

ECONOMIC ANALYSIS OF COMMERCIAL SURROGACY

Written by Manjari Rammohan & Parinita Kare

(3rd Year BA LLB Students, Christ University, Bangalore)

INTRODUCTION

The phrase “surrogate motherhood” in its varied semblances means, “substitute motherhood” for the genetic-biological mother.¹ It includes all methods whereby a woman bears a child for another woman, in her own womb, which she hands over to her employer at the time of birth.² With what started as only kith and kin of the infertile couple bearing the child, surrogacy is now a flourishing business in several countries such as U.S.A, India, Georgia, Russia and in particular Thailand,³ which has extended beyond the realm of close relatives to women with no relationship to the couple for sake of retaining anonymity. This arrangement is fuelled by strict contractual and financial agreements. An increasing number of infertile couples use surrogacy because of the lengthy legal procedures for adoption and the couples’ desire of having a genetically related child.⁴ Unfortunately, surrogacy is accompanied with myriad negative effects on the surrogate mother’s health.⁵ With the growing phenomenon of surrogacy remedying childlessness, there is a sleuth of problems that accompany it such as cross-border legal and ethical issues, which are gaining prominence. Certain countries such as Thailand whose economies thrive on the income derived from commercial surrogacy contracts from foreigners have gone to the extent of imposing a ban on the same in the light of unethical practices related to surrogacy. In various other countries, the dominant view is that surrogacy in itself is not derogatory towards women but rather such contracts which entail a profit from such transactions. Altruistic surrogacy was seen as the saving grace for infertile couples whilst keeping the practice within the confines of public policy. Altruistic surrogacy is when

¹ Surrogacy from a Feminist Perspective, [5(4) INDIAN J. OF MED. SCI. (IJME) (1997).

² The Assisted Reproductive Technologies(Regulation) Bill -2010
The Assisted Reproductive Technologies (Regulation) Bill-2010, Indian Council of Medical Research (ICMR), Ministry of Health &Family Welfare, Govt. of India, pg. 4 (aa).

³ Bhalla et al., India Seeks to Regulate Its Booming Surrogacy Industry, 2013 REUTERS HEALTH INFO.(2013).

⁴ M. FIELD, SURROGATE MOTHERHOOD 6 (1988).

⁵ Associate Prof Paula Gerber & Katie O’Byrne,Surrogacy, Law and Human Rights, .

a surrogate is given no financial gain for carrying a child. Only realistic out of pocket expenses are covered by the intended parents. E.g. medical costs, travel, time off work, etc.⁶ Thus unlike commercial surrogacy, it is not seen as a source of employment or income but is an act done in good faith. Now this seems to be the ideal conclusion and plan of action. Commercial surrogacy seems to be the inhumane alternative whereas Altruistic surrogacy served the purpose ensuring full consent and preservation of rights. However a model where the former is outlawed and the latter is allowed would work only in countries where the liberal democratic principles have led to an efficient implementation and enforcement of law, Australia in particular. What must be noted is the standard of living of an average Australian does not give rise to the necessity of partaking in Commercial surrogacies. So we're typically talking about countries that are still developing and thus have a certain level of poverty and unemployment that would be affected if commercial surrogacy were outlawed, countries like India and Thailand in particular.

This paper attempts to draw out the most efficient solution for developing countries and in doing so analyses the costs and benefits of outlawing commercial surrogacy with the assumption that Altruistic surrogacy would serve the same purpose minus the violations towards the rights of the mother and newborn.

COMMERCIAL SURROGACY v. ALTRUISTIC SURROGACY -

A Cost and Benefit Analysis

When we refer to this cost and benefit analysis let us keep in mind the economies of developing countries that have adopted altruistic surrogacy while outlawing the for profit practice. Now, the costs of commercial surrogacy are innumerable. There exists a derogatory sentiment towards women and rampant human rights violations.⁷ Coupled with this is the exploitation of these women not only financially but also mentally. Exploitation stemming from contracts of surrogacy is seen in developing countries where the high level of poverty (such as countries like India and Thailand) gives rise to industries where women can earn some source of income

⁶ SHARYN L. ROACH ANLEU & , 33 ACTA SOCIOLOGICA (1st ed. 1990).

