Chapter - 3
Arguments defending surrogacy

In modern age, childlessness of a couple may be of two types: voluntary choices of couples not to procreate and involuntary childlessness due to infertility and sub-fertility of couple. Now, the problem of infertility and sub-fertility exclusively depends on some physiological as well as medical reasons either of the male partner or the female partner or for both partners of the couple. As a result, infertility or sub-fertility may be of two types—male and female infertility or sub-fertility.

For many couples, infertility is a tragedy. It primarily refers to the biological inabilitys of individuals either to contribute to conception or to carry a pregnancy to full term. The American Society of Reproductive Medicine (ASRM) has defined infertility to be a disease of the reproductive system. (www.asrm.org/Patients/faqs.htm) site visited on 2/12/2010). WHO (World Health Organization) also declared infertility as a “failure to conceive after at least one year of unprotected coitus.” (Report of a meeting on “Medical, Ethical and Social Aspects of Assisted Reproduction,” held at WHO Headquarters in Geneva, Switzerland, 17–21 September 2001)

The consequences of infertility are manifold. It includes profound psychological effects, societal repercussions and personal suffering. In many cultures, inability to conceive bears a stigma. In closed social groups, a degree of rejection may cause considerable anxiety and disappointment to afflicted couple. For a long period of time, infertility, for many of those afflicted by it, is considered as a curse, a bitter torment. The most disgraceful part in the history of advancement of science and medicine expresses a great disappointment in not resolving the problem of involuntary childlessness of those couples. In pre-modern societies, most of infertile couples were subjected to witchcraft and sorcery. Sometimes, they were encouraged to holy, sacrificial offerings. In the early days of medical science, infertile couples were advised to adopt various poisonous, dubious procedures which were simply based on unscientific speculations only to assist ovulation and conception and in most instances, such experimentation ended with extreme disheartenment. (Children on demand: The ethics of defying nature by Tom Frame, University of New South Wales Press Ltd., Australia, 2008, pp 12-22).
3.1 Reasons for late progress in Reproductive sciences

The rise of modern reproductive sciences, in comparison with other branches of science, is relatively new, not very matured science till early 19th century. Adele E. Clarke in his article ‘Controversy and the Development of reproductive sciences,’ (Published in ‘Social Problems,’ Vol.37, No.1 (Feb, 1990) University of California Press, 1998, pp. 19-20 ) has made some observations on this issues: “Not a single English-language book on reproductive sciences was published until Marshall’s Physiology of reproduction appeared in Britain in 1910...Reproductive physiology developed comparatively late among the physiological studies of other major organ systems. A common explanation of this late development was that the scientific study of reproduction was not acceptable largely because of its association with human sexuality.”

3.2 The first social practice which fragments parenthood: Adoption

Due to inadequate progress in medical sciences, people try to look for a better solution to resolve this problem socially. As a result, adoption becomes the first paradigm case to resolve the crisis of childlessness in our social framework. From antique period, it has been accepted that the traditional image of a woman reflects the integrated view of motherhood. Motherhood has often been recognized as basic, defining characteristics of womanhood. Procreation is, no doubt, a complex activity. Normally, it consists of three essential parts: i) conception, ii) gestation and labour and iii) child-rearing. All these three aspects of procreation are ideally united in our traditional sense of motherhood. In traditional unified notion of motherhood, it is assumed that the mother of a child would be one who is the genetic contributor, gestator as well as the nurturant of the child. So, childbearing and childrearing—these two inseparable functions of motherhood are so tightly integrated with each other that one function could never be performed without the other. As a result, childrearing should exclusively be assigned to woman who bears the child.

Throughout history, the most popular response to infertility was some form of adoption and foster care. Adoption is supposed to be the first paradigm case where activities and responsibilities related to motherhood were split up into two parts: childbearing and childrearing. Such segregation allows us to acknowledge childbearing as one procreative function which a woman may choose to do
separately without performing other social responsibilities of motherhood (i.e., childrearing). So, motherhood includes not only the process of gestation and parturition, but also nurturance. The practice ensured that women who cannot bear children might also share the responsibilities of parenthood along with all other women who bear their children. Thus, adoption and other related foster cares had established a rich concept of motherhood as well as of parenthood.

Till the middle of the 20th century, adoption had been considered as the paradigm case of alternative motherhood and only probable social solution for infertility. Adoption was the earliest practice, which got social recognition to fragment the traditional unified image of parenthood—the parenthood which combines biological, gestational and nurturant acts of parenthood. As a practice, surrogate motherhood is structurally very similar to adoption, but not identical. In both of these practices, the gestational mother of the child, handed over others, will become the social parent of the child.

3.3 Limitations of adoption

Adoption gradually loses its significance and applicability due to some practical reasons.

✓ Firstly—non-availability of adoptable children. The number of adoptable babies suddenly falls down due to some practical reasons. One of the vital reasons is: some major changes occur in public attitude towards the deliberate termination of unwanted pregnancy. With the rise of second wave feminism, in the mid twentieth century, abortion was considered as an expression of reproductive autonomy rather than ethical choices with severe moral consequences. Till late ‘60s, the use of contraceptive pill, application of technologies like Norplant, RU486, legal validation of abortion—have made it possible to marginalize the birth rate of unwanted pregnancy in a large scale. Despite the continuing debate about the status of the fetus and the ethics of abortion, very few women are willing to continue with an unwanted pregnancy by giving birth and relinquishing the child for adoption and all these situations make it clear that the number of adoptable children has suddenly fallen.

