

LEGALISATION AND REGULATION OF SURROGACY CONTRACTS

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Introduction

The concept of alienability of rights through a contract is one of the most debated topics under contract law. What kind of rights can be alienated? What would be the extend of alienation of such rights? How to regulate them? These are the most difficult questions for which theorists are trying to find an answer.

One such controversial area of discussion relates to the legality of surrogacy contracts. The question of legality revolves around the rights model and the state's responsibility to protect its citizens¹. While the former allows for individual autonomy to decide what is best for them, the latter makes it the duty of the state to protect its nationals from taking decisions detrimental to their sense of personhood.

Critics to surrogacy view the payment to surrogate mother as baby selling and thus morally wrong and illegal. There is a general conceptualisation of economic duress to be the reason for women to participate in surrogacy. Especially in countries like India where surrogacy today has become a hub for not just nationals but also foreigners to get easy and cheap access to willing surrogate mothers. The lack of state intervention is resulting in unrestricted exploitation of the market and at the same time in a country like Taiwan, a ban on any kind of surrogacy is resulting in extreme state intervention in the lives of its nationals. To an extend which in some cases is denying the right of parenthood to its citizens.

¹ Neha Meena, *Surrogacy Contracts*, LEGAL SERVICES INDIA, <http://www.legalserviceindia.com/article/l434-Surrogacy-Contracts.html>

Through this paper I would analyse the diffe

rent theories presented by various authors and the legal positions of India and Taiwan regarding surrogacy contracts to answer one basic question – Do surrogacy contracts amount to baby selling?

And if they do what is a better solution, regulating or prohibiting them?

I argue that legalisation and regulation by the state is the only way to deal with the market for surrogacy. To cope up with the discrimination that tags along the unregulated market, state intervention with a uniform policy solution and a set of guidelines with proper implementation and check is required.

What is Surrogacy?

In the most basic sense “Surrogacy is an arrangement where a surrogate mother bears and delivers a child for another couple or person²” it can be either gestational or traditional. “In gestational surrogacy, an embryo, which is fertilized by *in vitro* fertilization, is implanted into the uterus of the surrogate mother who carries and delivers the baby. In traditional surrogacy, the surrogate mother is impregnated with the sperms of the intended father artificially, thus making her both genetic and gestational mother³”.

People choose surrogacy for various reasons, most common being infertility problems experienced by the intended mother. Another reason is the desire amongst homosexuals couples to start a family. Most countries still don't recognise homosexual marriages which makes it extremely difficult for the couples to adopt a child. Some give the opportunity to these couples to adopt as a single parent, such as Taiwan, but this policy takes away the right from the partner to be a legal parent⁴.

² Pikee Saxena, Archana Mishra, Sonia Malik, *Surrogacy – ethical and legal issues*, US NATIONAL LIBRARY OF MEDICINE – NATIONAL INSTITUTES OF HEALTH <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3531011/>

³ *Id*

⁴ Yun-Hsien Diana Lin, *Lesbian Parenting in Taiwan: Legal Issues and the Latest Developments*, ASIAN- PACIFIC LAW & POLICY JOURNAL, Vol. 14:2, 2013

The most common alternative traditionally chosen by prospective parents was adoption, but the desire to have a child which shares your DNA is extremely natural among human beings and with the advancement of science, surrogacy provided people with this opportunity. Thus, it gained more popularity. Also, the procedural hazards for adoption are becoming extremely complicated and the waiting lists are never ending making surrogacy more desirable⁵.

Another reason to choose surrogacy could be favouring a career or just the decision to not experience the pain of pregnancy, which is considered unacceptable by the society based on “moral values of the society.”

Feminist theorist about surrogacy

Feminists throughout the world are debating whether surrogacy should be legalised or not, all posing different ideological approaches. From the equality perspective of feminists, surrogacy should be treated as another economic opportunity. Carmel Shalev argued that “reproducing woman should be treated as an autonomous moral and economic agent. Women who wish to act as surrogates should be free to enter into contracts”⁶

The difference perspective on the other hand recognises the childbearing capacity as distinct and valuable to women, some argues that commercialising surrogacy depreciates women’s special role as child bearers and care givers by converting them into objects to meet the end of producing a baby. While some suggest that they should add economic value to their roles⁷.

