

Feminist Jurisprudential Perspective on Surrogacy

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Abstract

Surrogacy denotes the intersection of reproductive technology, autonomy, and gender justice, making it one of the most contested subjects within feminist jurisprudence. This article examines the conflicting feminist legal responses to surrogacy — radical, liberal, Marxist/socialist, pragmatic, and hedonic — and analyses how each framework explores legitimacy and legal regulation of surrogacy arrangements. The article highlights the jurisprudential /feminist perspective on surrogacy in a much different angle.

Keywords: Feminist Jurisprudence, Surrogacy, Reproductive Autonomy, Assisted Reproductive Technology, Gender Justice

1. Introduction

There is no unified theory of feminist jurisprudence on surrogacy which provides an exact answer to surrogacy disputes. As technological advances create new reproductive methods, women are faced with new challenges and choices. Some view surrogacy as a reproductive choice available to women, yet others view it as a form of slavery or prostitution highly exploitative of women [1]. Some regard these choices as new reproductive freedoms, while others feel that the autonomy and physical integrity of women are being compromised. As a result, feminist jurisprudence is widely divided on the morality and legality of surrogacy [2].

Infertility can be a major life crisis for those experiencing it. The infertility experience may involve many unforeseen losses for individuals, their intimates, and society as a whole — including loss of parenting experience, loss of stability in personal relationships, loss of self-confidence, and loss of future family expectations. Having children is always seen as a mandatory requirement for family and is a socially expected role for the preservation of the human species [3]. In this context, Assisted Reproductive Technologies (ARTs) — including surrogacy — have taken centre stage, offering hope to the infertile while simultaneously generating profound legal and ethical controversies.

The Warnock Report observed that for those who long for children, the realisation that they are unable to found a family can be shattering — disrupting their picture of the whole of their future lives and excluding them from a whole range of human activity, particularly the activities of their childrearing contemporaries [4]. At the same context, the Canadian Law Commission noted, infertility is not something that is easy to deal with and move on from, because having children is so firmly embedded in everyday social and family interactions [5].

ARTs, like other medical technologies, do not exist in a vacuum, and legal institutions cannot assess their risks and benefits without reference to the ways in which physicians and patients use these technologies in practice [6]. The bitter truth is that ART has the potential to liberate women but can equally be used to obstruct or undermine that liberation — it is often a double-edged sword [7]. This article surveys the

principal schools of feminist jurisprudential thought that have engaged with the surrogacy question, before drawing conclusions about the kind of regulatory framework that would best serve the interests of all parties.

2. Feminist Jurisprudential Schools and Surrogacy

2.1 Radical Feminist Jurisprudence

Radical feminist jurisprudence confronts women's oppression with a revolutionary analysis that goes to the root causes of male domination, defining men as responsible for and as beneficiaries of women's subordination. It emphasises the sexual and reproductive capacities of women and focuses on the commonality of women's condition across class, race, and national boundaries [8].

Radical cultural feminists tie women's oppression directly to their reproductive capacities and roles — pregnancy and mothering — and consequently support surrogacy bans on the ground that surrogate motherhood contracts are dehumanising inasmuch as they commodify birthing, reduce women to incubators, and alienate surrogate mothers from their reproductive labour [9]. In their view, surrogacy will once again make society value women primarily for their reproductive capacities and will transform the womb into a "commodity". There arises a strong possibility of economic coercion, with surrogacy occurring for the benefit of the rich at the expense of poorer women.

Scholars such as Catharine A. MacKinnon regard power inequality as a fundamental problem in female lives and view surrogacy as yet another instance of male control over women's bodies — analogous to prostitution in that women's bodies are taken and paid for the use of men [10]. However, radical libertarian feminists take a contrasting position: surrogacy, if handled properly, might actually strengthen connections between infertile couples, surrogates, and their children, and has the potential to produce new familial models that challenge the traditional hetero-patriarchal family.

2.2 Liberal Feminist Jurisprudence

Liberal feminist jurisprudence typically characterises surrogacy as a natural extension of women's reproductive liberty and personal autonomy. If women can contract freely to sell their productive labour for wages, then they should equally be at liberty to sell their reproductive services [11]. This school views surrogacy as a manifestation of women's liberation; nobody has the right to prevent her from doing so. From this perspective, surrogate women are taking care of a baby to give it to another woman who desperately wants to be a mother — a gift of life to an infertile couple.