✓ In adoption, none of the adoptive parents is genetically related with the adopted child. In fact, the genetic relatedness of parents with their children—plays a crucial role in allocating parental rights and duties to an individual,
especially in some Euro-American societies. Genetic linkage is the only determining factor, which reckons kin construction, forms the structure of family and calculates descent system. Within this biological interpretation of kinship, family and ancestry, the practice of adoption gradually loses its popularity and those who adhere to the genetic lineage to ancestry always try to seek out a practice other than adoption, because, parenthood through adoption lacks genetic relatedness. Surrogate motherhood provides two types of opportunities: in traditional surrogacy, the commissioning father is genetically related with the resulting child; in gestational surrogacy, both parents of the child are genetically connected with him/her. If the assistance of reproductive technologies makes it viable to achieve a child genetically related with them, then why should childless couples feel it compulsive to adopt a child who is genetically unrelated to them? Those who believe that the status and identity of progeny would be determined only through male ancestry, would prefer any type of surrogate motherhood. Surrogate motherhood is basically a solution of female infertility or sub-fertility. Thus, for obvious reasons, adoption gradually loses its popularity and significance and receives a second grade treatment next to surrogacy. When surrogate motherhood fails to resolve the crisis of childlessness, adoption seems the next choice to a couple.

Unlike adoption, surrogate motherhood has some added advantages. And, these advantages make surrogacy more popular and acceptable in comparison to adoption. These are: genetic relatedness to children, availability of competent surrogate mothers. In addition to it, comparatively low cost of medical treatments, high success rate, flexible law, rapid growth of reproductive tourism and reproductive industry especially in different Third world countries, like India—reduced the practice to a booming business. In India, surrogacy regulation is very liberal and flexible. In India, a surrogate mother could act as a surrogate for three successful attempts; three embryos can be implanted during one treatment cycle (3.5.13, Guideline by ICMR), while in UK, not more than one can be implanted at a time. So, the success rate of employing a surrogate mother is comparatively higher in India than other Euro-American countries. Availability of surrogate mothers, relaxation of law in different countries, high success rate, skilled medical practitioners, comparatively low cost of treatment—all these uprising circumstances make the practice popular and acceptable.
3.4 Surrogate motherhood: an alternative employment

Sometimes, it has been suggested that the practice of surrogate motherhood generates an additional option of employment, especially for poor, needy women, though employment would be a risky one. Basically, women from economically marginalized section of society, women belonging to below poverty line, especially from third world countries—are chosen to act as a surrogate mother due to their financial needs. Now, the act of gestational in surrogate pregnancy can be performed in association with other works, including domestic works. Surrogate motherhood, thus, provides an option to transform the reproductive labours like gestation into a wage labour and surrogate mother to a service provider. There are enormous instances, where service providers may take high-risk to perform their jobs in exchange of money, such as, soldiers, workers of mines, fire serviceman etc. Like other risky wage labours, surrogate motherhood has the potential to be harmful. But, the risks encountered by a surrogate mother in her surrogate pregnancy, may equally be experienced by her in her normal pregnancy.

3.5 In defense of surrogate motherhood: Three constitutional rights of US: Right to procreate, right to make a free contract and right to privacy

Now, the practice of surrogate motherhood has been encouraged by three kinds of constitutional rights of US: the right to reproduce, the right to make a contract to sell labour and right to privacy. An individual's right to reproduce—this notion has some uniqueness. An autonomous individual may enjoy two types of reproductive rights: right to procreate and right to avoid procreation. In 1973, in Roe vs. Wade case (410 US.113), reproductive right to avoid procreation got legal confirmation of US Supreme Court and legal right to abort a fetus was approved as a reproductive right of autonomous individual. Unlike right to abortion, no legal battle is fought to authenticate right to procreate. Perhaps it seems obvious that an individual by nature would procreate. The legal dispute which arises in connection with this right to procreate is basically about custodial dispute, mode of technological assistance, use of genetic materials etc. But, the reproductive right of an autonomous to procreate, in general, has never been challenged. Moreover, Article 16§1 of The Universal Declaration of Human Rights in 1948, affirms that "Men and women of full age, without any limitation due to race, nationality, or religion, have a right to marry and found a family."
Although this right is broader than the right to procreate, because one might form a family by adopting a child, it presumably includes the right to have offspring. In surrogacy, both the commissioning parents and the surrogate mother—are autonomous individuals. If an autonomous individual wants to contribute her genetic material or engage herself in some reproductive activities like gestation on behalf of other, such decision would be strictly treated as an implementation of procreative right. Similarly, it would also be treated as an execution of autonomous, reproductive freedom irrespective of the fact as to whether commissioning couples have decided whether to avail these reproductive assistance or not. Thus, in both ways, the arrangement of surrogate motherhood articulates the autonomous, reproductive decisions of two contracting parties: commissioning parents and a surrogate mother.