From a dominance theory perspective, feminists consider that men would eventually start controlling the surrogacy process to dominate women and benefit from their economic interests⁸. The most common example can be seen from India’s perspective where it is a reality that husband’s

⁵ Mrinal Vijay, *Commercial surrogacy arrangements: the unresolved dilemmas*, UCL JOURNAL OF LAW AND JURISPRUDENCE, HEIN ONLINE Citation: 3 UCLJLJ 200 2014

⁶ *Feminist perspectives on surrogacy*, UNIVERSITY OF CALIFORNIA, DAVIS, October 24, 2012, <http://femlegaltheory.blogspot.tw/2012/10/feminist-perspectives-on-surrogacy.html>

⁷ *Id*

⁸ *Id*

push their wives into surrogacy for “easy money” which most of the times leads to victimised state of women who weren’t physically or emotionally ready for the job⁹.

Finally, anti-essentialist perspective analyses how surrogacy affects different groups of women, with women from high social strata pushing the roles of child bearing to women who are less privileged. This may result in valuing child bearing in comparison to alternative fulfilling career options where women who can afford it would want to delegate the physical labour of child bearing to economically disadvantaged women¹⁰.

Arguments for and against Surrogacy Contracts

The first argument against surrogacy contract is made by Margaret Radin who highly critiqued commodification of aspects close one’s personhood such as child bearing capacity of women. She believes that doing so erodes the dignity and victimises women further.¹¹ Her theory concludes that by commercialising aspects which are close to one’s identity, such as sex, the value of it reduces in the society which undermines the societal relationships¹².

But some argue that putting reproductive labour in the public sphere removes the stereotype of not compensating women for their child bearing skills¹³. It allows for economic recognition of their labour¹⁴. They compare not paying women for reproductive labour to moralised slavery or exploitation¹⁵. Also, this is one contractual arrangement close to one’s personhood in which both the parties are well- off at the end. For people who desperately need the money it is an exchange of “life for life.”¹⁶ One party gets a child and the other gets a chance to come out of economic distress.

⁹ Alison Bailey, *Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy*, WILEY ON BEHALF OF HYPATIA, INC, HYPATIA, Vol. 26, No. 4, Responsibility and Identity in Global Justice (FALL 2011), pp. 715-741

¹⁰ *supra note 6*

¹¹ MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT*, HARVARD UNIVERSITY PRESS (1993) (Pg. – 23-57)

¹² *Id*

¹³ *Id*

¹⁴ *Id*

¹⁵ *Id*

¹⁶ Kalindi Vora, *Potential, risk and Return in Transnational Indian Gestational Surrogacy*,

Martha Field too criticises the stand taken by Radin by stating that the fight for women's rights would be intensified by legalising surrogacy. The reasons she states for the same are that one it distinguishes the social and the biological roles of a women and second is that feminists all around the worlds have been fighting for the legal procreative choices for women, putting a legal restraint on the same through surrogacy laws would directly go against the goal¹⁷.

Another argument raised against Radin's theory of commodification is by Richard J. Arneson. He states that the assumption of permitting exchange of a good in the market would depreciate its value is acknowledgment of an extreme scenario. Sometimes the market is the best place where one can be guaranteed appropriate respect and value for the service. It allows the flow of the marketable good from a person who doesn't appreciate it/ need it/ have it in abundance to someone who would truly appreciate it¹⁸.

The Second argument against surrogacy contracts related to the conditions prevalent which lead to the acceptance of the contract. One condition which makes a contract unenforceable in almost every jurisdiction in the world is if made under duress¹⁹. Financial limitation forcing a person into taking a decision too could be a part of that. Theorists argument that it is generally women from less privileged background who enter surrogacy due to lack of choice. This might result in exploitation of these poor women. A lot of Marxist theorists raise the dispute surrounding the class differences which would lead to exploitation of the poor as most of the women entering surrogacy of vulnerable and uneducated or maybe even pushed into it. Some might even risk their health to just get the money by lying about their medical history²⁰.