⁷ DIANA BRAHAMS, NO. 1, 17 , THE HASTINGS CENTER REPORT (1987), pp. 16-19

negating the pitfalls of the profession. Industries like surrogacy and prostitution exist in these countries because poverty gives rise to any gainful activity even if the same of derogatory towards their rights and status. These views were mirrored in a leading editorial in Thailand. When such poverty exists it is debatable whether contracts of surrogacy are entered into voluntarily. At some point your consent if guided by economic compulsions and while you may make a conscious choice it is devoid of free will. So in a paradigm where commercial surrogacy is allowed in these countries, there exists a plethora of costs, which plague the country in ethical and financial ways. Moreover, the aspect of consent being free is in itself questioned because of the deplorable economic conditions of many citizens. With all this tipping the scales towards one side, countries are forced to make decisions that resonate public policy and are foolishly of the opinion that this is in fact the best decision, ethically and thus economically as well. Before we can elucidate on this opinion held by lawmakers, let us understand the costs of altruistic surrogacy, the now alternative, legal, to commercial surrogacy. Here we see that there is little scope for economic exploitation because this practice does not entail a contract of profit but a mere agreement to facilitate the needs of one, in kind and good hearted spirits. In saying that, we can also deduce that this now being a non-income sector, there will be no economic compulsions that govern our choices.

These are plus points of the new alternative and while it may seem like a positive policy we must refer again to the framework given in our paper. We are talking about developing economies that once entertained commercial surrogacy but have switched over to this new alternative as means to keep social practices within the purview of public policy. Thus we can immediately rule out developed countries and the two notions that come along with them. One, that there exists efficient law and enforcement agencies to implement any policy effectively and in doing so curbs crime and exploitation. Two, that there is no dearth for inhumane sources of employment or those seen as derogatory to women, such as commercial surrogacy. Both these notions cannot be taken in our framework as we are talking about developing countries where there exists corruption and numerous inefficiencies in the Executive (Government and the Police) and thus there is little scope for such a drastic change in law (i.e. switch from commercial to altruistic surrogacy) to be implemented effectively in society. To add to this, it is commonly known that developing countries (especially those that formerly entertained commercial surrogacy) do in fact have high levels of poverty and in order to alleviate themselves from the same do indeed engage in employment such as surrogacy, prostitution etc.

Keeping these two points in mind, let us analyze the costs of Altruistic surrogacy in our paradigm. The ingredients of inefficient executive and high poverty make for a bad dish.

The ban on commercial surrogacy while allowing altruistic surrogacy will entail the same costs as the former. Due to inefficient policing and dire need for employment there is very little hope that non-profit surrogacy contracts will prevail. Nonetheless, one wonders if removing the payment aspect makes it more “exploitative”. The surrogate does not receive financial incentives above and beyond the required basic expenses of bearing a child. There is no guarantee that rich, infertile couples would not exploit poor, fertile women. It is difficult for any official authority to track the “gifts” being exchanged between the parties involved in the name of “compensation”. Lastly, altruistic surrogacy could also put voiceless, oppressed women in a highly vulnerable position, further disempowering them. Especially in countries with lax policing, there is a higher possibility of this occurring.⁸ Transactions remain unmonitored and people could very well be conducting illegal acts. Further, this means that there are doubts again about the freeness of the consent given. Finally, the fact that this practice is now criminalized, victims that suffer from economic and bodily exploitation must keep their silence for there is no scope for recourse. So in a country like the one explained, this policy move will do nothing but push the commercial surrogacy industry underground and open it up further to ethical violations without any protection for citizens. The surrogate mother experiences an added cost of Altruistic surrogacy personally. Many studies show that in surrogacy contracts for profit, the surrogate mother regards the transaction from a business perspective and in doing so is able to detach from the baby.⁹ This means that she goes through less mental trauma in commercial contracts because of the profit undertone that makes it impersonal. However, in altruistic surrogacy, this mental trauma during separation after birth is heightened because the contract that now exists is purely good will and personal, with respect to the surrogate mother. Thus we can safely conclude that in a debate of commercial surrogacy vs. Altruistic surrogacy, the former comes out with more costs and in fact more benefits. The benefits being employment to thousands of poor women and giving them an opportunity to better their own lives. And with this practice being within the range of legality, recourse can be sought against any violation of person or contract.

⁸ Why Ban Commercial Surrogacy, THE BUS. LINE (THE HINDU) .

⁹ Id

While we have concluded that commercial surrogacy is the best option, we see that there are a lot of flaws in this type of contract. Thus we face situation where on a policy level a law seems okay but in implementation there arises many issues. These flaws would result in commercial surrogacy being devoid of the aforementioned benefits and instead being an industry of exploitation. Some of the contractual issues that make this form of surrogacy complicated are elucidated ahead.

