

**THE PRACTICE OF SURROGACY AND KANT'S CATEGORICAL
IMPERATIVE: A PHILOSOPHICAL EVALUATION**

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MARCH, 2024

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**A RESEARCH PROJECT SUBMITTED TO THE DEPARTMENT OF
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CERTIFICATION

This is to certify that this essay; **The Practice of Surrogacy and Kant's Categorical Imperative: A Philosophical Evaluation** was carried out by **Eguono Elizabeth OKE** in the Department of Philosophy, Faculty of Arts, University of Benin, Benin City.

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DEDICATION

This essay is dedicated to God Almighty, who gave me understanding, strength and grace to complete my course of study in the University of Benin and to my Grandma Late Mrs. Ariyo Rosaline Ighojayenemo

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Firstly, I want to thank God for the completion of this project and also return all glory to him for seeing me through my stay in school. It can only be by his mercy's that I made it this far. A very big thank you to my dad Mr. Steady Temidayo Oke, for his moral and financial support all through my stay in the University of Benin. To my siblings, Mary, Benedict and Theresa, thanks for your love and support. To auntie Malo, I love you so much, thank you for your advice, encouragements and prayers. I would also like to appreciate my able supervisor Dr. Osemwegie Wesley, for his support, advice, fatherly love and for being the best supervisor one could ever ask for. To Dr. Asia Emmanuel, my assistant project supervisor as I fondly call him, thank you for always being there to assist me all the way.

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ABSTRACT

This project investigates the ethical implications of surrogacy by applying Immanuel Kant's categorical imperative. Surrogacy involves a woman carrying and giving birth to a child on behalf of another person or couple. The ethical debate surrounding surrogacy centers on issues such as reproductive autonomy, exploitation, and commodification of women's bodies.

Immanuel Kant's moral philosophy, particularly the categorical imperative, provides a framework for assessing the ethics of surrogacy. The categorical imperative states that moral actions should be guided by rational principles that can be universally applied without contradiction. It emphasizes treating individuals with dignity and respecting their autonomy.

This project examines how the categorical imperative can be used to evaluate surrogacy. It explores whether surrogacy aligns with Kant's moral framework or if it presents conflicts. The analysis considers factors such as the intentions and treatment of surrogate mothers, the potential commodification of the child, and the long-term consequences for all parties involved.

By applying Kant's categorical imperative to surrogacy, this project contributes to the ongoing discussion on the ethical aspects of surrogacy. The findings will provide insights into the compatibility of surrogacy with Kantian ethics and offer a broader understanding of the ethical considerations surrounding reproductive technologies and the human experience of procreation.

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

The term surrogacy is a concept that has been debated for ages now in our world. It was not such a popular practice among us until the 20th century, precisely 1985, which was when the first successful gestational surrogacy was carried out. The term surrogacy involves a whole lot of processes and in some cases do not turn out successful.¹

Surrogacy is a practice in which a woman (surrogate mother) Carrie's and gives birth to a child on behalf of another individual or couple (intended parents). It is a complex and controversial topic that raises numerous ethical and moral questions. An ethical framework that can be applied to examine the ethical implications of surrogacy is Immanuel Kant's Categorical Imperative.²

Immanuel Kant, a popular and influential philosopher of the 18th century proposed the Categorical Imperative as a moral principle to guide ethical decision making. According to Kant, it is an unconditional moral obligation that humans should follow irrespective of their desires or personal circumstances. It emphasizes the importance of treating humans as ends in themselves, rather than means to an end.

¹M. Velaquez, *Philosophy: A Text with Reading* (Belmont: McGraw Hill, 2002) p.12

²J. Omoregbe, *Ethics :A Systematic and Historical Study* (Lagos: Joja Press Ltd. 2012), p. 223

In the context of this discussion on surrogacy, Kant's Categorical Imperative is used to examine the ethical considerations involved. It makes us consider the following: The principle of universalizability, can the practice of surrogacy be universally applied without contradiction? Kant argues that an action can be morally right if it is universally acceptable, which means it can be applied as a general rule without leading to moral contradictions. Applying this to surrogacy as a concept, one must consider if the practice can be consistently and ethically applied in all situations without violating the rights of individuals involved. By using Kant's Categorical Imperative as an ethical framework, we can examine the moral dimensions of surrogacy and evaluate whether it aligns with the principles of universality, respect for persons and the preservation of human dignity.³

1.2 Statement of the Problem

This study examines the ethical issues involved in the process of surrogacy. It tries to understand the meaning of surrogacy and the different arguments for and against the permissibility of surrogate mothering. The inability of philosophers to resolve this issue brings into question the extent that Kant's notion of categorical imperative could serve in resolving this problem.

³ I. Kant, *Fundamental principles of Metaphysics of Morals*, T.K. Abbott(trans),(New York: Longmans Greens and co 1898), p. 38

1.3 Methodology

This study employed the method of hermeneutics. Given that it is qualitative research that focuses on the views of different scholars on the permissibility of surrogate mothering, hermeneutics will enable us review the texts on the subject matter, dissect the various contradictory views and interpret Kant so as to proffer a solution to the problem.

1.4 Purpose of the Study

The purpose of this study is to argue for surrogate mothering via the Kantian lens of categorical imperative. The other purposes of the study include to; understand the meaning of surrogacy; highlights the various views on surrogacy and their objections; and proffer an alternative solution via the Kantian lens of categorical imperative.

1.5 Significance of the study

This study reopens discussions on the practice and permissibility of surrogate mothering. It provides a detailed account of the permissibility of the practice through the Kantian lens of categorical imperative. The interpretation of Kant's categorical imperative enables this study to provide a subtle analysis and defence of the practice of surrogate mothering.

1.6 Scope of the study

This work covers the notion of surrogate mothering in bioethics, the various

debates and how Kant's categorical imperative could serve as a panacea to the problem of surrogacy. Although, Kantian ethics which is generally regarded as duty ethics has been interpreted in several academic circles to mean goodwill, prima facie, consequentialist and deontologist, this work is limited to the application of Kant's ethics to the problem of surrogate mothering.

1.7 Literature Review

In his *Traditions in Ethics* Denise Peter noted that Kant in search for the grounds of the validity of ethics employs the same methods by which he establishes the grounds of the certainty of science. A valid moral principle, Kant tells us, that is, a morality which is objectively and universally binding, requires an a priori foundation. This Kant calls "universal Moral Law."⁴ The Kant universal law is categorical imperative-those actions are right which conforms to principles, one can consistently will to be principles to everyone, and those actions are wrong which are based upon maxims that a rational creature could not will that all persons should follow.

Through the categorical imperative, then, we are enabled to distinguish right from wrong actions. It is unconditional directive for behavior, binding upon everyone because each rational person acknowledges an obligation to follow reason. For Kant differentiates

⁴Ibid; p. 47

the categorical imperative. Kant argues that the validity of the basis moral law would not be affected even if everyone were to violate in actual conduct.

For David Bender in his *Constructing a life Philosophy*, Kant posed a question “do you live by golden rule”⁵ and his answer was on, he gave reason that the golden rule for these days is “do unto others what they would do unto you” but do it first. Immanuel Kant says, he tries to live by what he called categorical imperatives, which is unconditional moral law binding all actions. He then suggests three (3) rules to live by:

1. We should treat others and ourselves as and themselves and not means to an end
2. Act that any of your actions could be made into universal law.
3. Search for truth.

Immanuel Kant in his *Groundwork for the Metaphysics of Morals* (1785) sought out and established the supreme principle of morality. The first two sections of this work are written in what he calls an “analytic” style: one that starts from what we suppose we know all uncovers what that knowledge presupposes.

In section one, Kant begins from the idea only a good will and actions expressive of such a will have unconditional value. A person of goodwill acts from the

⁵ D.L. Bender, *Constructing a Life Philosophy: Opposing View Points Series* (New York: Green haven Publishers,1985) p. 92

motive of duty. Acting from duty is not a matter of having a certain purposes, Kant argues, for a good purposes, such as helping others may be adopted either from duty or from natural inclination. The distinguishing feature is the purpose as something that required for him; something that is necessary for him to do. This feature captures the maxim, or subjective principles on which the agent acts.