A similar kind of constitutional right of US also defends surrogacy and this is—right to make a free contract. The doctrine of freedom to contract basically establishes a voluntary relationship between employee and employer, between manufacturer and labourer. The very nature and duration of this relationship depends on the model of contract. Since the contract is made by the valid consents of two contracting parties, the terms of the promises are, therefore, meant to be enforceable under law. Till the end of the nineteenth century, we have found that the right to contract was strictly treated as an economic right, applied only to economic matters. In 1897, the US Supreme Court, for the first time, had approved the right to contract as a constitutional right. Later on, in popular lawsuit, like Lochner vs. New York, 198 US. 45 (1905), (Cited in: The Oxford guide to United States Supreme Court decisions, By Kermit L. Hall, Oxford University Press, pp 161-63) where the right to contract of an autonomous individual had been violated, the verdict of US Supreme Court still confined the freedom to contract within economic periphery only. But, from time to time, the range of its applicability gradually changed. In fact, throughout a long period of time, social-personal matters—had not been considered as an unequivocal constitutional right. But, gradually, the right to make a free contract became the principal instrument not only to organize the private market places, but in our personal, intimate lives too.
Surrogate motherhood is fundamentally a contractual agreement—in which there are two contracting parties—surrogate mother, at the one hand, and commissioning father on the other. Two autonomous individuals should have the right to contract to execute their reproductive liberties. Each individual, by nature, would possess the right to make a free contract, to purchase or to sell their skill or labour, even reproductive labour. Therefore, on the one hand, a surrogate would possess the right to contract to sell her reproductive labour, like gestation, and on the other, the commissioning father possesses the right to contract to purchase the reproductive labour rendered by a surrogate mother to achieve a child for his own. Even, persons who wish to form a family apart from the traditional heterosexual reproduction, gay-lesbian couples or single parents, has the right to contract to achieve a child through surrogacy. In fact, except heterosexual reproduction, we have very little knowledge about the other reproductive relations. Through surrogacy, we are trying to incorporate some external assistance, apart from marital relationship, to experiment and to acquire adequate knowledge for establishing novel reproductive relationships other than traditional parent—child relationship.

In our study, we have seen that to shape surrogacy within a contractual format is not only beneficial, but also necessary for anyone who would defend the practice. Let us clarify the point. Traditionally, it is believed that childbearing is a non-compensatory act of motherhood. But, surrogate motherhood is a practice which not only fragments childbearing from childrearing, it also reduces childbearing as an act, as a service, as a labour that can be compensated by money. Reproductive labour, like gestation, thus, reduces to a mere wage labour. Now, the sale of a labour usually invites a market situation as well as application of market norms. Within a market situation, it is believed that the promises of a contract should be enforceable. Because, a contract is enforceable only within an optimal situation—when two contracting parties are better off, without making no one worse off. The preferences, desires posed by contracting parties should dominate any kind of paternalism. Through the contract of surrogacy, both the contracting parties would fulfill some of their personal objectives. The ultimate mission of commissioning parents is to achieve a child for their own, while, on the other side, a surrogate mother wants to ensure her amount of payment and other compensation, medical care and support during her pregnancy and during post childbirth. Violation of any promise by the contracting parties, fails to attain their desired destinations. So, the
successful completion of a surrogacy arrangement exclusively depends on the enforceability of surrogacy contract.

In addition to the right to procreate and right to contract, here, we would like to mention another type of constitutional right of US—the right to privacy. The right to privacy has been declared as a constitutional right by US Supreme Court in ruling of Roe vs. Wade case, in 1973, in Roe vs. Wade case (410 US.113). This right asserts the allocation of decision making authority of an individual. The surrogate’s constitutional right to privacy consists in her personal authority to make a reproductive decision, a decision which anticipates a dissociation of biological from social motherhood and supplements her capacity to enter into a legally effective contractual relationship to allocate the rearing responsibilities of the child regardless of her biological relatedness. The commissioning couples also possess similar authority to take reproductive decisions and to execute them by means of contract. Surrogacy is, therefore, an exercise of both parties’ privacy in reproduction, which creates a legal parent-child relation before conception.

3.6 Defense from gender neutrality

Sometimes, it has been assumed that a man who commissions a pregnancy through surrogacy has undertaken ‘fatherhood’ quite consciously and might be expected to be more involved in caring the resulting child than men usually have been. Feminists like Marjorie Maguite Shultz, thus, comments that surrogacy is a way to categorize parental responsibilities more gender neutral. It can “soften and offset gender imbalances that presently permeate the arena of procreation and parenting.” (Reproductive Technology and intension-based parenthood,’ by Marjorie Maguite Shultz, pp 304, Cited in ‘Surrogate mothering and Women’s freedom,’ by Mary Shanley, Published in ‘Sign,’ Spring, 1993, pp 620).

3.7 Families by choice: formations of families by same-sex couple

Till the mid of twentieth century, homosexuality was treated as a mental disease. In most cases, they concealed their sexual identities. In early 1960s, different rights movements like African-American civil rights movement, movements of Native Americans—were in full swing. Success of these movements and rise of second wave feminism gave impetus to gay-lesbian liberation movement. These movements demanded a fundamental rethinking about sex, sexuality, sex role and
constitutional guarantee of right to life, liberty and happiness. Now, in this early twenty first century, it would no longer be a novel event that the gay-lesbians institute intimate relationships among themselves and co-exist as family members. But, in most cases, after the revelation of their sexual identities they are thrown away from their families of origin. They are forced to find out a similar community for accompaniment and construct new families with other gay or lesbian individuals and supporters of their new communities. In fact, by constructing families, homosexual individuals are basically trying to fill up the support gap, which they received once from their biological families. So, these families, by nature, are formed in accordance with personal choices made by some autonomous, reproductive individuals. So, the basic foundations of these families rest on choices rather than on genetics. We may better call these families ‘families by choice.’

