

COMMERCIAL SURROGACY: LEGAL, SOCIAL, ETHICAL ISSUES

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ABSTRACT

“Surrogacy is a Human Victory over the Nature”

A Woman becomes complete when she gives birth to her own child and to be called mother. But unfortunately this gift is not equally distributed by god to every woman. There are many women who suffer infertility due to various reasons.

According to the Assisted Reproductive Technology (Regulation) Bill, in the world around 15 percent couples are found infertile. The World Health Organization (WHO) has declared the infertility as a disease and reported that, India has an estimated 19 to 20 million infertile couples. Thus, the infertility has become one of the most common medical and social problems. Infertility has become the reason for the marriage collapse, divorce, desertion and may result in heavy psychological consequences. Recently, the surrogacy has become the best option for infertile couples, single person and gay and lesbian persons of their own genetic babies. The lifeline of the surrogacy is the Article 21 of the Constitution of India, which confirms the reproductive rights to every individual irrespective any gender or any nationality of the person. This right is also recognized in most of the previous and recent international human rights instruments as well as the regional treaties. The practice of surrogacy is alleged as illegal, unethical and immoral practice. The surrogacy agreement involves the various social, ethical, legal, psychological and medical issues.

The term surrogacy means where a woman consented to bear the child with the intention to relinquish the baby upon the birth to the commissioning couple. The last three decades, there

is a huge growth of infertility clinics and surrogacy centers. Such clinics are growing like mushroom around the country.

Different countries have different rules for regulation of surrogacy, as some have legalized altruistic surrogacy whereas few have not. In some of the States of USA, the commercial surrogacy recognized as illegal and unenforceable. In Australia, the commercial surrogacy is treated as a criminal offence. Since 2004, only altruistic surrogacy has been allowed in Canada and New Zealand. The surrogacy arrangement is unlawful in France, Germany and Italy. The commercial surrogacy was legalized in India since 2002 but with the introduction of Surrogacy (Regulation) Bill, 2016 has banned the commercial surrogacy and legalized altruistic surrogacy, which is restricted only to Indian heterosexual married couple only who have completed 5 years of their marriage. The Surrogacy (Regulation) Bill, 2016 was recently introduced in the Parliament thus being still in the womb of the Parliament and not finally made an Act leaves ample scope for addressing the issues which seem to not have been mentioned herein.

The issues which the researcher wants to focus on are what happen if the commissioning parents refuse to take custody the child, who will be responsible to take custody of the child? Whether the commissioning parents are under legal obligation to take custody of the disabled child? Is denying homosexuals who are now recognized as third gender, the facility of surrogacy is not infringement of their human rights? Also how the legitimacy of the surrogate child be determined and what would be the nationality of the child? It is also alleged that surrogacy amounts to the commodification of women, sale of the child.

INTRODUCTION

Procreation is the natural instinct of the human beings. Thus those who can procreate naturally are fortunate. But infertility is the biggest hurdle and has been regarded from centuries as a divine punishment to those who can't give birth to child due to any reason either social or biological. From the very beginning 'adoption' was taken as an alternative for those who are unable to give birth to the child. But the adopted child does not give the childless couples the happiness of carrying forward their own bloodline. Here comes the 'surrogacy', a gift for the childless couples and even single individuals who want to become parents to their own genetic child.

Surrogacy is the assisted reproductive technology that helps the couples and individuals to overcome the obstacles of reproduction arising from infertility, medical complications, and threat of harm to mother or child, personal choice, biological limitations of same sex couples, death of partner, and the risk of transmission of genetic diseases to the child. Recently, surrogacy has emerged as most popular method to attain biological parenthood for a consistent number of prospective parents including older women, homosexual couples, and single parents. In the case of a surrogacy agreement, in fact, a woman (surrogate) accepts to carry a child to term for a couple or individuals and to relinquish that child to them after birth. The embryo is developed in vitro and then transferred to the womb of the gestational surrogate either using the egg and the sperm of the client couple (i.e., the prospective parents) or the donor egg and donor sperm for the use by the client couple.

Given the new opportunities surrogacy offer for family building, it should come as no surprise that reproductive care is now a growing phenomenon worldwide and its use has reached a global scale.

SURROGACY

The word 'surrogate' has its origin in Latin '*surrogatus*', past participle of '*surrogare*', meaning a substitute, that is, a person appointed to act in the place of another. Thus a surrogate mother is a woman who bears a child on behalf of another woman, either from her own egg or

from the implantation in her womb of a fertilized egg from other woman. Surrogacy can be classified based on medical and monetary conditions.

KINDS OF SURROGACY

Genetic Relationship: Gestational vs. Traditional Surrogacy

Surrogacy is classified into two kinds, gestational surrogacy and partial surrogacy based on medical procedure involved. Gestational surrogacy involves the 'surrogate' woman carrying the biological child of the infertile couple. Partial surrogacy, on the other hand, involves the egg of the 'surrogate' mother fertilized by the sperm of the father or the donor.