THE UNIVERSITY OF CHICAGO PRESS ON BEHALF OF WENNER-GREN FOUNDATION FOR ANTHROPOLOGICAL RESEARCH,

CURRENT ANTHROPOLOGY, Vol. 54, No. S7, Potentiality and Humanness: Revisiting the Anthropological Object in Contemporary Biomedicine (October 2013), pp. S97-S106

¹⁷ Martha A. Fields, *Selling One's Birth-Rights*, THE HARVARD LAW REVIEW ASSOCIATION, HARVARD LAW REVIEW, Vol. 102, No. 5 (Mar., 1989), pp. 1074-1079 (reviewed work of Surrogate Motherhood)

¹⁸ Richard J. Arneson, *Commodification and Commercial Surrogacy*, WILEY, PHILOSOPHY & PUBLIC AFFAIRS, Vol. 21, No. 2 (Spring, 1992), pp. 132-164

¹⁹ MICHAEL J. TREBILCOCK, *supra note 11*

²⁰ MRINAL VIJAY, *supra note 5*

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The counter argument to this is the presence of freedom to contract and full bodily autonomy to choose what is best for oneself. Theorists compare this to the autonomy provided to abort a child. They argue that if a woman is provided with the full autonomy to terminate a life then the right to create one too should be provided. Moreover, generally while aborting women are in a state of emotional and physical trauma as compared to surrogacy which is an informed choice.²¹ Also, because these women come from economically backward class, a lot of times the alternative job options available to these women are more exploitative and dangerous than surrogacy. For example, in India, job opportunities for a poor, uneducated woman are meagre with extremely low income for highly dangerous work at unhygienic conditions. The surrogacy contracts provide them not just with money but also safe and comfortable living spaces²².

Third argument against surrogacy is that it results in violations of the traditional conception of family and religion. The conservative approach towards family and religion states that sex within marriage should not be separated from the act of procreation. Bringing a third party into it violates the patriarchal structure.²³

A counterargument to this would be, one, the changing nature of the society and relationships. the changing models of traditional family structures cannot be disregarded completely. What about the rights of parenthood of homosexual couples? Adoption laws for homosexual couples are extremely stringent throughout the world that they are taking away the right of parenthood.²⁴ Just because of section of the society considers something immoral cannot be a basis for denying someone their basic human rights. Second if adoption is prevalent and highly appreciated so should surrogacy be. Adoption involves the same concept as surrogacy without the involvement of money.

Fourth argument made is that commodification of reproductive capacity of women is commercialising their mental and physical traits and the traits of children, making certain attributes of children more desirable because of the availability of genes to pick from. Especially in

²¹ MICHAEL J. TREBILCOCK, *supra* note 11

²² ALISON BAILEY, *supra* note 9

²³ MICHAEL J. TREBILCOCK, *supra* note 11

²⁴ MRINAL VIJAY, *supra* note 5

traditional surrogacy contracts, people want to pick and choose a package of qualities which are highly appreciated in the market which undermines the value of these women and children making their lives comparable to livestock²⁵.

Theorists argue that division of labour based on physical traits is extremely common and socially acceptable²⁶ in the labour market. Regarding the commercialising for children because of gene selection, it is argued by Richard J. Arneson that the concern regarding commercialisation of traits comes along with partial surrogacy. He states that in the long run, with the advancement of medical technologies, partial surrogacy would be completely eclipsed by gestational surrogacy. The market for the gene pool would subsequently subside. Thus, the concern regarding marketability of physical and mental traits is a short-lived phenomenon and would disappear in the long run²⁷. But the discrimination of women based on traits continues.

One would assume that gestational surrogacy would end the discrimination based on trait selection for the surrogates, but we completely forgot to take into consideration the societies, such as India where people are judged based on their physical appearances all the time for every kind of work. In some parts, it is also witnessed that the process of preferring some traits over another is not just prevalent in traditional surrogacy but also in gestational surrogacy. It is observed that couples prefer white skinned, educated, English speaking women to bear their children even if the child had no genetic connection with the surrogate²⁸. This generally shows how the skills and physical attributes of a person are used to determine the character of a person, even though they have nothing to do with their child bearing capacity. In one Gujarat based surrogacy clinic in India, an agent could not find work for a potential surrogate because of her dark complexion²⁹.