Surrogate motherhood provides a better option both for gay and lesbian couples to raise a child genetically related with them and institute planned family relationships in an extended sense of kinship. To reproduce a child, one of the lesbian couples may opt artificial insemination by donor and may socially raise the child either by one or by both lesbian couples. In case of gay couples, a surrogate mother is employed to nurture a fetus—fetus which may be produced by using genetic materials of either of the partners of the gay couple. The employment of a surrogate mother, with other supportive technologies, enables a gay or lesbian couple to institute a fresh, new family-tree apart from traditional heterosexual reproduction. This novel form of procreation not only extends the sense of kinship, it also modifies the traditional notion of relatedness in a new way. In a gay family, a child may be raised by two fathers—one genetic and other social, without a mother. In a lesbian family, the child may be nurtured by two mothers—one genetic and one social, without the assistance of a father.

The possibility to form gay-lesbian families shows that heterosexual reproduction or biological relatedness is, no longer, an exclusive foundation of kinship or inheritance. It also incorporates the autonomous reproductive choices of individuals. Surrogate motherhood, thus, indulges to build up a family—kinship—in an alternative way.
So long, we have observed that surrogate motherhood can be employed by married-heterosexual-childless couples or by couples of the same sex. Our study has also noted that the advantages of this technology can also be availed and enjoyed by a large section of autonomous, reproductive individuals, not by couples. And, this technological advantage opens up a great opportunity to a single or to a widow or to a divorcee—to be the parent of a child.

3.8 Families by choice: formations of families by individual

Singlehood, basically, is a life-style in which an individual chooses to opt not to marry. There are different forms of singlehood—a single may live apart from his/her family relatives or may not. But, the number of single living individual gradually rises up due to some socio-economic reasons. Later on, singlehood incorporates other members of society who become alienated from their families for social reasons, for example, a large section of divorcee, widow and people choose to postpone marriage etc.

Assisted reproductive technologies offer great opportunities to those singles who wish to raise a child genetically related to them. The majority of single individuals prefers to use AID (artificial insemination by donor) with their own genetic materials and employs a surrogate mother to implant and nurture the fetus till birth. But, in reality, we have noted that in most of the countries gay-lesbian couples or singles were not permitted to use assisted reproductive technologies in any way. In this context, I like to refer to a lawsuit filed in Israel in 1988.

A childless Israeli couple, Danniel Nachmani and Ruthi Nachmani, agreed to undergo IVF and then commissioned a surrogate mother in California to bear their child. They did not sign any agreement with the IVF clinic about the disposal of the embryos. In that clinic, eleven fertilized eggs were collected from Ruthi and frozen them for future implantation. Within a reasonable period of time, the couples were separated and Danniel remarried and had two children from the subsequent marriage. Ruthi appealed to the clinic for release of the fertilized eggs to her so that she could assign a surrogate mother for a child. Danniel objected to release those pre-embryos. In a district court, Ruthi filed litigation and was successful to obtain a favourable order. However, ultimately on September 12, 1996, the Supreme Court of Israel upheld Danni's fundamental right—'not to be forced to be parent.' (Ref: Law versus Justice, Published in Justice, No. 11,
December, 1996, pp 35) This judgment raises large number of debatable issues along with the issue whether singles should be allowed to raise a child or not. In many countries like India, the use of surrogate motherhood for a single individual got legal approval. In India, the regulatory guideline made by Indian Council of Medical Research, states that “collection of gametes from a dying person will only be permitted if the widow wishes to have a child” (Section 3.5.12) and “there is no bar to use ART techniques by single unmarried women or lesbian or gay couple” (Section 3.5.2). Therefore, all kinds of alternative attempts to form a family are encouraged by technology as well as by law.

3.9 Theoretical Defenses: various economic and moral doctrines

Our study, finally, looks after some of the theoretical underpinnings which encourage us to build up some conceptual defenses originated from the very root of our understanding. Our study closely observed that surrogate motherhood has become popular not only due to technological advancements, there also remain some theoretical defenses mainly from some economic and moral doctrines. These doctrines support as well as make strong defense in favour of surrogate motherhood. Thus, the main objectives of our study, at this point, is to detect what sort of doctrines or theses are responsible for flourishing and defending surrogacy at a large scale.

In this regard, our study refers to two types of market situations advocated by two distinct economic approaches. These two doctrines are: **universal commodification** and **welfare economics**.

Now, before elaborating these two theses, I would like to make it clear: what actually market is. In general, economists believe that there are different types of market. Variety of market ordinarily depends on the nature of goods and services sold in that market. Such market situations, sometimes, may be beneficial, sometimes harmful. Now, in economics, a market is an institution involving regular and frequent exchange, buying and selling. So, the question arises: what are the benefits of this market exchange? Most of the economists choose any one of these alternatives: dynamism, capacity for innovation, and communication of information unavailable by other means, enhancement of choice and success promoting long-term economic growth etc. (Invasions of the market, written by
3.10 Defense of universal commodification

Some economists believe that all conceivable things could be placed under two broad categories: things that could be placed in market place without any doubt and described as salable market commodity and secondly, those things that could never be placed in a market situation and these things are popularly known as market-inalienable objects. Economists who believe that there are market-inalienable objects are known as 'Essentialist' and those who believe that each and everything in this universe is tradable—are the followers of the thesis called 'universal commodification.'

In Essentialist thesis, it is believed that there are certain things which are genuinely inappropriate for commodification. This means that some sort of goods, things, services can never be bought or sold in a free market. To label such goods as market inalienable, we may refer to various social norms or restrictions, such as degradation, incommensurability, which could impose constrains on these objects or services for free-market exchange. According to this Essentialist view, reproductive services are the good example of market-inalienable object.