In section two, Kant reaches the same conclusion by another route- a general analysis of the role of reason in action. The concept of obligation, or unconditional necessary action can be analyzed to yield the same principle uncovered in section one. Since an obligatory action is required or necessary, the maxim of performing it must be conceived as a law. This yield the first formulation of Kant's categorical imperative; the formula of a universal law: act only on a maxim which you can at the same time will to be a universal law.⁶

Mere analysis of the concept of moral obligation shows that the formula of universal law is its principle. But it is another question how this principles is "possible" – that is how it can be binding on the will. Kant argues that since every willed action is done with an end in view, the possibility of morality depends on the existence of an objectively necessary end. He proposes that we must treat humanity as an end itself not as

⁶ T. Carson, Golden Rule, In *Encyclopaedia of Ethic*, L.O Becker and C.B. Becker (ed.) vol.1 (New York: Routledge, 2001), p. 614

a means by which we mean the rational power of self-determination. This leads Kant to a new formulation of the categorical imperative. Act always so that you treat humanity in your own person or another, never merely as a means but also at the same as an end in result.⁷

In section three, Kant argues, we must regard ourselves as possessing free wills. We cannot think our actions as causally determined by outside forces or natural laws. So far this conception of our freedom is merely negative. Since the will is a form of causality, however, its actions must be determined in accordance with some laws or principles. The free will, therefore must be conceived as autonomous, the author of its own laws. The moral law is in fact the positive conception of freedom.

Also in his *Critique of Practical Reason* (1788) Kant had planned to proceed from the *Groundwork of the Metaphysics of Morals* itself, but he apparently continued to dissatisfy with the argument described in the *groundwork of metaphysics of moral*. In any case, in the second critique, Kant produced a new argument for the moral law which he called a “credential” for it.⁸

⁷ W. F. Lawhead, *Voyage of Discovery: A Historical Introduction to Philosophy*, (London: Wadsworth Publishing Company, 1998) p. 342

⁸ D.P White, *Great Tradition in Ethics* (Belmont: Wadsworth Publishing Company, 1996), P.181

When we make a decision about what to do, or in Kant's language adopt a maxim, reflection on whether our reasons justify our actions leads us to awareness of the moral law. And we find that it is fact of reason that we can be motivated to act as this law requires even when our strongest natural inclination is opposed to it. From this, in turn we learn that we are free. In this book Kant established the freedom of the will, the immortality of the soul and the existence of God.

This work attempts to answer the question of reason's power with respect to the principle of understanding. Here, Kant starts his moral philosophy; practical reason is a priori because "ought" expresses rational necessity. Kant had already observed that it is not difficult to establish conditional rational necessity as he later argues, the conditional necessity is expressed by hypothetical imperative which have their form: if you would achieve end E, you must do A.

This principle is analytic for the will, since willing something is deciding to cause it and deciding to cause it is deciding to use the means to bring it about. The moral law is categorical imperative which is synthetic a priori and must be established by critique.

Barbara Mackinnon remarked and asked on Chapter five in his *Ethics Theory and Contemporary Issues* that Kant's moral theory gives room for two main questions which Kant believed philosophy should address, they are:

- i. What can I know?
- ii. What ought I do?

In answering the first question, Kant thought he was creating a new Copernican revolution. He gives answer to the second question in his philosophy. This book start with Kantian ethics by posing the question “what gives an act moral worth?”⁹ It is not the consequences of the act, according of Kant but the motive behind the action. The right motive according to Kant is what gives a moral worth.

What is the right motive? Kant believed that an act has specifically moral worth only if it is done with a right intention or motive. He referred to this as having goodwill-good without having any qualifications. A goodwill is to act out duty or out of a concern and respect of the moral law. Kant’s universal law is called categorical imperative which is unconditional, binding all actions and Kant differentiate it from the hypothetical imperative which is conditional.

Commenting on Kant’s ethics and the notion of surrogacy, Emmett Barcalow noted in his work *Moral Philosophy, theories and Issues* that for Kant the only thing that is good without qualification in this world is goodwill. Some things we regarded as good such wealth, courage, power, talent etc. are not in good themselves because they can

⁹ B. Mackinnon *Ethics Theory and Contemporary Issues* (New York: McGraw Hill Publishers, 2002) p. 21

become bad when misused.¹⁰

Kant proposed a moral law that is necessarily binding and called it categorical imperative. He believed that it was derived from goodwill. The book explains vividly what Kant meant by actions and maxims. Kant believes that people act as they do for a reason (whether or not they are immediately conscious of the reason or engaged in deliberation before acting). It also explained how categorical imperatives are formulated.¹¹

¹⁰ E. Barcalow noted in his work *Moral Philosophy, theories and Issues* (London: Heinemann Publishers, 2000) p. 32

¹¹ I. Kant, *Fundamental principles of Metaphysics of Morals*, T.K. Abbott(trans),(New York: Longmans Greens and co 1898), p. 38

CHAPTER TWO

KANT AND THE CATEGORICAL IMPERATIVE

2.1 Kant's Biography

Immanuel Kant was born on April 22, 1724, in Königsberg, Prussia (now Kaliningrad, Russia), where he spent his entire life, and died on February 12, 1804 at the age of seventy-nine. He is a German Philosopher, whose writings are Prerequisite reading for all who desire to understand nineteenth and twentieth centuries thought. Kant lived by routine, although he had many friends, he did not marry and did not venture more than forty miles from Königsberg, the city of his birth and death. No wonder. The German writer and poet, Heinrich Heine immortalized him as automation thus:

Immanuel Kant. Rising from bed, Coffee-drinking, lecturing eating, working everything had its fixed time: and the neighbors knew that it must be exactly half four when they saw professor Kant, in his gray coat, with his cane in his hand, step out of his house-door, and move toward the little lime tree avenue, which is named after him, the philosopher's walk. Eight times he walked up and down that walk at every season of the year, and when the weather was bad, or the gray clouds threatened rain, his servant, old Lampe, was seen anxiously following him with a large umbrella under his arm like an image of providence.¹

We can boldly say that Kant's moral philosophy is the evidence of his life style. Because his life is the reflection of his moral philosophy. Immanuel Kant's family belonged to the lower middle class and was devoutly religious. His parents were poor but devout

1. D.P. White, *Great Tradition in Ethics* (Belmont: Wadsworth Publishing Company, 1996), p.179.

members of a fundamentalist protestant sect known as Pietism. In recognition of his son's academic ability and because of this family's religious persuasion, Immanuel's father sent him to the local Pietistic College to prepare for the ministry. Immanuel continued his studies at the University of Konigsberg, and became increasingly interested in natural science and philosophy. He studied a wide variety of subjects including theology, philosophy, mathematics, physics and medicine. He withdrew from the university in 1747 to support himself by working as a private tutor for families in the Konigsberg area. He resumed his studies in 1754 and completed his degree the following year. Thereafter, he was appointed as an instructorship at his university and finally, in the 1770, was promoted to a full Professorship.

It is a matter of fact, that Kant was a famous and successful teacher. Perhaps surprisingly for one who was so rigorous in his thinking, he is reputed to have given the following advice in practical pedagogy: "Attend most to the student of the middle ability, the dunces are beyond help and geniuses help themselves."² The testimonies of his students show that, Kant's teaching is of thing of success. He teaches not for money's sake but for the sake of duty. To vividly understand the personality of Immanuel Kant, one biographer wrote,

Restricted to quiet life by a modest income, delicate health, and a demanding

² *Ibid*; p. 180

workload, Kant never married or travelled... this picture must be tempered by the less families set of images handed down to use by his friends and students of a genial host, famous for an immensely popular teacher whose students claimed that they never left a single lecture in his ethics without having become better men “and of “ the old Jacobin whose passionate defence of the French Revolution (1789-1799) astonished and inspired his contemporaries.³

This shows a true picture of Kant.

2.2 Influences on Kant

There is no doubt; there are influences on Immanuel Kant. His family’s background affect his philosophical thought; his moral philosophy is the reflection of his life style. Kant was influenced by some philosophers before him and after his time.