Fifth objection to surrogacy includes that as the parents were not themselves carrying the child, it might undermine the value of the child for them³⁰. But a counter argument to this is that then that

²⁵ MICHAEL J. TREBILCOCK, *supra* note 11

²⁶ *Id*

²⁷ RICHARD J. ARNESON, *supra* note 18

²⁸ ALISON BAILEY, *supra* note 9

²⁹ *Id*

³⁰ MICHAEL J. TREBILCOCK, *supra* note 11

should be a reason to even ban adoption. In surrogacy, the child is most of the times connected to at least one parent. In adoption, it is a stranger that the prospective parents bring into their family. The fact that the parents were willing to spend a magnificent amount of money to bring a child into their lives shows the amount of dedication towards the child and maybe because the birth of child was possible after several obstacles they would provide the child with even more love and care. Also, the screening process for the commissioning parents before the contract for surrogacy is signed helps ensure that the child would be cared for³¹.

The sixth argument concerns the emotional and mental well-being of the child. It is argued by some that the child might have detrimental effects after knowing that his/her birth mother gave them up for money³². It may result in long lasting psychological effects and the child might consider itself as “object of exchange.”

One argument against it could be that such risks are extremely uncertain, and follow with adoption too. Prospective parents cannot give up having children because of the risks it might entail and parents can be taught about how to sensitively handle such situations. Moreover, the argument portrays the worst-case scenario. The consequences and responses vary from child to child and generally depend on the relationship and the bond between the parents and the child. Some might take it with a positive spirit that their parents wanted to have them so desperately that went to the extent of commissioning their birth.

One last objection I would discuss is the argument that surrogacy amounts to baby selling and is against “public policy³³.” This is most widely made moral argument against surrogacy. As a response to this argument Richard J. Arneson rightly claims that what is traded in surrogacy agreements are the parental and not the property rights of the children. Exchanging these rights isn't the same as buying or selling a baby. These rights are provided to parents to make decisions for their kids till the time they are young for the welfare of the child³⁴.

³¹ MRINAL VIJAY, *supra note 5*

³² *Id*

³³ *Id*

³⁴ RICHARD J. ARNESON, *supra note 18*

Based on all the argument for and against surrogacy contracts I hold the view that it does not amount to baby selling and is an extremely valuable service provided to childless couples. Surrogacy is an informed choice that women choose and not a situation in which they are forced to give up the baby because of incapability to take care of the child. It's a planned and calculated decision between parties to surrender parental rights before the conception of the child³⁵.

The arguments against surrogacy contract relating to exploitation of surrogates is a real and challenging issue which could only be tackled by regulation and not restriction. As Martha Fields argues "Banning surrogacy contracts violates a couple's fundamental right to procreate, Field implies that such a ban would not be unconstitutional on either equal protection or due process grounds. She concedes, however, that a ban could have undesirable practical consequences. Surrogacy provides a solution for infertile couples who want a child of their own and are willing to pay"³⁶

Before going on to the possible policy considerations for regulation of surrogacy contract I would discuss the models prevailing in India, where surrogacy is legal and of Taiwan, where surrogacy is completely banned to further build on to the argument that regulation is the only solution.

Situation in India

In the words of Amrita Pande, who did an intensive research on the surrogate clinics in Gujarat, "Commercial surrogacy in India is the new labour – gendered, exploitative and stigmatised but labour"³⁷ She argues that the "Western moral treatment of surrogacy makes very little analytical sense in developing countries like India where surrogacy work is rapidly becoming a survival strategy"³⁸

Commercial surrogacy is not just legal in India but is also offered at 1/3rd the price in United States and United Kingdom which makes India a hot destination for surrogacy. Though legal, surrogacy

³⁵ *Id*

³⁶ MARTHA A. FIELDS, *supra note 17*

³⁷ ALISON BAILEY, *supra note 9*

³⁸ *Id*

is not regulated in the Indian market which results into economic exploitation of the surrogate mothers and the profit maximisation of the middlemen and commercial agencies³⁹. The government has been trying to regulate the market since 2008 but has failed to introduce the bill in the parliament. The Assisted Reproductive Technology Regulation Bill if passed would make India the country with most liberal and permissive surrogacy laws⁴⁰.