In reply to this Essentialist or more specifically doctrine of market-inalienability, some economists prefer to introduce another novel, economic approach, which is popularly known as 'universal commodification.' The term 'universal commodification' was, at first, used by Margaret Jane Radin in her article 'Market Inalienability' (Published in 'Harvard Law Review,' Vol. 100, No. 8 (June, 1987), pp 1859). However, this approach was ideologically followed long before by many economists like Richard Posner, J. Buchanan and G. Tullock, A. Alchian and W. Allen and mostly the members of Chicago School of Economics and Nobel Laureates like Milton Friedman (Capitalism and Freedom, University of Chicago Press, 1962) and Gary Becker (The Economic Approach to Human Behaviour, The University of Chicago Press, 1976).

According to universal commodification, the term 'economic good' is an all-inclusive, all-encompassing concept, which may be applicable not only to market commodities like milk, shoes, cars, but also includes friendships, cleanliness,
health, honesty etc. This universal approach towards commodification fundamentally incorporates two types of market mechanism: one is universal market rhetoric and the other one is universal market methodology. The users of market rhetoric have discovered various market principles as well as market calculus, which may help to convert each part of human life into a commodity. Similarly, market methodology also introduces a cost-benefit analysis to assess human action and social outcomes through monetary transaction. Thus, both the rhetoric and methodology reduced everything to “an object that can be possessed, that can be thought of as equivalent to a sum of money, and that can be alienated....hence all human interactions are sales.” (Market Inalienability, by Margaret Jane Radin, Published in Harvard Law Review, Vol. 100, No. 8. (June, 1987) pp. 1861)

Alan Wolfe has expressed the thesis in a very precise form: “...marriage is not so much about love as about supply and demand as regulated through markets for spouses; ... people should have the right to sell their body parts, after they are dead, to any willing buyer; ... the best solution to the problems of surrogate mothering is to allow parties to contract freely on the market with no government regulation; and a man commits suicide ‘when the total discounted lifetime ultimately remaining to him reaches zero’.” (Cited in Moral Order and social disorder: the American search for civil society, By Frank Hearn, © 1997 by Walter de Gruyter, New York, pp 8).

Now, this kind of approach towards human behaviour has two prominent outcomes which are as follows:

a) Each behaviour, including human behaviour, is reduced to a market commodity and each labour to wage labour. Each segment of reproductive life becomes a salable good. Reproductive services like gestation, genetic substances like sperm, ova or embryo—all these are reduced to market commodities, the sale of which are governed by market norms like other commodities.

b) Under universal commodification, social ideals are reduced to efficiency and this efficiency, by nature, is closely related to distribution of wealth. Such distribution may not be proper and fair always. Because, in seeking efficiency, universal commodification invites a laissez-faire market
situation, which has two prominent features: firstly, in a laissez-faire market, trading is voluntary and is supposed to gain the maximum benefit. And, secondly, it expresses the free choice of traders. So, the presumptive efficiency and choices—are two distinctive features of a laissez-faire market situation.

The practice of surrogate motherhood may comfortably shape itself within this market situation. Each and every unique feature of universal commodification or more specifically of a laissez-faire market situation offers favourable market conditions to develop the trading of surrogate parenting within this economic infrastructure. To treat reproductive services as wage labour or to permit the application of market norms in the private sphere of life—procreation—allows us to treat the act of gestation as a wage labour and also permits the sale of surrogate’s ova. So, both traditional as well as gestational surrogacy shape them into laissez-faire market situation. Possibilities to gain the maximum benefits, exercising free choices—all favourable market situations promote and also defend surrogate motherhood.

3.11 Defense of welfare economics

Next, I would like to mention another popular economic thesis, called ‘Welfare economics.’ The notion of ‘good’ or ‘just’ for a society is not only crucial for moral philosophy or in political matters, but is equally important in economic discussion also, because economics is deeply concerned with the decision-making of financial policies with an expected consequence for the well-being of the entire population. So, the discussions about ‘just’ or ‘good’ are relevant in ethics, political philosophy as well as in economics.

At the early stage of twentieth century, a normative branch of economics was developed by economists like Francis T. Edgeworth (1881), Alfred Marshall (1890), Arthur C. Pigou (1920), (Rationality and Freedom, by Amartya Sen, pp. 70) about the total welfare of an economic system. The theory took its inspiration from Jeremy Bentham who had advocated the use of utilitarian calculus in order to obtain judgments about the social interest by aggregating the personal interests of different individuals in the form of their respective utilities or welfare.
Nobel laureate, Prof. Amartya Sen in his book ‘Jibanyātrā O Arthoniti’ written in Bengali, (Published By Ananda Publishers, 1405 (Bengali year), pp 31.) observed that three well-known principles constitute utilitarianism. These principles are—consequentialism, welfarism and sum-ranking. So, a utilitarian approach is the revelation of all these three principles. Consequentialism refers to the rightness of an action, policy or choices that could be made only on the basis of consequences of that state of affair. Welfarism, broadly speaking, considers that evaluation of any social state would be based exclusively on the utilities generated in that state of affair. And, sum-ranking suggests the aggregation of individual utilities by simply summing them. So, welfare or utility is the summation of the satisfaction of all individuals achieved as a consequence.