Kant as we know, was educated in the predominant Leibniz-Wolffian philosophy (1646-1716, Wolff 1679-1754), an extreme form of dogmatic rationalism. Kant had relatively average philosophy. Kant was impressed by Hume’s theory of knowledge. Kant said;

I openly confess that the suggestion of David Hume was the very thing that many years ago first woke me from the dogmatic slumber and gave my investigations in the field of speculative philosophy quite a new direction.⁴

Kant found merit not only in Hume’s empiricism, but also is Descartes’ rationalism, with its emphasis on the role mind in attaining knowledge. Descartes’ theory

³ A.M. Frazier, “Immanuel Kant”, in *Encyclopaedia of Ethics*, vol 2, L.C. Backer and C.B Backer (ed.), (New York and London: Rout ledge, 2001), P.929.

⁴ S.E. Stumpf, and D.C. Abel, *Elements of Philosophy: an Introduction*, (New York: McGraw-Hill, 2002), P.69

of “Ego” influenced him, that he attributed the theory of perception to “ego” “myself”. The theory of dualism of “res Cogitans” and “res exterica” can be said to have influenced Kant’s dualism of Noumena and phenomena worlds. Also, the doctrine of innate ideas shaped his moral doctrine of the will and the moral law within us.

We can also boldly say that John Locke’s epistemology influenced Kant. Locke was against Descartes’ view that knowledge is innate. For Locke, the mind is at birth a tabula rasa “Clean slate”. Kant is against this, the mind for him is active, it imposes its concepts and categories on the object of knowledge.

Another major influence on his ethical views is the work of Rousseau (1712 -1778). Citing encyclopaedia of ethics, Rousseau’s remark, in the social contract (1962) that: “To be governed by appetite alone is slavery, while obedience to a law one prescribes to oneself is freedom.”⁵

This may be source of Kant’s leading idea that obligation is grounded in autonomy. No wonder, in the 1760s, Kant wrote that it was Rousseau who taught him the value of humanity.⁶

One should also note that religion plays a major role in the influences of Kant. For his parents were a devoted member of a fundamental protestant sect known as pietism,

⁵ Frazier, IM, *Op. Cit*; p. 929.

⁶ *Ibid*; p. 930.

his father sent him to the local school, pietistic college to prepare for the ministry. No doubt, one can say that the doctrine of the golden rule as an ethical precept influenced Kant's categorical imperative. Probably, it was the golden rule which prompted him to formulate the categorical imperatives. For we read that, Kant treated the golden rule with disdain, saying that it cannot "serve... as the rule or principle," that it is only a deduction from" the supreme principle through with a serious limitation.⁷

2.3 Works of Kant

Immanuel Kant's work and his contribution to the academics cannot be underrated. Kant wrote tremendously in natural sciences and philosophy. He evolved from a man-of-letters philosopher with a free and flowing style of writing and thinking into "critical" philosopher with a labour style of presenting uncompromisingly profound through. He transformed a spontaneous scientific curiosity into an impulse to explore the foundation of science, at the innovation of an important school of thought⁸.

The most important of Kant's scientific writings is his *General Natural History and Theory of Heaven* (1755), In which he accounts for the system by formulating the nebular hypothesis. Kant's philosophical works includes *Critique for Pure Reason* (1781), in which his concern is to demonstrate the possibility of certain knowledge in the natural

⁷ M.G. Singer, "Golden rule" in *Encyclopaedia of Ethics*, vol 2 L.C. Backer and C.B Becker (ed.), (New York and London: 2012), P.615

sciences and mathematics. In his *Critique of Judgment* (1790), he analyses aesthetics and biology. Kant endeavors to show the foundation of genuine morality in the *Fundamental Principle of Metaphysics in Moral* (1785), and the *Critique of Practical Reason* in the latter, he investigates the implication of morality for religion.

The direction of Kant's Philosophical interest is revealed in his reflection as Paul Guyer writes: "Immanuel Kant concluded his critique of practical reason (1788) thus: two things filled the mind with ever new and increasing admiration and awe... the starry above me and the moral law within me."⁸ His concerns are with nature and morality. Against the background of 18th century skepticism, which called into question the foundation of scientific knowledge and morality, he proposed a comprehensive system of the universe in which their certainty is guaranteed. He undertook an intensive examination of the nature of thought to show how we can have certain knowledge of both scientific facts and moral duties. Kant in search for the grounds of the validity of ethics employed the same method by which he established the grounds of the certainty of science. A valid moral principle must be independent of the empirical data of morality, it is to be binding upon all men. In short, for Kant, a genuine morality (i.e. objectively and universally binding), require an a priori foundation.

⁸ White, GTE, *Op, Cit*; P.180.

2.4 Kant's Ethics of Duty

Ethic comes from the Greek word "ethos" which means "character". Kant's approach to ethics differs in a fundamental way from that of Aristotle, Augustine and Aquinas. These Philosophers believed that happiness is the highest good and understood ethics as the study of how to attain this goal. Kant holds that the highest good is a "Goodwill" and that ethics is the understanding of what makes a "Will" good. For Kant happiness is good only if the person who is happy deserves it because of his or her goodwill. In a Kant's view, neither happiness nor any of the other things considered as good such as virtues, intelligence, wealth, honour, knowledge etc, are good in themselves for they can be misused by someone with a bad will. The only thing on this world that is good in itself is Goodwill as Kant explains at the beginning of the Fundamental Principles of the Metaphysics of Morals:

Nothing can possibly be conceived in the world, or even out of it, that can be called good without qualification, except a Goodwill... power, riches, honour, even health and the general well-being and contentment with one's condition that is called happiness, inspire pride, and often presumption, if there is no goodwill to correct the influence of these on the mind.⁹

To act in order to achieve happiness, or to fulfill any other desire we may have, is not to act morally but selfishly. To act morally is to act with a goodwill, which means

⁹ I. Kant, *Fundamental Elements of Metaphysics of Morals*, T.K. Abbott (trans.), (New York: Longmans green company, 1898), p.10.

to act from Duty. The Goodwill is not good because it achieves good results, even if it were unable to attain the ends it seeks, it would still be good in itself and have a higher worth than the superficial things gained by immoral actions.

Kant then proceeds to explain the relationship between Goodwill and Duty: goodwill is one which acts for the sake of duty. Indeed, human actions have inner moral worth only if they are performed from duty. Actions that result from inclination or self-interest may be praise-worthy if they happen, for whatever reason, to accord with duty, but they have no inner worth. Duty is, as Kant will say, the necessity of acting from respect for the moral law.

Duty does not serve our desires and preferences (inclinations), but rather overpower them. For instance, if I help someone in need because doing so is my pleasure, then I am acting from inclination and not from duty.¹⁰

Kant points out the differences between an action done from duty and that done in agreement with duty. To say that an action is performed for the sake of duty, it means that the duty requires it. It describes the agent's motivation. To say that an action, agree with duty describes the objective action, irrespective of the agent's motivation.¹² Kant's reflection on acting from duty let him to formulate three propositions of morality. They are:

¹⁰ Stumpf and Abel, *Op. Cit*; p.379.

- (1) An action must be done from duty in order to have moral worth.
- (2) An action done from duty derives its moral worth from the maxim by which it is determined.
- (3) Duty is the necessity of acting from respect for the law (moral law).¹³

The moral law is something we can respect, something that inspire awe and obedience. According to Kant, the moral law is known as categorical imperative, it is unconditional binding.

2.5 Categorical Imperative

By an “imperative”, Kant meant a conclusion of practical reasoning stating that one has reason to act in a certain way, expressed as a claim about how one ought to act.¹¹ For example, that one ought to exercise for the sake of health, or that one ought to keep one’s agreements. The finite rational agent, according to Kant experience practical reasons as constraints because, they experience motives that can conflict with reason and there are limitations on their rational capacities, which make them not to conform to these standards always or without effort. The term ought to expresses this aspect of constrain or necessitation. There are two kinds of imperatives or command, as Kant understood it.