THE PITFALLS OF CONTRACTUAL COMMERCIAL SURROGACY

According to Richard Posner, economics is a science of rational choices and is based on three tenets¹⁰. If the surrogate mother spends time with the child after birth and there is a certain “bonding” that occurs, she may not want to give up rights over the child entirely to the biological parents. This is following up the Baby M case, where although the surrogate had to undergo psychological training and counseling, she was unable to surrender her child and the New Jersey court legally recognized her as the mother of the child. Posner argues that if the surrogate is allowed to rescind the contract, the recipient parents would have lost a year in the hope of finally having their child enter their home and may lose faith in subsequent mother as well. He gives preference to the opportunity cost of the parents losing one year over the surrogate losing complete rights over the child. He urges the relaxation of adoption laws, where money isn’t explicitly given by the adoptive parents, to cater to a large and inflexible market for babies. But on the other hand, an analysis of an agreement between surrogates and the biological parents would reveal that it is not a strictly contractual relationship but it is unique because of the special bond that exists between the surrogate and the child and hence the contract may not be enforced positively. Brinig suggest that surrogacy contracts shouldn’t be enforceable because of information asymmetries, third party externalities (surrogate mother’s health) and market asymmetries such as middlemen. Many scholars are of the view that putting a price on a child in a market would amount to commodifying children and dilapidating their status in society.

¹⁰ R. POSNER, ECONOMIC ANALYSIS OF LAW 3 (1986).

However, the basic flaw in Richard Posner's theories is that he assumes that transactions are voluntary.¹¹ Posner states that contracts are entered into only when they mutually benefit both parties. However, to reap these benefits, the contract needs to be enforced to begin with. The freedom to serve as a birth mother through surrogacy derives from the freedom to contract. However, this model of contracting is frequently flawed on various levels. One of the basic tenets of contract law is that the consent be freely given. Going by surveys, surrogate mothers come from poor backgrounds and have lesser bargaining power than the well off biological parents who opt for such expensive techniques. The surrogate mothers are forced to undertake these contracts in pursuance of having one square meal and the terms of the agreement are biased towards the biological parents which results in an imbalance in contract making. The costs of litigation applicable to gaining expectation damages from breach would leave one or both of the original parties worse off than if the contract had simply been performed. Also, Posner's supposition assumes that the seller is mindful of the cost the buyer has on the product, which Posner defines as the cost of purchase plus the profits the buyer will make.

THE ECONOMIC SOLUTION

The best economic solution is thus allowing commercial surrogacy coupled with a reduction in transaction costs. The reason we need to reduce transaction costs is to bring about efficiency in the contract and in turn in the concerned industry. Thus it would be more advantageous to internalise transaction costs such as medical expenses than undertake the costs of possible litigation that would arise if the contract is under dispute.

According to Coase Theorem, efficiency happens in the absence of transaction cost, which are basically obstacles in allocation of resources¹². Most surrogacy contracts are incomplete and hence the law should fill in gaps in these agreements and reduce transaction costs. Practical inputs towards reduction of transaction costs are given below.

¹¹ Kimbrell, Baby-Sitting Consideration: Surrogate Mother's Right to "Rent Her Womb" for a Fee, 18 GONZ. L. Rev. 539, 544 (1983).

¹²Richard A. Posner, *The Law and Economics of Contract Interpretation*, http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2893&context=journal_articles

1. *Regulation*: The first option to try out when transaction costs concerning this industry are to be reduced is regulation itself. The current scenario is commercial surrogacy being merely allowed but not sponsored by the state in the form of any legislation at all. This non-involvement of the state allows commercial surrogacy to hurt the country in ways that the cost and benefit earlier has explained. While we concluded that commercial surrogacy is the better option, we can make it the best option by recommending that the state should concur on a policy regarding commercial surrogacy. A definition of the rights and the liabilities of the parties concerned as well as a guiding legislation to keep transactions away from exploitation and instead mutually beneficial will certainly remove the gray area. This will also make enforcement of these contracts easier and more efficient. Well-defined laws could make this industry both ethical and profitable.
2. *Bounded rationality*: Williamson's contributions to the field of Transaction Cost Economics complement, and extend, those of Coase. First, Williamson started with an explicitly behavioral assumption of human behavior (bounded rationality).¹³ Bounded rationality is the idea that when individuals make decisions, their [rationality](#) is limited by the available information, the tractability of the decision problem, the cognitive limitations of their minds, and the time available to make the decision.¹⁴ Second, he recognized that transacting parties sometimes behave opportunistically and take advantage of their counter-parties.¹⁵ In the case of a surrogate contract, when there are certain extreme clauses such as the surrogate agreeing not to abort the child except in cases where her life is on the line, this tends to add to the surrogate fearing her own safety and would want to rescind the contract at an earlier stage due to her idea of bounded rationality. Moreover, such clauses are advantageous to the biological parents who have more bargaining power. In these circumstances, the