Liberal feminists further view surrogate children as beneficiaries of surrogacy arrangements, arguing that the primary concern should be the wellbeing of all parties rather than a categorical prohibition [12]. Banning surrogacy, in their view, is itself a paternalistic restriction on women's autonomy that replicates the very structures of oppression that feminism seeks to dismantle.

2.3 Marxist and Socialist Feminist Jurisprudence

Marxist and socialist feminist jurisprudential thought explores the implicit economic inequalities in surrogacy arrangements. Under capitalist patriarchy, the ways in which race, gender, and class shape a person's relationship to the means of reproduction are obscured. Invoking Marx's theory of alienation, this

school accounts for the ways women are alienated from the "products" of their reproductive labour — the child [13].

To socialist feminists, surrogacy surrenders the individuality of women. Capitalist class relationships are regarded as the root cause of female oppression, exploitation, and discrimination. Men are socialised into exploitative relationships in relation to work, and they carry this socialisation over into the home and their relationships with women [14]. As Rosemarie Tong has elaborated, whereas Marxist feminists emphasise that under capitalism there is always a price high enough to entice even the most resistant person to sell what is most precious to them, radical feminists emphasise that under patriarchy there is always an appeal strong enough to convince the most hesitant woman that it is her duty to help an infertile couple have a child [15].

2.4 Pragmatic Feminist Jurisprudence

Pragmatic feminist jurisprudence holds that human beings cannot determine with certainty what is always best for women, since every situation arises differently. Each solution may have disadvantages. The only appropriate course of action is the resolution of an issue in a pragmatic mode — context-sensitive and solution-oriented rather than ideologically rigid [16].

Feminist jurists of this school believe that continuous attention must be given to power inequalities — whether through political power, economic resources, or otherwise — to avoid gender inequality. It is also noted that women's suffering is very difficult to translate into legal arguments, and that a genuine focus on women's pleasures and pains, substantially different from men's, is equally significant [17].

2.5 Hedonic Feminist Jurisprudence

A more nuanced concern is advanced by hedonic feminist jurisprudence. Proponents of this approach insist that the real experience of surrogate women — their sufferings when handing over the baby and the vulnerability of the sections of women who enter into such arrangements — must be carefully evaluated [18]. The focus should be on improving the conditions that drive women towards surrogacy rather than condemning the act itself.

The urgent need, on this view, is to improve the quality of the surrogate's life in all spheres — empowering her and enabling her to live with dignity. Remedies must be sought to improve the lives of women who are willing to rent their womb out of extreme economic necessity. For that, a thorough study of the varied regulatory aspects of surrogacy is indispensable.

3. Critical Analysis

Each feminist jurisprudential school captures a genuine dimension of the surrogacy debate, yet none is wholly adequate on its own. The radical critique rightly identifies the dangers of commodification and economic coercion but risks paternalism by denying women the agency to make reproductive choices freely. The liberal position correctly centres autonomy but can underplay the structural disadvantages that make "free" choice illusory for economically marginalised women.

The Marxist and socialist frameworks illuminate the economic power dynamics embedded in surrogacy markets but may reduce the complexity of women's motivations to pure class analysis. Pragmatism is intellectually honest about the limits of theory but offers limited prescriptive guidance. Hedonic feminism,

with its insistence on centring the actual lived experience of surrogate women, offers the most promising foundation for law reform, though it too requires supplementation by rigorous empirical methodology.

What is incontrovertible is that ART, including surrogacy, cannot be assessed in a vacuum. As technological, socio-economic, and political developments in a globalised world constantly demand new responses, legislation must re-examine old concepts and develop new theoretical paradigms [19]. The development of reproductive technologies has enabled humans to access their very genesis, causing a wave that still impacts on the understanding of ourselves [20].

4. Conclusion

Feminist jurisprudence does not speak with one voice on surrogacy, and that plurality is a strength, not a weakness. The divergence of opinion reflects the genuine complexity of a practice that simultaneously holds the promise of liberating women from the pain of involuntary childlessness and the risk of reducing them to commodified reproductive vessels. Any regulatory framework that takes feminist concerns seriously must navigate these competing considerations.

The most defensible approach is one that: (i) preserves women's reproductive autonomy while guarding against economic coercion; (ii) imposes robust contractual safeguards, including independent legal advice and cooling-off periods for surrogate mothers; (iii) criminalises exploitative commercial arrangements without banning altruistic surrogacy; and (iv) allocates resources to improve the socio-economic conditions that make surrogacy a financial necessity rather than a genuine choice for vulnerable women. Strict and empirically informed regulation alone can deliver justice to all persons involved in the process.

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