They are:

¹¹ A. Reath, “Categorical Hypothetical and Imperative”, In *Encyclopaedia of Ethics*, vol. 1, by L.C. Backer and C.B. Becker (New York and London: rout ledge, 2001), p.190

- i. Categorical imperative and
- ii. Hypothetical imperatives.

Kant understood categorical imperative to be a requirement of reason applying with necessity to any rational agent, the authority of which is not based on appeal to any particular desires or interests in an agent. While hypothetical imperative is the conditional imperative which commands a person to do something that is means to an end.¹² To understand the concept of a categorical imperative, one must grasp the basic distinction that Kant draws between hypothetical imperatives and categorical imperative. A hypothetical imperative represents an action as good or necessary as means to some desired end.¹³ For example, if you want to become a medical doctor, you must study medicine. A categorical imperative, by contrast, represents an action as good in itself, without reference to any further end beyond the action. It says that one ought to perform a certain action for its own sake, regardless of one's desire or interests. Kant further distinguishes between problematic hypothetical imperative is this. If you want to become a lawyer, you must study law. It is the imperative of skill. The assertor hypothetical imperatives command one to behave in a certain way to be happy.

A categorical imperative says that one ought to perform a certain action whether

¹² Ibid; p. 191

¹³ I. Kant; FPM, *Op. Cit*; p.38

one wants to or not, without regard to how it serves one's interests, thus setting out an inviolable requirement on action. The validity of a categorical imperative is independent of an agent's particular desires and interests, for that reason, they are thought to be rationally necessary and inescapable; that one has no interest in an action or end prescribed by a categorical imperative does not exempt one from the requirement.¹⁷

Kant thinks that from the concept of a categorical imperative, one can derive the fundamental principle of morality by which we determine what our duties are. Kant major works in ethics are devoted to exploring different formulations of categorical imperative (that he takes to be equivalent). According to Kant, there is only one categorical imperative are. First, as Kant writes, then I quote: "There is therefore one categorical imperative, namely this; act only on that maxim whereby thou canst at the same time will that it should become a universal law"¹⁸.

Kant's first explicit formulation of the categorical imperative requires an individual to obey a maxim which can, without contradiction, be willed to be a rule for everyone. The second main formulations emphasizes clearly on respect of human dignity and using humanity either in one own self or in person of others. Thus, in Hinman's work on ethics, he presented the formulation in a direct form as it was stated by Kant himself. "So, act in such a way that you always treat humanity, whether in your own person or in

person of any other, never simply as a means but always at the same time as an end.”¹⁴

In this formulation, we see more clearly its social implication. It requires us to treat all human beings as ends in themselves and never as merely means to ends.

J.I. Omoregbe enumerated six different formulations of the categorical imperative as Kant expressed them.¹⁵ They are as follows:

1. Act only on that maxim through which you can at the same time will that it should become a universal law.
2. Again, I am never to act otherwise than so that my maxim should become universal law.
3. Act as if the maxim of your action were to become through you will a universal law of nature.
4. So, act as to use humanity both in your own person and in person of others always at the same time as an end, never as a means.
5. So act that your will can regard itself at the same time as making universal law through its maxim.
6. So act as if you will always through your maxims a law-making member in a universal

¹⁴ L.M. Hinman, *Ethics: A Pluralistic Approach to Moral Theory*, (Belmont Wadsworth Cengage learning, 2008), P.179

¹⁵ J.I. Omoregbe, *Ethics: a systematic and Historical Study* (Lagos: Joja press Ltd, 2012), p.224

kingdom of ends.

2.6 The Source of Moral Law-Categorical Imperative

The categorical imperative does not based on anything outside or external to rational will, otherwise, it would not be unconditional because the “will” can always say “No” to anything outside itself. Thus, man “rational will” according to Kant, is the source or moral law. The moral law is self-imposed law; it is man rational will which imposes on itself the law. This is what Kant calls “the principal of the autonomy of the will, Omoregbe says: It is the sole principle of all moral law and of all corresponding duties.”¹⁶

2.7 Categorical Imperative and its Universalization

How can I find out that action I intend to perform is morally right or wrong? According to Kant, the yardstick for distinguishing right from wrong actions in the principle of universalization. In a Kant view, if one wants to know whether the action intended to perform is right or wrong, one should look at the maxim (underlying principle) of the action, and then universalize it. He believes that what make an action right or wrong are the intentions or motive behind it. Would you consider it desired if everybody in a similar situation as yourself performs a similar action as you now intend to perform? If your answer is in the affirmative, then it is a sign that the action in question is morally

¹⁶ Ibid; p. 226

right, but otherwise, it is wrong.

Kant gives the example of a man who intends to commit suicide at a time of distress. A man feels sick as a result of series of series of misfortunes, but he is still in possession of his reason as to ask himself whether taking his own life may not be contrary to himself. It is obvious that his maxim cannot be universalize, because universalize it will be a contradiction to his duty. Another example given by Kant is that of a man who finds himself in a financial difficulty. To get out of this problem, he decides to go and borrow money with insincere promise to pay it back, when his motive is not to pay it back for he knows that nobody will borrow him money, if he gives no firm promise to pay it back. He should now ask himself whether he would like his maxim to be universalized. It is obvious that, the maxim cannot be universalized without contradicting itself. For if it were to become a universal law, that anybody in a financial difficulty should borrow money with an insincere promise to pay back, then, that would be the end of borrowing and leading.

CHAPTER THREE

THE PRACTICE OF SURROGACY AND KANT'S CATEGORICAL IMPERATIVE

3.1 The Meaning and Nature of Surrogacy

By etymology, the word surrogacy is derived from the Latin word *subrogare* and it simply means "to substitute". Literally it means to exchange somebody for another person, not quite different from its today's advanced application. The fact still remains that this arrangement is practically synonymous with various cultures around the globe and this makes it cumbersome to actually locate a particular culture as the first people to have practiced it. There have been some efforts towards classifying surrogacy as a modern act but factually this practice alludes to the Bible. And this made Victoria to assert that, "the first recorded surrogacy agreement is found in the Old Testament in Genesis 16."¹ That is, during the childless age of Sarai (later called Sarah) and Abram (also later called Abraham). When it appears to Sarai that she could no longer conceive and give birth naturally but she and her husband were desirous of a child, Sarai had to suggest surrogacy as a way out to her husband as the Bible puts it, "Now Sarai, Abram's wife bare him no children: and she had an handmaid, an Egyptian, whose name was Hagar. And Sarai said unto Abram, behold now, the Lord hath restrained me from bearing:

¹ D. Satz, Market in Women's Reproductive Labour. Philos public Att (1992)p.21

I pray thee, go in unto my maid. It may be that I may obtain children by her. And Abram hearkened to the voice of Sarai."²

Kate in her view, though agreed with Victoria's assertion but still opine that, "many people believe that it started before them but was only recorded in the Bible as the case of Abram and Sarai." There is an element of truth in this claim because such an arrangement could not have been original of them. It is possible that it was widely practised in that community even before the case of Abram and Sarai, hence, their informed decision to resort to it as their final arbiter of hope to have children.

According to Webster's Dictionary, surrogacy is described as, "a method of reproduction in which a woman agrees to be pregnant using her own egg and carry a child for another individual or couple. In some situation and location, a surrogate mother might be paid for her services. The term is sometimes used to refer to a woman who agrees to carry a biologically unrelated child for another couple that was conceived

² F. Sarah, "Postmodern procreation: A cultural Account of Assisted Reproduction".In conceiving the New world Order. The Global politics of reproduction, ed. Ginsburg, D. Faye and Rayna. Berkeley:(University of California press 2008). P.323

through in-vitro fertilization (IVF)."³ This practice is purely a way of assisting a helpless person or people to achieve an impossibility for them with a sincere adherence to the agreement. And this is why Stedman's Medical Dictionary holds that, "a surrogate mother is a woman who is under contract to carry a pregnancy for another woman or couple."⁴

On the stance of the Victorian Law Reform Commission, "Surrogacy involves an agreement made with a woman who is, or who is to become pregnant. This woman is the surrogate mother. She is the one who gestate the child. In accordance with the agreement, which can be for altruistic or commercial purpose, the woman will surrender the child born from that pregnancy permanently to another person or people who wish to become the child's parent. This couple....are called commissioning couple"¹⁰. In fact, this is the generally accepted definition of surrogacy in most jurisdictions because it is

³ F. Sarah, "Postmodern procreation: A cultural Account of Assisted Reproduction". In *conceiving the New world Order. The Global politics of reproduction*, ed. Ginsburg, D. Faye and Rayna. Berkeley:(University of California press 2008). P.323

⁴ A. Borgmann, *Real American Ethics: taking Responsibilities for our country* Chicago, IL:(University of Chicago Press, 2006). P. 61.

comprehensive and encompasses all the modus operandi in any surrogacy arrangement.