¹³ Bajari, Patrick and Steven Tadelis. "Incentives versus transaction costs: a theory of procurement contracts." RAND Journal of Economics 32, 2001: 387-407.

¹⁴ Elster, Jon (1983). *Sour Grapes: Studies in the Subversion of Rationality*. Cambridge, UK: Cambridge University Press. [ISBN 0-521-25230-X](#).

¹⁵ Robert Gibbons, *Transaction-Cost Economics: Past, Present, and Future?*
<http://web.mit.edu/~rgibbons/www/Gibbons%20SJE%20Apr%2013.pdf>

transaction cost increases multifold and should extreme, inflexible clauses should not be allowed by the government/hospital agency mediating the surrogacy.

3. *Anticipatory breach:* This is also a transaction cost. The parents are under constant fear that the surrogate mother will rescind the contract. And this fear or added cost is greater if the couple has already has a fruitless surrogacy contract. Thus to combat anticipated breach, surrogate mothers should be given the right to ask for counseling to help her get through the separation from the newborn. This will make giving up the child easier as well as ease her mental burden. This right will actually reduce transaction costs because the possibility of her rescinding the contract post counseling will be minimal.
4. *Economize on information costs:* Better information enables individuals to make better choices. Thus, the cost of information needs to be balanced out against the benefits arising out symmetric information between the surrogate and the biological parents. The law must focus on dissemination of information as well as incentives to do so. The party failing to disclose information must pay for the losses of ignorant parties.¹⁶ Some examples of how information can be institutionalized so as to provide easy access is a database of surrogacy. An information database should be made available. In doing so, we will be catering to the rights of both the surrogate mother and the intending parents. This database will include information such as the medical history of the surrogate mother and any other physiological information. This will help the intending parents choose the right surrogate and reduce asymmetry or information and consequently transaction costs. Similarly, the surrogate mother too should be provided with information regarding the intending parents such as place of residence, job description etc. as a right of hers. Studies show that such information is comforting to the surrogate mother and knowing the fate of the baby makes the separation easier. Here we see that costs are being cut due to a simple information database.

¹⁶ S.A. Smith, *Contract Theory*, Oxford: Oxford University Press, 2004

5. *Efficient Breach*: The underlying principle in modern contract law is that the parties either honour their promises or pay damages. It is an obligation to compensate for losses arising out of the inefficient breach. In this way, resources flow the most efficient way.¹⁷

6. *Efficient Risk Bearing*: Parties enter into an agreement, which is legally enforceable to reduce the risk of default. Contract law should facilitate risk sharing by upholding the terms of the contract. Another way to uphold risk bearing would be a clause whereby both sides of the contract agree to some amount of security in deposit and the contract defaultee would be able to claim the amount from the deposit. This mitigates risk and is a guarantee in some form. An insurance clause is another example whereby the biological parents pay a certain premium to an insurance agent regulated by the government, who in turn will pay for all expenses in case of some health injury to the surrogate. This eases the minds of the biological parents, as they know they will not be held unlimitedly liable for damages to the surrogate mother.

CONCLUSION

In the course of the paper, we have tackled the concepts of altruistic and commercial surrogacy. With that, we've also evidenced our preference for commercial surrogacy with a cost and benefit analysis. We did however understand that even with commercial surrogacy, the society could be paying high social costs. In order to combat this, a reduction in transaction costs was recommended. Thus, through out the paper, we have tried to view laws through an economic lens and while there are other issues to be regarding in law making, economics does take the same into consideration. It converts these issues into costs and benefits and then weighs the scale to produce the most efficient law. In conclusion, the paper is an example of the nexus between law and economics and how the latter can be used as a tool for the former.

¹⁷ Baker, George, Michael Gibbs, and Bengt Holmstrom. 1994. "The Internal Economics of the Firm: Evidence from Personnel Data." *Quarterly Journal of Economics* 109:881-919.