Welfare economics mainly divided into two broad groups, Traditional Neoclassical and New approaches, depending on various uses of measurements for calculating the welfare or utility achieved by an individual. While the new approach prefers to adopt ordinal measurement, the traditional neoclassical thesis adopts cardinal approaches. If an assessment is scale-measurable, i.e, a comparison between two objects can be expressed numerically, then the measurement is called cardinal, otherwise, measurements without mentioning numerical references are called ordinal. Few economists like Lionel Robbins, Vilfred Patero, became skeptical about the possibility of measuring the welfare of an individual cardinally and also added that it was impossible to calculate an individual’s welfare, and then it would hardly be possible to determine the well-being of two or more individuals. According to this new approach, two categories of people—poor and rich—could never enjoy the same amount of satisfaction from equal amount of profit. Suppose, the profit amount of a transaction is Rs. 1,000/-. While a poor man relishes this profit margin, a rich could never.

To overcome these situations, new welfare economists had adopted a novel mechanism called ‘Pareto Optimality.’ Pareto principle suggests that a change is desirable only when it would be possible to build up a situation within which some individual(s) is better off without making the other worse off. Take a concrete example. Suppose that three boys A, B and C can earn Rs. 50/=, Rs. 50/=, Rs. 70/= respectively to do certain job ‘X.’ Suppose that there would be another job situation called ‘Y’, where A, B and C could earn Rs. 60/=, Rs. 60/=, Rs. 70/=...
respectively by performing ‘Y.’ Hence, ‘Y’ refers to an optimal situation, where A and B could earn more without hampering the earning of C.

Prof. Amartya Sen in his book ‘Jibanyatra O Arthoniti’ (Published By Ananda Publishers, 1405 (Bengali year), pp 40.) has offered some limitations for implementing Pareto optimality. According to him, think of a society which consists of a large number of people living in miserable life condition. Prof. Sen thinks that if it is impossible to provide any sort of betterment to these poor people without lessening benefits enjoyed by comparatively well-off individuals, then that situation would also be regarded as ‘optimal’ situation. Prof. Sen observed that inequality, unhappy conditions may co-exist within Pareto optimal situation.

To solve the problem, a few welfare economists like Nicholas Kaldor, Hick etc., had developed some compensation tests. Any change usually makes some people better off while making others worse off, so these tests ask what would happen if the winners were to compensate the loser.

Surrogacy is simply a kind of contractual agreement. The economic analysis (welfare) of any contract law has offered a theory on which promises should be enforced. Under this approach, a contract should be enforced when it makes two people better off, without making anyone else worse off (Pareto optimality). Now, the question arises: who should decide and at what point of time, that concerned parties are better off? The probable answer is: Since they are the best judges of their own welfare it is the parties themselves. Their preferences and their desires should dominate any kind of paternalistic intervention by the legal system, except in some rare circumstances where the parties are demonstrably not acting rationally or when their actions have negative effects on third parties. A surrogate mother and commissioning parents—the contracting parties evaluate their own welfare. While commissioning parents achieve their genetic child, a surrogate mother also enjoys her altruistic satisfaction or financial benefits. In case of non-enforcement of surrogacy contract, both contracting parties would suffer. If a surrogate mother changes her mind and keeps the resulting child in her custody or commissioning parents disagree to pay the remuneration and other medical expenses—surrogacy fails to become beneficial for all related parties.
3.12 Defense from moral standpoints

And, finally, I would like to mention three prominent philosophical doctrines as well as moral theses to justify the philosophical underpinning about social justice that could build up a strong defense for evolving practices like surrogacy. These three doctrines are—Utilitarianism, Liberalism and Egalitarianism.

The first theory is **utilitarianism**, a doctrine advocated by Jeremy Bentham, John Stuart Mill etc. The main tenet of this thesis is: to achieve the greatest good for the greatest number. For a utilitarian, happiness is the prime goal of human life which ought to be promoted by social and collective policies. The second thesis is: **libertarianism**, whose key focal point is freedom. Unlike a utilitarian, a libertarian’s main concern is about individual rights rather than of happiness. We can refer to the name of John Locke as one of the prominent libertarians. And, the last thesis is: **egalitarianism**. This theory principally focused on the distribution of social advantages. Name of Jean-Jacques Rousseau can be mentioned as a prominent author of this campaign. In fact, we may better call egalitarianism as a perspective which both utilitarian as well as liberals utilize as a helpful mechanism to distribute wealth, justice or rights among people.

In this context, I would like to begin our discussion from a common feature more or less shared by these three moral doctrines. We have noticed that all these three theses explicitly or implicitly admit a social ranking or gradation within a social situation. Theoretically, we can think of different social situations of a state within which different types of social ranking or ordering may exist. Let us make the point more clear with some examples.

Let us think of a social state consisting of only two citizens, namely, ‘A’ and ‘B.’

1. ‘X’ might be a possible social situation of a state in which ‘A’ possesses 20 acres of land and 15 cows, while ‘B’ possesses 10 acres of land and 30 cows for cultivating their land. Both citizens have enjoyed the right to sell, property right, political rights etc. equally.

2. ‘Y’ would be a possible social state situation within which all resources and rights could be controlled either by ‘A’ or by ‘B’ exclusively.
3. ‘Z’ might be a possible state situation where conditions might be exactly the same as in ‘X,’ with the sole difference that ‘A’ has 25 acres of land and ‘B’ has 20 cows for cultivation.