From the above definitions, what cuts across clearly is that the motive of surrogacy is to put an end to the suffering of infertility being experienced by infertile couples, including the family cum societal pressure heaped on them, that is, in most cases. Infertility is not just an individual problem but on the long run it will have a gross negative on the developmental altitude of any such society. Thus, it may be inferred that pain and suffering of infertility serves as a catalyst to the embracement of surrogacy as a way out. What began as individual problem will get to a stage where such an individual will be frustrated due to the pain and suffering and it will affect anyone around such a person and then, it becomes a social problem that deserves urgent attention. Stressing on pain and suffering, Monge said that pain "pertains to the semantic organic order, it constitutes a sign, indicative that harmony in the physiological order is getting disturbed. Thus, it is interpreted as the protest of the organism."⁵ While he defined suffering as that which "...begins often as physical pain, possesses other characteristics. It is more internal, more psychological...it is accompanied by a host of emotional experience like anguish,

⁵L. Purdy, *Surrogate Motherhood: Exploitation or Empowerment?* Blackwell publisher Ltd. P.54

sadness, pessimism and so on."¹¹

These conditions for the practice of surrogacy make it pellucid that the issue of surrogacy is not a remotely strange and uncommon phenomenon which is reserved for the medical professionals and health-care workers. But it is well known incidence which can raise a serious moral dilemma that will need observation and explication and evaluation.

3.2 Forms of Surrogacy

Surrogacy can be of various forms but comprehensively, we have forms of surrogacy agreements, viz: traditional, non-commercial, commercial, international and gestational surrogacy. Some authors only recognise traditional and gestational surrogacy as the two main basic forms of surrogacy but I decided to accommodate other forms for proper understanding.

3.2.1 Traditional Surrogacy

Traditional surrogacy is also known as "partial" or "natural" surrogacy due to its procedure. Before the introduction of assisted reproduction technology (ART), this was the only means of helping the women who had either no uterus or had severely damaged womb (which makes them incapable to conceive again) to have their own children. In accordance with this, Chakravarty puts it that, "in this procedure, husband was allowed to

stay with a woman for the purpose of producing a child with the knowledge and permission of his infertile wife."⁶ This shows that there is an informed consent from the infertile wife to allow her husband to opt for this form of surrogacy.

This procedure is regarded as traditional because the assistance of a medical practitioner is not needed. This form is being practised by various cultures in most parts of the world. It is regarded as a partial owing to the fact that it is only the gene of one of the infertile couple will be present in the child including the genetic features of the surrogate also. In other words, there are forty-six (46) chromosomes that make up the human gene. During conception or fertilization, half of these chromosomes will be from the two parties involved in this process; their chromosomes will make up and form that of the child. Twenty-three (23) chromosomes will come from the male partner while the remaining half will be that of the surrogate mother. This implies that the child will be biologically and genetically related to both the father as well as the surrogate mother.

But where the father suffers from low sperm count or azoospermia, donor's sperm

⁶ M. Charlseworth, "Reasons for and Against Surrogate Motherhood".In M. Meggitt, Surrogacy in whose interest, proceedings of the Natiuonal Conference on Surrogacy in Malbourne (1991) Mission of St James and St John publisher p. 57.

will be used and introduce it into the surrogate mother's reproductive tract via artificial insemination (A.D). in any case the surrogate's egg must be used. This form of surrogacy is natural because it involves coitus between the two parties (except in low sperm count or azoospermia), hence, it does not separate reproduction from coitus.

3.2.2 Non-Commercial Surrogacy

Just as the name implies, there is no form of payment or settlement to the surrogate in this form of surrogacy agreement. It is purely altruistic and sacrificial in nature. After the birth of the child in this form, the child will be handed over to the infertile couple in form of a gift by the surrogate mother. However, the couple will settle the surrogate mother's hospital bills and also finance her relevant health expenses.

In this form of arrangement, mostly relatives and friends are those who partake in it, as a way of assisting their beloved one to parent a child or children. They do it out of sympathy and love for humanity backed up with an informed consent from the both parties, having understood their contextual features. This is welcomed by various cultures around the globe. In her experience with this form of surrogacy in Australia, Victoria narrated, "I was supervising law students who volunteer at a community legal centre in Melbourne. One of the students came into my office and told me a couple came in and they were seeking general adoption advice. They wanted to adopt out their four years old

son who had been living since birth with the husband's brother and wife. They themselves already have four children and did not need anymore. The husband's brother and his wife were unable to have children so they gave them one of their sons...the couple was from one of the Polynesian Island close to the north of Australia and they told us that this happened in their extended family quite often. There was nothing extraordinary about their view was that they were simply helping out their brother and his wife by gifting their son. Why should they miss out from the joy of having a child."⁷ This is an act of being one's brother's keeper, for a friend in need they say is a friend indeed. And this is a very pragmatic way to demonstrate such love towards your loved ones.

3.2.3 Commercial Surrogacy

Borrowing from the name, commercial surrogacy agreement is a form of surrogacy that involves the payment for the services of the surrogate mother. There is no form of altruism here but rather it is contractual agreement between the surrogate mother and the commissioning couples. In this form of surrogacy, it does not necessarily need that the commissioning couple and the surrogate mother must be related. The surrogate can be distant to the commissioning couples.

⁷ A. Wertheimer, *Exploitation*. Princeton, N.J Princeton University press.

In some countries and states that consent to commercial surrogacy, there are established regulatory agencies that are saddled with the responsibility of controlling this form of surrogacy. They can source for a surrogate for the couple. This form of surrogacy is really tedious because it involves the services of a medical doctor, a lawyer, regulatory agency, a surrogate mother and the commissioning couple. It is very costly due to the people involved and each person is expected to perform his function sincerely in order to avoid any form of pandemonium.

In fact, some people really frown at this form of surrogacy claiming that it is unjust to man. This is why Victoria plainly stated that, "the strongest objections have been by far against commercial surrogacy agreement. It is contract for reward that leads to the commoditisation of child bearing."⁸ Some people opined that this form of surrogacy will definitely amount to exploitation of the surrogate mother, especially from the lower social class. On the other hand, it is viewed that the surrogate can also exploit the couple because of their desperation to really have a child, by way of charging an exorbitant fee to the couple.

3.2.4 International Surrogacy

⁸C. Humbyrd, op. Cit p. 113

From the nomenclature, this is the form of a surrogacy agreement which occurs across the boundaries of different nations. Commissioning couples can move from their own countries to other countries in search of surrogate mothers. The reason for this tour is well-known to the couple. But Casey claimed that, "commercial, gestational surrogacy which occurs across countries borders, typically with prospective partners from wealthier countries and surrogate mothers from poorer countries".⁹

There is an element of truth in this claim because from findings it was discovered that it will cost up to \$10,000 to \$20,000 in order to secure the services of a surrogate mother in the United State of America and in United Kingdom. But in developing countries such as India, Kenya, Zimbabwe and so on, the same surrogate's services will cost as low as \$4,000 and \$5,000. Some people hold that there can be exploitation by the couple to the surrogate mothers especially if it is a country where there is no law concerning surrogacy arrangements

Hence, Casey proposed "fair trade surrogacy" as a way to obliterate any form of injustices in the international surrogacy. She argues that fair trade is all about "justice through benefit sharing". This fair trade will serve as a regulatory framework in order to

⁹ C. Humbyrd, op. Cit, p. 113

benefit the surrogate mother and also serve as a nemesis against unjust motive by any party.

