they may. We are, however, keen on ensuring that such research and practice does not cross delineated ethical borders.

Law, morals and ethics

Society, especially when it is of a pluralistic nature, often takes the law on a given subject as the final arbiter. Most assume that if it is legal, it must be ethical and moral. This touchstone is reinforced by the fact that illegal acts attract punishment. The fact that statutory law may be behind the times and may lack the depth and objectivity of moral law is overlooked. Moral law, of course, guides the individual. Ethics, on the other hand, affect professionals. Unfortunately, ethics, in practice, appears to be only as binding as can be ensured by the monitoring agency - in our case the medical councils - through penal control such as suspension or debarment. In the absence of such control, as is the case, ethical standards are consigned to the printed codes and are more honoured in the breach.

Surrogacy

The term 'surrogate' is defined, in common parlance, as a substitute or deputy. As with several other definitions, the advent of such techniques as artificial insemination by the donor (AID), ovum donation, in *vitro* fertilisation (IVF) and genetic manipulation has forced us to revise this understanding as well.

In reproductive biology, the concept of 'parent' needs reconsideration. Classically, parents were defined as those who, through sexual intercourse, gave birth to their offspring. By extension, artificial insemination of the wife

using sperm obtained from the husband (AIH) led to a similar consequence. At the present time, 'marriage', itself, has become an unnecessary imposition and 'living in' is often the 'in' thing. The terms 'husband' and 'wife' are being replaced by 'the couple concerned'. In India, as in England, Common Law Marriage is the unwritten law established by custom, usage and precedent. The law in India has yet to incorporate recent changes in social mores.

Surrogacy is currently implied in a variety of events. Let us consider two examples:

1. A couple (Mr. and Mrs. X) cannot have a child because Mrs. X is unable to receive the fertilised ovum into her womb and nourish it there due to a malformation of the womb or as a consequence of disease. They, therefore, resort to extraction of Mrs. X's ovum to be fertilised by Mr. X's sperm in the laboratory. In order to produce the necessary eggs, Mrs. X is made to undergo several procedures and the eggs are extracted from her ovum by a minor operation. She has, therefore, played an important role in the production of this baby,

The resultant embryos - or, more correctly, blastocysts - are implanted into the womb of another woman (Ms. Y) who carries the foetus to full term on the understanding that on birth, she will hand the baby over to Mr. and Mrs. X, from whose gametes or germ cells the baby was produced. Ms. Y is a surrogate mother.

This appears simple and logical. Consider, now, some other aspects. Once the blastocyst was implanted in Ms. Y's womb, it was she who nourished the foetus and bore all the travails of pregnancy. She could, for instance, have suffered from toxemia of pregnancy and its ill effects. If natural, vaginal delivery is not possible, it is she who will undergo Caesarian section under anaesthesia. This process, inevitably, results in the establishment of a bond between her and the baby. This will strengthen if she is also made to breast feed the infant or, for any reason, retain the baby for any length of time before she is asked to hand it over to Mrs. X.²³

There can be - and have been - conflicts between the genetic or biological mother (Mrs. X) and the surrogate mother, the latter being unwilling to hand over the baby she has carried within her for nine months.

2. Another form of surrogacy leads to even greater problems. Mrs. X does not have viable eggs in her ovaries. Ms. Y is therefore artificially inseminated, using Mr. X's sperms. In this case, Mrs. X has played virtually no role and Ms. Y is the genetic mother as well as the surrogate mother (by agreement). Should she decide not to hand over the

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baby after delivery to Mrs. X, the legal ramifications are complex indeed. (Since artificial insemination was carried out by prior agreement, she is not open to the charge of adultery.)

There has been a legal precedent in USA where the surrogate mother had accepted a fee. After delivery, she was unwilling to hand over 'Baby M' and entered a legal plea that she 'regretted the sale for adoption' of her child. The first trial judge ruled against the surrogate mother. The final judgement by the Supreme Court restored the child to the surrogate mother, the couple who had contracted for it being given visitation rights. A. M. Rosenthal commented on this case in the New **York Times** (5 February 1988): 'What (the Supreme Court) really did was rule that a human soul was more important than a contract - that (the earlier judge's) philosophy that 'a deal is a deal' is wrong when the deal involves the selling of a human being.'¹

The Warnock Committee, which went into the question of IVF and embryo transfer anticipated legal wrangles and stipulated that these procedures should be carried out without there being any financial transaction between the surrogate and the biological parents.²

Nirmala Devi

It is unfortunate that in the case of Nirmala Devi, the financial transaction is the primary factor prompting surrogacy. Her desperate need overcame her own reservations and those of her husband, on whose behalf she

has initiated the deal. The police, however, have warned her that she could be culpable under the Suppression of Immoral Traffic Act. She now seeks to challenge this in court. **Prima facie**, it appears that the stand adopted by the police has no legal basis. Where is the immoral trafficking? Neither prostitution nor adultery is involved here. There is no attempt at destroying the bond of marriage.

The law has not declared IVF or any of the procedures involved in implanting the blastocyst into the surrogate either immoral or illegal. The Warnock Committee stipulation has, as yet, no legal validity either in England or in India.

Catholic church

In terms of the teachings of the Catholic church, IVF has been specifically condemned as immoral in that it is a substitute for - rather than mere assistance of - the natural act in marriage. So too have AIH and AID been declared morally unacceptable as interfering with the true and complete self-giving essential to the relationship of Catholic marriage. A pluralistic society may not agree with this stand or accept these condemnations.³

References

1. Whitehead MB, Schwartz NL: *A mother's story - the truth about the baby M case*. New York: Arrow Books 1989.
2. Warnock Dame M et al: *The Government Committee on Inquiry into Human Fertilisation and Embryology*. 1984.
3. *The Vatican Congregation for the Doctrine of the Faith: Instructions on respect for human life and the dignity of procreation* (Donum vitae). February 1987.

