

SURROGACY: CHANGING DEFINITIONS OF MOTHERHOOD

By Mansi Singh Tomar¹⁶² & Sourav Sharma¹⁶³

INTRODUCTION

Surrogacy has recently become a hyped up topic for discussion by everyone. The growing of infertility clinics, new medical technologies and level of awareness among all sections of society has lead to heated debate on this topic of surrogacy and on the changing definitions of motherhood. Surrogacy is a well known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party.¹⁶⁴ In the present time surrogacy is of four types' traditional surrogacy, gestational surrogacy, altruistic surrogacy and commercial surrogacy.

In traditional surrogacy the woman is impregnated with the spermatozoa of the biological father and the oocyte belongs to the surrogate herself making surrogate the biological mother of the child. This practice is done for giving the child born out of such pregnancy to the biological father and his spouse either male or female. In such cases surrogate is impregnated via home artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (intra cervical insemination) which is performed at a fertility clinic.¹⁶⁵ This process of traditional surrogacy is not permitted under ART (Assisted Reproductive Technology) bill, 2008.

Surrogacy splits up the natural notion of reproduction into three parts instead of two that is social parents, a gestational mother, and the genetic matter that links the first two.¹⁶⁶ In gestational surrogacy the surrogate is a mere carriage of the baby, the baby is not connected to her biologically. An embryo is prepared outside the surrogate's body using the spermatozoa and oocyte of the intending parents or in case of infertile or gay or lesbian couples either the spermatozoa or oocyte or both could be donated for the formation of embryo. This embryo is inserted in the body of gestational carrier through the process of in-vitro-fertilisation(IVF). The

¹⁶² 3rd year BALLB Student, Institute of Law, Nirma University, Ahmedabad

¹⁶³ 3rd year BALLB Student, Institute of Law, Nirma University, Ahmedabad

¹⁶⁴ Baby Manji Yamada vs. Union of India AIR (2009) SC 84

¹⁶⁵ Ibid

¹⁶⁶ Imrana Qadeer and Mary E. John, The Business and Ethics of Surrogacy, *Economic and Political Weekly*, Vol. 44, No. 2 pp. 10-12, Jan. 10 - 16, 2009

surrogate later has to give up this child to the biological or intended parents and has to relinquish all her rights over that child as per the agreement. This gestational surrogacy is allowed under ART bill wherein the surrogate must not be in anyway attached to the child biologically.

In altruistic surrogacy the surrogate receives no financial reward for her pregnancy or the relinquishment of the child although usually all expenses such as medical expenses, maternity clothing, and other related expenses to the pregnancy and birth are paid by the intended parents.¹⁶⁷ Whereas, in commercial surrogacy there is a proper agreement between the intending parents and the gestational surrogate to get paid for carrying the child in her womb. This type of surrogacy is legal in various countries including India. Even the ART Regulation Bill allows commercial surrogacy but it leaves the terms and conditions of the contract to be decided by the intending parents and the surrogate. There are no specific guidelines provided for the same in the regulation bill.

Surrogacy in India is not only attached with infertility of couples and their dream of parenthood but on a large scale is attached with the poverty of this country. Many women agree to become surrogates just because of the financial and economic conditions of their family; it has become a survival strategy and a temporary occupation for poor rural women.¹⁶⁸ In a country like India there is lot of stigma attached to the occupation like surrogacy many mistook it as another form of prostitution or selling of wombs. Due to this social stigma surrogates mostly have to hide this occupation of theirs from the society and their relatives.

The ART Regulation Bill, 2008 is issued in order to assist these modern reproductive technologies like sperm donation, egg donation, embryo donation and surrogacy. The guidelines of ART have been uploaded on Indian Council of Medical Research (ICMR) and Ministry of Health and Family Welfare (MOHFW) which is meant to regulate this new and growing business. There are also a few Indian cases like the case of Japanese baby Manji Yamada¹⁶⁹ and Jan Balaz vs. Anand Municipality and ors.¹⁷⁰ which help in regulating surrogacy agreements.

¹⁶⁷ Baby Manji Yamada vs. Union of India AIR (2009) SC 84

¹⁶⁸ Amrita Pande, "At Least I Am Not Sleeping with Anyone": Resisting the Stigma of Commercial Surrogacy in India, *Feminist Studies*, Vol. 36, No. 2, RE-INVENTING MOTHERS, pp. 292-312

¹⁶⁹ AIR (2009) SC 84

¹⁷⁰ AIR(2010)Guj21

RESULTS (Findings)

The “Dirty Work”

Everett Hughes invoked the term "dirty work" to refer to tasks and occupations that are likely to be perceived as degrading.¹⁷¹ In the term dirty work, works which seem physically disgusting like butchering, works which wound dignity of a person by requiring servile behaviour like domestic works, shoe shining etc and the works which offend moral conceptions like dancing topless, prostitution, surrogate motherhood etc have been included.