3.2.5 Gestational Surrogacy

In gestational surrogacy, there is no genetic relation between the surrogate mother and the child of the prospective parents. This form of surrogacy is also referred to as full surrogacy (which is legally recognised by the Israeli government). The only role of the surrogate mother here is to provide her uterus for the hosting of the couple's gamete and to also gestate the child.

The sperm of the prospective father and the egg or ovum of the prospective mother are collected and fertilized in a test-tube inside a laboratory and later transfer it (embryo) into the woman's uterus via the reproductive tract before the occurrence of mitosis and meiosis, through the process of artificial insemination (A.I). The sperm is collected from the intending father through masturbation or through vibratory stimuli. While the egg of the intending mother is retrieved through ovarian hyper-stimulation processes in order to get the eggs mature quickly. In the case of low sperm count from the intending father, sperm of a donor will be used or can be taken from the sperm bank (just like we have blood bank), that is, from the cryopreserved sperm.

This form of surrogacy is indeed costly. However, the three things which are

needed before a successful pregnancy will occur are: viable sperm, mature egg and a well-functioning uterus. It is only uterus that is demanded of the surrogate mother or gestational surrogate mother while the genetic specimen will be gotten from the commissioning couples. In order to ensure good health of the expecting child and that of the surrogate, she will be restricted from certain things which are considered inimical to the health of the child, such as smoking, consumption of alcohol, wearing of tight dresses, consumption of kinds of food and so on. This is not to punish the surrogate mother. Even in a normal family in terms of pregnancy, women are not allowed to do any of these things for medical reasons and above all for the overall harmony of the child and the surrogate mother.

3.3 Various Arguments in Surrogacy

Surrogacy became a public nation because of Bay Cotton and Baby M. cases in the 1980s. Various arguments have, over the years been propounded by different persons and articulated scholars towards the practice of surrogacy arrangement. Apparently, these arguments are tailored against this practice. However, some eminent scholars have roared their arguments in consideration of surrogacy arrangement, The first outrage was that commercial surrogacy is proportional to "baby buying" or trading babies. This is considered as a repugnant thought and act by those against this practice towards ending

the pang of infertility among couples. But according to Scolt, "it was not clear, initially, whether the repugnancy was against altruistic..."¹⁰ this involves financial quid pro quo.

The second reason in countenance to the vehemence of this practice was that surrogacy exploits women by using them as a mere incubators, especially in a situation whereby women from a lower social class or poorer nations are being enlisted thereby underpaying them when compared with their counterparts in the developed nations.

Finally, but definitely not the least, the major concern surround the welfare of the child born of surrogacy arrangement. The major issue lies on the possible psychological effects on the child, especially if told the procedure of his birth. In order to understand these arguments adequately, they will be outlined thus: the welfare argument, commodification argument and exploitation argument. The various arguments will be discussed one after the other and evaluated alongside. This evaluation will attempt to uncover the ethical models fundamental to the various arguments with a view to ascertaining the philosophical implications of such arguments.

3.3.1 Welfare Argument

¹⁰ S.B. Rae, The ethics of Commercial surrogate motherhood. (Brave New Families, 1994 Praeger publishers), Westport Connecticut. P.87

Those who are because of the welfare of the surrogate mothers and the children born of surrogate arrangement, argued against surrogacy with their reasons which are not unconnected with possibility of harm which the surrogates or the surrogate children might also pass through, especially the psychological turmoil which the children might experiences if they are told the truth or the possible physical harm the surrogate mothers will face as well as risking their lives for the benefit of other people as some scholars would argue, are tenacious with their stance.

Franklin, along this view, argued that the embryo is personalized and bestowed with right of a legal entity, while the material body is reduced to a nurturing machine, to a vessel which merely contains the embryo and the fetus.¹¹ That is to say that the surrogate mother are not duelly regarded as compared to the babies. They are seen to be temporally important whose relevance terminates after the birth of the baby, thereby neglecting the bound existed between the mother and the child throughout the gestation period. But instead, must handover the baby to the intending parent having played her role as a mere incubator. Some people opined that this is a risky job because many women who serve as

¹¹ A. Lori, "Alternative Mode of Reproduction", In Reproductive Laws for the 1990s by Sherrill C. and Taub N. (Humana press, London) p.58

surrogate mother are from poor nations (compared to industrialized western nations). However, according to Casey, "but the argument against surrogacy on the basis of some harm compared to no harm is an inequitable comparison. Rather we must evaluate the workplace risks these women currently face."¹² Laura Purdy argued in this line that poor women now face substantial risks in the workplace. Even a superficial survey of the hazards in occupation available to poor women would give pause to those who would prohibit surrogacy on grounds of risk."¹³ This is highly evident considering the height of conscious risks that women in developing countries expose themselves to in order to make an ends met on daily basis. And the hazards they will surrogacy, even when there is no hazard as such.

Now, if because of psychological harm to the surrogate mothers which they might face when handing over the baby to the commissioning couples forms another basis of rejecting surrogacy, it means that the assumed harm needs to be greater than the harms of

¹² F. MacCallum, E. Lycett (et al), Surrogacy: The Experience of Commissioning Couples Hum Reprod 2003. P. 18

¹³ L. Purdy, Surrogate Motherhood: Exploitation or Empowerment? Blackwell publisher Ltd. P.54

their alternative means of livelihood. But for the very fact that these women, in spite of their alternative means to livelihood, decide to reckon with surrogacy arrangement shows that possible harm from surrogacy (if at all) cannot be compared to that of the alternative (s). The claim that women have bond with their babies amounts to a fallacy of hasty generalization. Just as Debra observes that not all women "bond" with their fetuses, some women above them."¹⁴ There have been cases whereby some women "took in" without their knowledge (in marriages) but ruthlessly abort them as they do not want them - the babies. Even some un-marriage women, having carried their babies to term and deliver them, will jettison the babies without collecting any reward from anybody. So, on this ground, I think that those arguments against surrogacy cannot hold water.

On the presumption that after delivering it may be difficult for the surrogate mothers to relinquish the child to the genetic parents is not universally true. This is confirmed by a research carried out by Jadva et al, they interviewed quiet large number of surrogate mothers and have reported that surrogate mothers did not experience any distress. Or difficulties in terms of depression or anxiety while handing over the child to

¹⁴ D. Spar, For Love and Money: The Political Economy of commercial Surrogacy.(Rev Int Polit Econ California1995). P. 26

the commissioning parents. The minor difficulties surrogate mothers did experience were shortlived.¹⁵

Concerning the possible psychological harm to the child if told the truth of his birth, MacCallum et al, gave their detailed analyzed information based on interview with forty-two (42) couples with one year child born through surrogacy

1. All genetic parents disclosed to maternal and paternal grandparents about surrogacy arrangement. The reason for disclosing the news to the family were:

i. To share the experience with the family

ii. There was no choice but to tell

iii. There was no reason not to tell

Majority of the couples relatives were happy and reacted positively. Only a majority (7%) reacted negatively.

2. Hundred percent of the commissioning couples (both mother and father) reported that they planned to tell the child about surrogacy in the near future. The more common reason for planning to tell the child was put the child had a right to know the truth.

¹⁵ V. Jadva, E.J. Lycett (et all), Surrogate Mothers: Motivation, Experiences And Beyond. Hum Reprod. (ESHRE suppl.)(2002). P.105

Another reason suggested that the child might be psychologically upset if the disclosure comes from anyone else'.¹⁶ This is the best way to solve any possible psychological harm or problem that might surface at all. And there has never been any reported case at all concerning any form of psychological harm being suffered by a child born through surrogacy. Jonathan Wryly said that if the child's feelings are of reason against surrogacy the baby has to have, by the time of birth, have specific feeling towards the particular woman who bears him. The evidence for this can charitably be described as light."¹⁷

Finally, it is obvious that those using surrogate's and child's welfare to argue against surrogacy are in countenance to the principle of non-maleficence. But they should not hastily forget pains and suffering of involuntary infertility being experienced by the couples. And as such, should also think of the welfare of the couples too, failure of which will amount to a conflict between the principle of non-maleficence and the principle of beneficence. Their argument will be parochial and biased if the anti-surrogacy fails to

¹⁶ F. MacCallum, E. Lycett (et al), Surrogacy: The Experience of Commissioning Couples Hum Reprod 2003. P. 18

¹⁷ J. Glover, Fertility and the family: Glover Report on Reproductive technologies to the European Commission. London. UK

consider the benefit of the couple as surrogacy could, as its positivity, be the least hope of infertile couples to have their own child.