Right now, the surrogacy clinics function based on their own rules which have no state supervision. It isn't that these women are treated awfully but the amount of money they receive because of lack of regulation is drastically low than what is paid in the West. The worst part about these contract is that in case of unsuccessful outcome of pregnancy, chances of getting payment are extremely bleak because of lack of redressal mechanisms. Moreover, provision of insurance or post-pregnancy medical and psychiatric support aren't available. Their contracts generally state that in case of medical harm to the surrogate, neither the clinic nor the commissioning parents would be in way responsible⁴¹.

The clinics have generally selection criteria to choose women who can be surrogates, it ranges from 20 – 45 years, women who are married and have had a child before are chosen. They are provided with therapy sessions to make them accustomed to the fact that they would be giving the child away and that they aren't in anyway connected to the child. As most of them don't know English and their contracts are in English, the clinics communicate the terms of the contract to them⁴².

The most common way in which commercial surrogacy clinics function are putting the surrogate mothers in hostels to make sure that they are properly supervised. The main motive behind this is to hide them from the public eye and save them from social stigma. They can meet their family on

³⁹ PIKEE SAXENA, ARCHANA MISHRA, SONIA Malik *supra note 2*

⁴⁰ *Id*

⁴¹ *Id*

⁴² Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, THE UNIVERSITY OF CHICAGO PRESS, Signs, Vol. 35, No. 4 (Summer 2010), pp. 969-992

weekends but not allowed to go their homes for the fear of indulgence in sexual intercourse or strain from household work⁴³.

These hostels become the best part and the most integral part of the contract for most of the surrogate mothers. The contracts make these women connect to each other deeply and share their experiences. The class profile of the women who choose to be surrogates in India come from poor families with average income being \$60 per month. The amount of money they get for surrogacy amounts for 5-year worth of salary to most of them⁴⁴. Women choose this field for a variety of reason, to provide their children with education, pay off their loans, getting their daughters married, building a house and for basic survival of the family⁴⁵. Sometimes these women are the only working members of the family.

The good part of these clinics is that they provide emotional support to the women not just for the time they spend there but also for their future lives. These women are generally given some vocational training and English classes to prepare them better for the upcoming phases of their lives⁴⁶.

But due to the lack of regulation there are a lot of information that isn't disclosed to these women. IVF treatments entail of lot of medical risks such as multiple foetuses due to IVF, risk because of the hormonal injections for egg harvest and other implantation risks. They are provided no medical or legal recourse against such risks due to the lack of regulation⁴⁷.

Situation in countries which ban surrogacy

Commercial surrogacy is completely prohibited in countries like Taiwan but when it comes to altruistic, only married couples can avail the services under restrict regulation. The commissioning parents must have a biological connection to the child and the mother should have a medical proof

⁴³ Id

⁴⁴ ALISON BAILEY, *supra note 9*

⁴⁵ Id

⁴⁶ AMRITA PANDE, *supra note 42*

⁴⁷ KALINDI VORA, *supra note 16*

is incapability to carry a child. The contract between the surrogate and the intended parents is notarised by the court and in case of its breach a fine or 5-year imprisonment could be imposed⁴⁸.

Other fertility treatment can be availed only by married couples. The laws of the country specifically exclude homosexual, single people, or any other non-traditional arrangements from getting artificial reproduction mechanisms. Even adoption laws in Taiwan are so strict that they exclude homosexuals from adopting a child⁴⁹.

The strict laws against artificial reproduction, surrogacy and adoption leaves no choice for people but to travel abroad to satisfy their need of becomes parents. India and Thailand are the most popular destinations for people from such countries to look for surrogates⁵⁰.