Now, within these possible social situations namely, X, Y, Z, individuals or citizens do not enjoy equal social status or social ranking. In fact, social ranking would only be possible within a social situation where any kind of discrimination occurs. Such discrimination may be due to some social or financial causes or may be due to gender or power relations. So, when we pronounce the phrase ‘better off’ or ‘worse off,’ we presuppose that there exists at least one who is either ‘better off’ or ‘worse off’ in relation to at least one person. The notion of ‘better off’ or ‘worse off’ is relative term. Thus, the social ranking of an individual within a society shows that we all do not possess same social ranking. All the moral doctrines, discussed above, consider social discriminations as indispensable feature of ranking, but, different moral doctrines offer various types of moral measurements to minimize these social inequalities. Utilitarianism, libertarianism and egalitarianism—all these three moral doctrines presume social injustices, but with varying degrees.

According to egalitarianism, we can construct a ‘leximin norm,’ (Commodification and commercial surrogacy, Philosophy and Public Affairs, pp134) a norm which stipulates to maximize the benefits for the most worse-off individual as a first priority, then to maximize the benefits the second worse-off as a second priority without lessening any benefits assigned to first worse-off. Then, third one and so on, proceeding to the best-off individual. So, for an egalitarian, distribution of social wealth or advantages would follow ‘leximin norm.’ While utilitarianism is based on the principle that every individual should be given equal consideration in the evaluation of the total happiness, libertarianism advocates an even distribution of basic rights and liberties.

The defense made by Liberalism, specifically with accord to liberal feminism, is based on two types of fundamental rights: right to reproduce and right to contract. Surrogate motherhood enables individuals or couples to fulfill their desire to become parents. Surrogate arrangement promotes female autonomy because it allows women to have complete control over their reproductive functions.
Commercial surrogacy is based on a legal right that gives adults the freedom to contract with other adults.

For a utilitarian, surrogate pregnancy does not harm the resulting children and therefore it is useful in resolving the issue of human infertility. Children are not harmed because they are “wanted” by their social parents. Surrogate motherhood provides a better solution for female infertility at the one hand, while on the other hand, a surrogate mother enjoys the financial compensation in exchange of her reproductive services she had rendered during her surrogate pregnancy. Without harming any third party, if two contracting parties mutually gain benefits and happiness by using surrogacy, their happiness also makes other people, who are closely related to them, much happier.

3.13 A novel approach of defense: by Edger Page

To defend surrogacy, I like to apply a unique, novel doctrine proposed by Edger Page. Surrogate motherhood has two popular forms: traditional and gestational. In traditional surrogacy, the surrogate mother contributes her own genetic material—ovum. In gestational surrogacy, both commissioning parents are the genetic parents of the resulting child; surrogate mother has no genetic relation with the baby. Sometimes, it has been objected that, in case of traditional surrogacy, the surrogate mother is not only the birth mother, but also the genetic mother of the child. So, how could commissioning parents become the legal parents of the resulting child? Edgar Page, in his article, ‘Taking Surrogacy seriously,’ (Published in Philosophical Ethics in reproductive medicine, Published By Manchester University Press, 1990, pp. 51-59), has introduced a novel doctrine of donation—in-utero-donation. According to Page, unlike children, an individual can donate or transfer his/her genetic substances like gamete, embryo etc. At the very moment of donation, the donor loses all the parental rights related to these genetic substances and such rights ultimately transferred from the donor to the donee. Depending on the same logic, we can assume that if a man can donate his gamete, then, a reproductive woman can also donate her ovum to others. Again, if the donation of ovum outside her body is permissible, what is the harm to think that a surrogate mother donates her ova within her own body? She actually donates her ova in-uterus. Thus, if we admit that a woman can donate her ova, it becomes irrelevant whether such donation takes places inside the body or outside
of it. And, like donation of gamete or embryo, all parental rights related to this genetic material transferred to the donee (commissioning parents) from the donor (surrogate mother). Page's doctrine of in-utero donation, thus, protects the legal position of the commissioning parents of the child.

3.14 Our assessment

We would conclude this chapter with the following observations:

- Female infertility can be put under two broad categories: one who is unable to produce ova and medically declared as unfit to gestate a child and the second group includes woman who can produce quality ova for fertilization, but medically unfit for gestation. In medical terminology, the first category of woman is known as 'infertile,' while the second as 'sub-fertile.' Under the medical terminology, the technological assistance received by the first group of women IVF-by donor, i.e, the sperm of the male partner fertilized the ova of the donor in a petri dish and the resulting fetus is implanted to the womb of a surrogate mother for full term. But, in second case, the embryo created by the couples, are implanted to the womb of a surrogate mother for full term.

Now, these two options, especially the second option—gestational surrogacy, provide a great opportunity to both intending couples to be genetically related with their child and it is this opportunity, which gives rise to a dispute. The dispute is about the misuse of this technology. Critics like Mary Warnock had mentioned the dispute as a surrogacy for 'convenience,' (Mary Warnock, supra, n.10, para 8.2, cited in 'Value of Life: An introduction to Medical Ethics,' by John Harris, published by Routledge, pp. 142) which means that women who are confirmed as medically fit or capable to gestate her own baby for full term, may wish to employ a surrogate mother only to avoid the burden of pregnancy. Now, this negative attitude towards pregnancy might vary from person to person depending on their personal choices. Such negative feeling may occur—due to certain physical or mental hazards related to pregnancy—due to feeling of discomfortness during and after the period of pregnancy—due to pain and life-risk at the time of childbirth. Pregnancy always creates some problem of varying degree, such as, permanent marks, certain biological transformation on woman's body, chances of miscarriage or stillbirth. All these possibilities, in anticipation, may create an unpleasant, unexciting, non-appealing mind-set of woman toward pregnancy. As a consequence, it seems highly probable that in near future, women from rich, well-
off, affluent families may employ surrogate mothers to gestate their baby only for convenience ground. It has been scientifically proven that, in gestational surrogacy, the fetus is almost cent percent genetically related with its genetic parents and the genetic contribution of a surrogate mother is approximately nil. So, the possibility to employ a gestational surrogate mother only to avoid the hazards and risk factors related to pregnancy for a long period of time is exceptionally high. And, once it is permitted to use the technology exclusively on the ground of 'convenience,' this would not only encourage the negative attitude towards pregnancy, it would soon become a regular practice among women not to be pregnant, but to employ surrogate mothers on their behalf. This tendency ultimately disregards the traditional maternal-child bond and disrupts the psychological attachment of a mother with her child.