Payment for a Surrogate: Compensated vs. Altruistic Surrogacy

Commercial surrogacy and Altruistic surrogacy, this division is on the basis of monetary compensation provided to surrogate. Commercial surrogacy, it is a practice of gestating a child for another couple or for an individual through the use of ARTs and in lieu of remuneration. Whereas, Altruistic Surrogacy is an act of kindness where the process of surrogacy is performed for childless issues without any profit which means no money is paid to surrogates.

Ethical, Moral & Social Issues revolving around Surrogacy

In a very obvious way surrogacy foregrounds the shifting pattern of 'family', intimacy, parenthood, gender relation and sexuality. Surrogacy Arrangements are controversial on account of various grounds of which few are:

- Surrogacy commercializes the women reproductive capacities and commodifies the child. During the course of the pregnancy, the arrangement calls for restrictions on the surrogate mother's behavior and authority to make medical decisions concerning herself and the fetus.
- These Surrogacy Arrangements permits the manipulation and handling of human gametes and embryo out of the human body, which raised the problems of moral responsibilities and legal ownership.
- Surrogacy arrangements put birth of child outside the boundary of marriage and allow a child to be intentionally procured to give others.

- There are issues where the intended couple no longer want the child, split up, pass away or abandon the child. In an infamously known **Indian Baby M case**¹, production/custody of a child Manji Yamada given birth by a surrogate mother in Anand, Gujarat under a surrogacy agreement with her entered into by Dr. Yuki Yamada and Dr. Ikufumi Yamada of Japan was at stake. The sperm had come from Dr. Ikufumi Yamada, but egg from a donor, not from Dr. Yuki Yamada but there arose matrimonial discords between the commissioning parents and the mother disagreed to accept the surrogate child. The genetic father Dr. Ikufumi Yamada desired to take custody of the child, but he had to return to Japan due to expiration of his visa. The grandmother of the baby Manji, Ms. Emiko Yamada flew from Japan to take care of the child and filed a petition in the Supreme Court under **article 32** of the Constitution. Ultimately, baby Manji left for Japan in the care of her genetic father and grandmother.
- The age of commissioning parents is also a matter of concern because if they are about to approach old age what would be the fate of the surrogate child.
- The citizenship of a surrogate child is also a matter of grave concern in an international surrogacy arrangement. Under the Constitution, a child born here from an Indian surrogate mother is entitled to Indian citizenship, but what happens if the biological mother is a foreign citizen and the child applies for citizenship of that country. The lack of regulation around international commercial surrogacy has left many babies in stateless limbo, with no country granting them citizenship because of complex conflicts over who the legal parents are. Problems arise when the country of the intended parents and the country of the surrogate mother both refuse to grant the baby nationality, or when the parents who ordered the baby decide to abandon it. The case of a Norwegian woman, Kari Ann Volden, who had used an Indian surrogate to carry a baby created from a donated egg and sperm. The surrogate gave birth to twin boys in early 2010, but Norway refused to give Volden passports to take the twins home, saying the Indian surrogate was the legal parent. India also refused to recognize the babies, saying that Volden was the legal parent. "For the first two years of their life, these twins (were) stateless". Volden and the twins were stranded in India until she was able to go back to

¹ Baby Manji Yamada v. Union of India (2008) 13 SCC 518

Norway and legally adopt them. Another case in which a gay couple from Belgium arranged for a baby to be born in Ukraine, but Belgian authorities refused to accept the men as the boy's legal parents. Neither Belgium nor Ukraine recognized the baby as a citizen, and he ended up spending the first 16 months of his life with foster parents and another year in an orphanage before he was allowed into Belgium.

- Abandoned surrogate child due to health issues. One case raised in the Family Law Council report involved a Queensland couple, Mr. and Ms. Dudley, and a Thai surrogate mother, Ms. Chedi. **Gammy**² a baby boy born to a Thai surrogate mother for an Australian man (the baby's genetic father) and his wife. Gammy was diagnosed with Down syndrome at an advanced stage of the Thai surrogate's pregnancy and suffers from a heart and lung condition, and it was a deciding factor in the decision of the Australian couple to abandon Gammy but take his healthy twin sister.
- Disqualification of homosexual couples, foreign single individuals and couples in live-in relationships Surrogacy (either traditional or gestational) is a great option for LGBTQ prospective parents who would like to have a child who is genetically related to one or both parents; it is most often utilized by male same-sex couples, but can also be used by two women or a couple where either or both partners are transgender.

JUDICIAL APPROACH

Surrogacy Bill, 2016: Contemporary Issues and Challenges

The surrogacy bill, undoubtedly, a welcome step but invites several issues and challenges. Some of the lacunas in the bill are as follows:

- If you didn't have 'close' relatives who were willing to help?

Like in case:

Maybe, you married against your family's wishes.

² Farnell & Anor and Chanbua (2016) FLC 93-700

If the fetus is discovered to have a problem, what happens if the surrogate mother decides she does not want an abortion for religious or emotional reasons? Will the parents, who are compelled by law to ‘not abandon the child, born out of a surrogacy procedure, under any circumstances’, find themselves capable of taking care of the child?