Need for regulation

When citizens hold diverse idea's regarding an extremely crucial subject, sometimes the most appropriate way to deal with it is to call for state intervention. The debate between the theorists and the factual problems regarding surrogacy calls for a middle ground which only regulation can provide. State should come in to regulate surrogacy in a manner which respects the values exhibited by both the diverging groups.

As Amrita Pande argues "Contractual pregnancy is neither moral nor immoral, neither virtuous nor vicious, market for wombs is not good or evil, it just exists."⁵¹ And the best way to deal with them is by regulating them. Recognising and regulating surrogacy as labour analyses the experiences that these women go through and acknowledges them as critical agents⁵².

Based on the models adopted by different societies and policy arguments made by theorists, surrogacy law should be uniformly drafted at an international level. Some policies which should

⁴⁸ *Reproductive laws for Taiwan*, GLOBAL IVF, June 19, 2013, <http://www.globalivf.com/directory/laws/taiwan/>

⁴⁹ YUN-HSIEN DIANA LIN, *supra note 4*

⁵⁰ *Id*

⁵¹ ALISON BAILEY, *supra note 9*

⁵² MARTHA A. FIELDS, *supra note 17*

be essentially included are that the contract must be in the language which the surrogate understands and she must be given some time to carefully analyse the contract before signing.

Second, the right to rescind the contract must always be included. The surrogate mother should be provided with a cooling off time to finally make up her mind about giving the baby away, as professor Fields have argued this would not be an indefinite period and after the baby is handed over to the commissioning parents the right to rescind ends⁵³. Even Trebilcock agrees with this approach being an essential part of the surrogacy contract. But in case of contract being rescinded, the commissioning parents should not just get their money back but must also be provided extra damages for the mental trauma and breach of contract that they suffered.

Third, a set of strict screening and psychological testing and therapy must be provided not just to the surrogate but also the commissioning parents before and after entering the surrogacy contract. The emotional strength needed for the process might be underestimated by the parties. Preparing the parties involved for unforeseeable outcomes to some degree is essential. Phys iatric support must be mandatorily provided the all surrogates after they give the child away, even if the women is not experiencing any kind of trauma, ability to share one's crucial experiences is always helpful.

Regarding the fees paid to the surrogates, first at an international level the countries must come together and formulate a minimum amount that must be paid to surrogates irrespective of which country they are from. This is extremely important to ensure a fair dealing when surrogates are chosen from developing countries. If the commissioning parents out of goodwill or as gratitude to the surrogate want to pay more, they should be allowed to do so.

Moreover, the payment instead of being made in bulk after completion of the contract must be paid trimester wise which would keep providing the monetary satisfaction and motivation to the surrogates for their compassionate work. The payment should be made to the surrogate and not to any one family member unless the surrogate wishes so. This would ensure that the husband or any other family member doesn't take away the money which is for the services by the surrogate.

⁵³ MICHAEL J. TREBILCOCK, *supra* note 11

There must also be a set of guidelines for the physical health of the women chosen to be a surrogate to avoid health risks. The total number of deliveries per women in a life time should not cross 6 at max, if the surrogate is married then spousal consent could also be taken into consideration to avoid marital disputes. Proper screening had the medical history and diseases such as STD and other communicable diseases should be concluded⁵⁴.

And most importantly, the surrogate must be insured for all the medical and other related expenses for healthcare during pregnancy, childbirth and even for a few months after the childbirth. The life of the surrogate should be insured as well.

Conclusion

Childbirth and parenthood are amongst the closest attributes to a person's being. There is nothing wrong with getting your share of happiness with someone else's help when the body demands it. What matters is that both the parties are well off by the agreement.

The process of surrogacy has a lot at stake and benefits everyone, provides the joy of a child to the parents, middlemen or clinics get their high profits, surrogates too get money but isn't the amount that they deserve based on the international market prices. The regulation could help secure their financial interests in the best possible way. In the Indian scenarios, the surrogates put everything at hold in their lives, their family, their health, their reputation to earn the desperately needed money⁵⁵. The least that can be done is regulate this blooming market was that they get a fair price, health and legal protection for the services they provide.

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⁵⁴PIKEE SAXENA, ARCHANA MISHRA, SONIA MALIK *supra note 2*

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