3.3.2 Commodification Argument

Commodification argument is another issue brought against the practice of surrogacy arrangement. This term has an economic undertone, hence, according to Borgmann, "is the process of moving something into the market, making it a fungible object, that is, a commodity available for sale and purchase."¹⁸ The basis of this argument is that, surrogate arrangement has reduced reproduction, children and women to a commodity traded in the market place. This is because the commercial surrogate mothers are being paid by the intending couples before the baby is being relinquished to the commissioning couples. Even some scholars have equated surrogacy with prostitution as the women are being paid for their service. Women tend to be using their reproductive capacity for a fee making themselves available for hire over a period of time. Hence, Charlesworth regrettably observed that we do not give absolute freedom in our society. A

¹⁸ A. Borgmann, *Real American Ethics: taking Responsibilities for our country* Chicago, IL:(University of Chicago Press, 2006). P. 61.

woman should not be given the freedom to sell her reproductive capacity for profit.¹⁹ this is why jurisdictions of some countries prohibit the practice, including altruistic surrogacy agreement.

But is it reasonable to compare babies with market commodities? Children are of something can price as if yams or tomatoes in the market. The value of human life cannot be quantified with any market commodity. For the fact that commissioning couples pay the commercial surrogate mothers does not imply that they are buying a thing or toy which is manufactured for their pleasure. The child still have Fundamental rights that protects his membership of the society. Just as Andrew rightly asserts that there is no evidence that the couple who pay \$10,000 to a surrogate is any more likely to treat the child as a commodity than a couple who pay \$10,000 to an in vitro fertilization doctor."²⁰ No amount of money is equal to a human life. What the commissioning couples are

¹⁹ M. Charlseworth, "Reasons for and Against Surrogate Motherhood".In M. Meggitt, Surrogacy in whose interest, proceedings of the Natiuonal Conference on Surrogacy in Malbourne (1991) Mission of St James and St John publisher p. 57.

²⁰ M.A Monge, Ethical Practices In Health And Diseases :A prime of Health Care Ethics,(Manila: sinaglata plc, 1994) p. 19

paying for is not for the baby rather for the rendered service by the surrogate mothers including the transfer of custody of the baby to the intending parents for the interest of the child.

Hence, the employment of commodification argument in rejection of surrogacy arrangement is epistemologically myopic because children are not the same as market products nor the surrogate mothers the same as an imported as well as exported products in order to cut down excess cost. The surrogate mothers cannot be associated with prostitution because speaking a posteriori, they are only relinquishing, the parental rights of the baby to the intending parents who are capable of raising the child. And this is why Peter Omonzejele in his own view opined that it is not politically correct to use market place phrases such as "lease" in these sort of arrangement. This is because surrogate arrangement so not fit into normal market place ethos....²¹

3.3.3 Exploitation Argument

Exploitation is usually attributed by those against the practice of surrogacy

²¹ P.F. Omonzejele, "The Ethics of Commercial Surrogate Mothering:A Response to Casey Humbyrd". International Journal, Human Reproduction and Genetic Ethics. Vol 17, issue 1. (Equinox publishing Ltd, Switzerland, 2012)p. 112

especially with regards to commercial surrogacy whereby they submit that women or couples from the wealthier nations will underpay the surrogate mothers from the poorer nations, thereby taking full advantage of their condition-poverty- and offering them surrogate arrangement as an alternative to means of livelihood with a financial inducement as a bait (this arrangement is targeted against the international surrogacy). This financial inducement will blind these surrogate mothers from considering the risk they will be exposed to, and as such, giving no informed consent but merely just to meet up with immediate needs as a result of their precarious situation.

The employment of exploitation to attack the practice of surrogacy arrangement will obligate us to consider the concept. According to Wertheimer in his book, *Exploitation*, he distinguishes between harmful exploitation and mutually advantageous exploitation."²²

According to Humbyrd, she prefers to limit herself to the consideration of harmful exploitation to the case where someone is exploited when they are induced to behave in a manner contrary to how they wanted to act.¹⁴ This can be better understood when for

²² C. Humbyrd, "Fair Trade International Surrogacy." In *Developing World Bioethics* vol 9, Nos (2000 Blackwell publisher Ltd.P 112.

instance, woman or couple "A" due to whatever reason, are unable to carry pregnancy to term decide to enlist the assistance of woman "B" as a surrogate mother knowing fully well that she is in dire need of money to meet up with urgent needs of herself and her family. The couples might decide to pay her whatever they wish to pay her without any consideration, but merely to use her as a means of achieving their goal. In this case, the couple or the woman "A" is exploiting the woman "B". or as some persons have also argued that because the couple or woman "A" is in dire need of a child and is ready to do anything for her benefactor, the woman "B" might use it as an opportunity to be requesting for various exorbitant fees from the couples or woman "A" using their predicament to enrich herself. This is considered as a harmful exploitation. But most people hold that it is usually the surrogate mothers that are being exploited as the wealthier couples are using them as an escape route from the burden of pregnancy.

The second type of exploitation by Wertheimer is mutually advantageous exploitation where "both the intended parents and the surrogate gain from the transaction but the distribution of those gains is unfair to the surrogate say, because the interests of the wealthy contracting couples are better served than those of the surrogate".²³ This is

²³ A. Wertheimer, op. Cit p. 99

like paying someone too little in return for their services. However, both of them benefited from the involvement. The couples benefited child while the surrogate mother did benefit from the payment but felt cheated, even though she willingly opted to serve as a surrogate. This is in contrast with harmful exploitation where the surrogate did not give an informed consent but was obliged by the forces of survival emanating from the financial bait of the commissioning couples.

But the argument of exploitation predicated on surrogacy which makes some countries to ban any form of surrogacy is not evident to suffice the claim. Appearance is not usually the reality. It is one thing to assume possibilities and it is another thing of its reality, especially in a surrogate arrangement. This is true because even in some countries where surrogacy is being prohibited, some women still avail themselves to desirous couples, even without the knowledge or the involvement of the government and there has never been any case of exploitation from the law enforcement agency. However, according to Peter Omonzejele, "in general, the ethical argument against monetary compensation in surrogacy is that it could comprise informed consent... this is particularly true in setting where poverty is prevalent.... This is because impoverished people tend to be more inclined of meeting their compelling needs rather than assessing

the related risks".²⁴

But the fact is that exploitation only exist (as being used in this context) in a market setting whereby one of the parties is not duely considered in terms of payment or settlement of which surrogacy arrangement does not belong to according to Peter Omonzejele,

it is for this reason that surrogate mothering cannot be considered in a similar fashion to working in a manufacturing line... but unlike regular market arrangements, human lives are not evaluated on the basis of settings, as all persons are equal regardless of where they reside. This means that we cannot equate surrogacy to real work done vis-avis what constitutes real wage for work done in that context. This is because surrogacy does not fall within normal market transactions and factors for determining wages.²⁵

Moreso, exploitation should not serve as an argument against surrogacy arrangement (or international surrogacy) instead we should see reason with Debora when she said that unless one posits, however, that the existence of global inequality renders all economic choice moot; and until there is any path by which these inequalities can feasibly be addressed, denying women these particular seems oddly counterproductive. It also does not square with the kind of logic applied to other areas of global labour

²⁴ P.F. Omonzejele op Cit p. 113

²⁵ Ibid P.114

market...(where) concern about global inequalities lead towards international rules and regulations, not a total prohibition of the activity involved.¹⁸ There is absolutely no sense in throwing away the baby with the bath water. Surrogacy arrangement, a posteriori, has brought back joy of parenthood into various families worldwide. This is positive as everything is not all about negativity.