- The surrogate mother, according to the bill, has to be a married woman with at least one child because it indicates that she is able to carry a child to term. In the scenarios listed above, what happens to her responsibilities towards her own family? What if she decides, at that stage, that the surrogacy is demanding too much of her?
- If help is hired for her in such situations, who pays for it? The surrogate mother/family or the couple who want the baby, who according to the proposed bill, can only pay for medical care.
- What about post-natal care? To what extent is the couple who want the baby responsible for it? What if the surrogate mother slips into post-natal depression and needs long term care? Who will take the responsibility?

Sadly, what the bill does is blatantly ignore the “commercial” surrogate mother and the reason why they rent out their womb.

SURROGACY: INTERNATIONAL SCENARIO

Laws differ widely from one country to another. In England, commercial surrogacy arrangements are not legal and are prohibited by the surrogacy arrangement act 1985. A surrogate mother still maintains the legal right for the child, even if they are genetically unrelated. Unless a parental order or adoption order is made the surrogate mother remains the legal mother of the child.

Status of surrogacy in USA

In USA, the surrogacy and its attendant's legal issues fall under state jurisdiction and it differs from state to state. Some states facilitate surrogacy and surrogacy contracts, others simply refuse to enforce them and some penalize commercial surrogacy. In Canada, the Assisted

Human Reproduction Act permits only altruistic surrogacy; surrogate mothers may be reimbursed for approved expenses, but payment of any other consideration or fee is illegal.

Status of surrogacy in Australia

In Australia, all states (except Tasmania, which bans all surrogacy under the surrogacy Contracts Act 1993) altruistic surrogacy has been recognized as legal. However, in all states arranging commercial surrogacy is a criminal offense.

Status of surrogacy in South Africa

The South Africa Children's Act of 2005 enabled the "commissioning parents" and the surrogate to have their surrogacy agreement validated by the High Court even before fertilization. This allows the commissioning parents to be recognized as legal parents from the outset of the process and helps prevent uncertainty.

Status of surrogacy in Asian Countries

In Japan, the Science Council of Japan proposed a ban on surrogacy and doctors, agents and clients will be punished for commercial surrogacy arrangements. In Saudi, Arabia religious authorities do not allow the use of surrogate mothers.

In China, Ministry of Health banned surrogacy in 2001. Despite this regulation it is reported that illegal surrogacy "black market" is still flourishing in China. Anxious about such situation strict legislation has been suggested by the political parties.

CONCLUSION

The concept of surrogate motherhood is accompanied by a great deal of moral and ethical controversy. The variety of legislative responses to enforcement of the surrogate mother contracts suggests that there are no easy answers. Surrogacy arrangements have different implications on different societies having distinct culture, social values, religious and social set up etc. But human rights issues relating to surrogacy arrangements have universal character. These issues can be addressed by effectuating the basic human rights through legislation. The

human rights instruments should be translated in tune with the current pace of assisted reproductive technologies. At the end it can be said that even if surrogacy oversteps the natural ways of procreation, only those who have been able to get children from it know the value of legitimacy of surrogacy. At times, in a society like India, where barrenness is considered incompleteness for a woman, people have no option, but to resort to it to live peacefully in society. Instead of banning commercial surrogacy or making it legal only for married couples, let's regulate it in a better manner because the reason why surrogacy was introduced in the first place was to give the happiness of having a child to the childless couples and single parents. Allowing only Altruistic surrogacy will not bring much benefit as a couple might have no interested relative to surrogate for them. Limiting it to our own citizens will also bring a down in the surrogacy industry where surrogates do derive economic benefits which help them run their families in a better way. There have also been numerous cases of exploitation at lesser known clinics, but that is something tight and focused regulation could have weeded out. With tightly drawn laws India could have protected the rights of surrogates.

The legal issues related with surrogacy are very complex and need to be addressed by a comprehensive legislation. Surrogacy involves conflict of various interests and has inscrutable impact on the primary unit of society viz. family. Non-intervention of law in this knotty issue will not be proper at a time when law is to act as ardent defender of human liberty and an instrument of distribution of positive entitlements. At the same time, prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. The baby trade, however, does not stop with bans on commercial surrogacy. Instead, infertility clinics jump through legal loopholes by moving surrogate mothers across borders. These movements expose surrogate mothers to great risks. Under these circumstances, women are far more vulnerable than before. They are wholly dependent on agencies that have brought them into countries where they are strangers and unfamiliar with the language, culture and social norms.

Active legislative intervention is required to facilitate correct use of the assisted reproductive technologies and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. The need of the hour is to adopt a pragmatic approach by legalizing commercial surrogacy arrangements but regulate it heavily with stringent laws. Rather than bans, governments should consider laws that uphold surrogate mothers' sense of dignity and bodily

integrity. Surrogate mothers should be treated as full human beings who have the right to choose how they get pregnant, the right to opt out of medical interventions, the right to refuse cesarean surgeries and the right to maintain contact with the babies they birthed. Commercial surrogacy is tenable only if surrogate mothers' emotional, physical and intellectual well-being is respected. We cannot consider surrogacy against the unity of marriage, as even adoption is legally permissible. Let us Regulate Technology and not Human Lives...

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