Again, what might disturb us: in most cases, surrogate mother had no option but to engage herself in an alternative job to earn money. An option with no other alternative choice—is virtually a kind of enforcement. In Indian currency, a surrogate mother receives approximately Rs. 4,50,000/- to 6,00,000/-, which is quite attractive for a needy, underprivileged woman of our country. To enforce a needy woman or to utilize coerced woman for a risky job—even be treated as morally justifiable. Moreover, indulgence to create negative attitude towards pregnancy, may establish a separate, distinct class of woman—a breeder class. Martha Field, in her book, 'Surrogate Motherhood' (Published By Cambridge University Press, Expanded Edition, 1990, pp. 30-31) suspects, "...employers would pressure women to employ a surrogate rather than allow their own pregnancy to inconvenience their employer or impede their career. Employers might, for example, confer health insurance that would cover hiring a surrogate instead of giving women maternity leave."

Now, to resolve the problem of 'surrogacy for convenience,' in 1990, British Medical association (BMA) formally accepted that employments of surrogate motherhood would be restricted only as an 'option of last resort.' Now, the question arises: what is meant for 'option of last resort?' In those cases where it is impossible or highly undesirable for medical reasons to carry the fetus for full course of pregnancy, only these couples would be recommended for surrogacy. (A textbook of in vitro fertilization and assisted reproduction: the Bourn Hall Guide
to Clinical and Laboratory Practice, by Peter R. Brinsden, Published By Taylor and Francis, 2005, pp 394).

The Bourn Hall Clinic, where the first surrogate baby of Britain was born (through IVF) in 1989 (British Medical Journal, April, 2000, Edited by Peter R. Brindsen) had independently constituted an Ethical Committee. The committee offered guidelines to determine for whom surrogacy should be employed (Regulating Reproduction: Law, Technology And Autonomy, By Emily Jackson, Published By Hart Publishing, 2001, pp 292)

(A) Full or IVF surrogacy could be utilized where the woman ovulates but without a uterus, but with one or both ovaries functioning, are the most obvious group that may be suitable for surrogacy. These include:

- Women with congenital absence of the uterus.
- Women who have had a hysterectomy for cancer,
- Women who have had a hysterectomy for severe hemorrhage or ruptured uterus.

(B) Women who suffer repeated miscarriage, for whom the prospect of carrying a baby to term is deemed to be remote, those who have repeatedly failed to achieve a pregnancy following IVF treatment may also be considered.

(C) Women with certain medical conditions, which may make pregnancy life threatening for her own health or for that of the child. For example, the commissioning mother might have kidney disease or high blood pressure.

(D) Women with repeated abortion.

Moreover, surrogacy could be used as a less high-tech strategy where one or other of the commissioning parents carries a genetic disorder which might be passed on to offspring. Thus, the applications of surrogate motherhood would be strictly restricted only to medically unfit couples.

- Princess Elizabeth Asquith Bibesco once told that blessed are those who can give without remembering and take without forgetting (Transformative Motherhood: On Giving And Getting In A Consumer Culture, Edited By Linda L. Layne, Published By New York University Press, 1999, pp 65). A prefect gift is one which is priceless, which transcends material expression and
economic worth and which renders the material to immaterial. 'Gift of life' is, no doubt, a good example of perfect gift. 'Gift of life' ordinarily includes blood-donation, donation of organ, bone-marrow donation etc. With the advent of different assisted reproductive technologies, the range of 'gift of life' includes sperm donation, ovum donation, embryo donation etc. In recent years, proponents of surrogate motherhood acknowledge the practice as a paradigm case of 'gift of life.' For them, the inclusion of surrogate motherhood within the rubric of 'gift of life' is appropriate and reasonable mainly for two prominent reasons: the contribution of a surrogate mother reinforces to think that her contribution can never be compensated and secondly, whatever a surrogate mother offers is almost equivalent to 'near-sacrifice.'

Sometimes, it has been objected that in commercial surrogacy, a surrogate mother's service is compensated by money. How could a commercial form of service be included within the rubric of 'gift of life'? Non-commercial, altruistic surrogacy could hardly be treated as a gift or as a sacrifice. In reply to this objection, we may say that there are enormous instances through which it could be established that altruistic, non-commercial use is much better than its commercial use. Take the example of blood donation. The quality of blood collected from a non-commercial blood bank is comparatively better and safer than collected from commercial blood bank. Remuneration attached to commercial form of blood donation inspires a large section of donors who are alcoholic, diseased persons suppressing their illness in order to get payment or poor marginally fit to donate blood. Thus, remuneration or compensation does not always imply the inadequacy of any service.

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