3.4 Kant's Categorical Imperative as a response to the Practice of Surrogacy

Kant's categorical imperatives were cast in a prima facie way that tends to provide absolute grounds for the rightness and wrongness of moral actions. These imperatives as Kant sees them are to be true in all situations or applied across board. One of such imperative is the universal maxim which asks whether one can wish his/her action to be done universalism irrespective of the persons involved.

Another reason Omonzejele advanced for the exploitation or undue advantage that exists in surrogate transaction is the lack of alternatives. Given the inability of the surrogate mother to achieve her needs, one area which Omonzejele had failed to explore is Kant's categorical imperative, which states, 'do not use others as means to an end, but rather, treat them as ends in themselves'. This type of relationship does not take undue advantage of the hand in any trans-active arrangements. If Kantian Imperative is followed, to the latter, surrogate transactions would be unexploitative and such, every party in the

arrangement would see the other as ends in themselves.

As we have been discussing, there are different reasons why a woman is unable to achieve conception naturally or unable to carry a baby to term. As a result of this many intervention are sort after (including miraculous, woman to woman and many others, etc). This project has since identified the different arguments for and against surrogate mothering. In particular, the argument advanced by Casey Humbyrd that "...absence of reputation nearly ensures that a surrogate mother in a poor country has been underpaid and thus exploited by wealthier individuals"²⁶ and Peter Omonzejele on the other hand found Hymbyrd's argument unconvincing especially at the point of implementation.²⁷ This is because Omonzejele was able to demonstrate how reputation and Humbyrd's notion of fair compensation would not lead to undue inducement and exploitation in a resource-poor setting where urgent needs often exist. Omonzejele vehemently argued that the use of reputations is too vague and subject to interpretation especially when applied to international research. When applied to surrogacy, therefore, Omonzejele worries that

²⁶ C. Humbyrd, op. Cit p. 113

²⁷ P.F. Omonzejele op Cit p. 113

where such a reputation is put in place, there is always risk of the surrogacy agencies and relevant organs giving different interpretations to regulatory frameworks are insufficient mechanisms of protection in surrogate transactions. However, neither Humbyrd nor Omonzejele considered the arguments of Immanuel Kant on duty and good will. Kant has admonished that actions taken out of duty are morally right because we are duty-bound to act as such. Further, Kant argued that actions done out of duty should be considered done out of goodwill. This is to say that the moral agent acts in the best interest of the general public and does so, in order that his act would become a universal maxim. Hence, Omonzejele's worries can be circumvented if the regulatory agency interprets the law correctly as he is duty-bound to do so, and of goodwill, they should also argue that their interpretation could be made universal no matter who is involved in the surrogacy transactions.

However, Omonzejele sees this as unfounded because he thinks that the ethical argument in monetary compensation in surrogacy is that it could compromise informed consent.²⁸ Omonzejele argues that in an area where poverty is prevalent, monetary or material offers have the potential to act as an undue inducement to surrogate mothers,

²⁸ Ibid.

leading to exploitation. Omonzejele sees Humbryd's argument as vague on what ought to constitute an adequate and favorable compensation to be employed in surrogacy transactions and the modality for implementing what she considers as fair compensation; hence, Omonzejele argues that when urgent needs exist for which there is no alternative, commercial surrogacy is almost always exploitative even if mutually beneficial to the involved parties.²¹ A point which Kant would have advanced. To drive home his point, Omonzejele painstakingly addresses some basic questions such as; what constitutes an exploitative transaction? What are the elements of an exploitative transaction? And do surrogacy arrangements fit into an acceptable definition of an exploitative argument? For Omonzejele, exploitation implies taking undue advantage of a person or a group of people. Thus, he sees the engagement of a powerful woman with a less powerful woman as exploitative in nature. Some of the elements of exploitation as Omonzejele conceives it are imbalance of power, existence of at least two agents, disproportion in benefit accruing, lack of alternatives and compelling needs. Omonzejele holds that although a mere imbalance of power does not necessarily involve exploitation. However, exploitation occurs when the exploitee's weakness has been taken an undue advantage of and that exploitation emanates from transactions between two parties. Also, the exploited party is most likely to suffer harm. However, harm is not a sufficient condition as it does not

always have to be present. Since the exploited party benefits from the transaction, the only question is the appropriateness of the benefits.

On adequate/fair compensation, Casely Humbyrd has agreed that “the fundamental mistake being made is to assume that a person cannot rationally and autonomously weigh the overall value of the money against the disadvantages of being a surrogate mother.”²⁹ Hence, she concludes that there is need for fair compensation for surrogate mothers since she may benefit from due any point and still be exploited.

The above argument renders surrogate mothering impermissible given the exploitative. It will also be recalled that Kant’s categorical imperative does not give room for exploitation. It negates the using of humans as means to end and admonishes us to make our action a universal maxim.

²⁹ C. Humbyrd, op. Cit p. 113

CHAPTER FOUR

EVALUATION AND CONCLUSION

4.1 Evaluation

Our discussion so far on the morality of surrogacy brings to question the vividness or intricacies and relevance of surrogate mothering to contemporary man living in a world of advanced medical technology. The issues of childlessness, keeping fit and pregnancy stress have been watered down. Surrogacy has generated a lot of questions and concerns over the years which have resulted to an endless conflict of ideas and positions. Central to this question is what is to be done in the face of couples who are for one reason or the other unable to procreate so as to maintain the continuity of life. Should we allow the couples to suffer endlessly? To what extent has Kant's categorical imperative served as a panacea to the issues of exploitation raised about surrogate mothering? What has Kant got to do with surrogacy?

In answering these questions, an analysis of surrogacy was given, according to which the basic forms of surrogacy were discussed. The analysis of this concept in the long run brought to the forefront the complexities inherent in it, though complex, this concept needs some form of clarification and evaluation. The practice of surrogacy as can be seen is exploitative in nature given the lucid arguments of Peter Omonzejele. However,

the issues raised by Omonzejele can be circumvented when we reflect on the elements of Kant's categorical imperative. Kant's ethics of duty and non-exploitation of the other could serve as a panacea to the concerns raised by Omonzejele.¹

Kant's moral law which often see human beings as owing obligation to others and that human actions ought to be guided reason conceives ethics from a deontological perspective. This perspective sees the consequence of human actions as instrument to help us to find what our right duties are. This argument is similar to some key bio-ethical principles which include beneficence, non-maleficence and the principles of first do no harm and more importantly the principles of autonomy and patient's well-being are keys in determining the morality of surrogacy.

Kant's moral philosophy is a complex whole. It can only be understood in context. Its application to the exploitative nature of surrogacy is only in the wider sense of its treating others as we will want them to treat us.

¹ P. F. Omonzejele "The Ethics of Commercial Surrogate Mothering: A Response to Casey Humbyrd" in *Human Reproduction and Genetic Ethics* Vol. 17.1, May 2011, p. 115

4.2 Conclusion

While it remains undeniable that philosophical problems are perennial. The exploitative nature of surrogate mothering almost dissolve into semantic or no-problem at all when reflected upon through the ethical lens of Immanuel Kant. It is pertinent to note here that this work has made a case for those with liberal view on surrogate mothering. The strategy or instrument of this case is the ethical works of Immanuel Kant.

Also related to the ethical theory of Kant is the principle of autonomy and well-being. Warburton correctly suggested that everything depends on which basic moral view one subscribe to.² Thus, those not sympathetic to Kantian ethics would subscribe to other forms of ethical theory thereby rejecting or accepting the surrogacy on the different grounds. Better still, are those who hold a middle position on the surrogacy debate. However, an examination of Kant's ethical framework will lead to a conclusion on surrogate mothering as followings

1. Nothing is either good or bad reason makes it so
2. The motives and intentions of a person have to be considered in determining whether a person's actions is either good or bad

² N. Warburton *Philosophy: The Basics*: London: Routledge, 1992, p. 50

3. If an action can be universalized and does not exploit the other such an act should be encourage
4. The essence of life is happiness without which life itself will be worthless and anyone who lacks this should be assisted towards it
5. That if the exploitative element of surrogacy is addressed, the act itself should be encouraged.

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