This concept of including surrogate motherhood in the category of dirty work showcases the actual mentality of people and society towards this occupation. On one hand some refer surrogates to be true angels¹⁷² who make the dream of parenthood of infertile or incapable couples come true whereas on the other hand people criticize surrogates calling them sellers of motherhood or lenders of wombs. These different views regarding surrogacy leave this occupation in a sticky situation full of controversial views.

Some surrogates refuse to connect this work of theirs with labour and deny it being dirty. They back their argument by citing examples from religious perspectives. A surrogate Parvati (a pseudonym) in one of the interviews said “We can’t really call surrogacy ‘work.’ I personally feel it’s nothing strange to us Hindus; it’s in our religion. It’s something like what Yashoda Ma did for God Krishna. And Krishna loved his Yashoda Ma, didn’t he?”¹⁷³ Not only surrogates but sometimes even their family members and their husband support them in this argument of theirs calling this a “blessing of God that they are able to fulfill their familial obligations.”¹⁷⁴

The Contract of Surrogacy

In most cases the intending parents are couples from abroad or are NRI’s, some of them are also Indians. Basically the surrogates are required to find a surrogate mother themselves but in some cases there are surrogate brokers who search surrogates for the client and take

¹⁷¹ Amrita Pande, "At Least I Am Not Sleeping with Anyone": Resisting the Stigma of Commercial Surrogacy in India, *Feminist Studies*, Vol. 36, No. 2, *RE-INVENTING MOTHERS*, pp. 292-312

¹⁷² *Ibid*

¹⁷³ Amrita Pande, Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker, *Signs*, Vol. 35, No. 4, pp. 969-992

¹⁷⁴ Amrita Pande, "At Least I Am Not Sleeping with Anyone": Resisting the Stigma of Commercial Surrogacy in India, *Feminist Studies*, Vol. 36, No. 2, *RE-INVENTING MOTHERS*, pp. 292-312

commission from them. These surrogate brokers convince women to go for surrogacy and explain them how this could help stabilize the financial condition of their family.

For a married woman to opt for surrogacy the prior consent of her husband is required. Counseling sessions for woman opting for surrogacy are conducted as most of them are illiterate or have dropped out after high school. These counseling sessions reiterate that they are only wombs and are in no way directly attached with the baby, this makes them feel a little less attached towards the baby. It is explained to them in a way that a guest child who is homeless is coming to live in their house and they have to take care of them as a guest and protect them more than they protect their own child and when the time comes for this guest to leave they must leave it and in return they will get paid for this care of theirs.¹⁷⁵

After these sessions if woman agree then a contract is signed by them before the actual transfer of embryo takes place. These agreements are made and guided mostly by the ART clinics and are in English. Surrogates being illiterate do not understand the language of such agreements and are only told about it in brief. In these agreements surrogates are made to agree that they will carry a baby in their womb for 9 months which will not be biologically connected to them and will later give away this baby to the intending parents in return for a consideration. This consideration mostly is a sum of money but, the amount of money in such cases differs.

The intending parents take care of the surrogate till the time child is delivered and take care of all the expenses incurred during such period. After delivery there is an obligation on the intending parents to take the child with them no matter what sex child belongs to or what deformity is it born with. The clients keep on paying the amount to the surrogate as per their contractual obligation.

The ART Regulation Bill, 2008

Section 2(aa) defines surrogacy as an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons

¹⁷⁵ Amrita Pande, Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker, *Signs*, Vol. 35, No. 4, pp. 969-992

for whom she is acting as a surrogate.¹⁷⁶ Section 2(bb) defines surrogate mother as a woman who is a citizen of India and is resident in India, who agrees to have an embryo generated from the sperm of a man who is not her husband and the oocyte of another woman, implanted in her to carry the pregnancy to viability and deliver the child to the couple / individual that had asked for surrogacy.¹⁷⁷ Section 2(cc) defines surrogacy agreement as a contract between the person(s) availing of assisted reproductive technology and the surrogate mother.¹⁷⁸

Section 34¹⁷⁹ deals with rights and duties in relation to surrogacy. It talks about the rights and duties of a woman entering into the surrogacy agreement. It says that there shall be an enforceable agreement between intended parents and surrogate, all expenses of this pregnancy will be taken care of by the intended parents, the terms and conditions of the contract shall be decided by the parties themselves, after the delivery of child the surrogate will have to relinquish all her rights over child, no woman who is below the age of 21 and above the age of 35 years can be a surrogate, to be a surrogate the woman must be physically and medically fit, she cannot act as a surrogate for more than 5 live births including her own children, the surrogate can undergo 3 embryo transfers for the same couple and can go for surrogacy for maximum 3 couples, the name of the surrogate shall not be mentioned on the birth certificate, etc.

All these rights and duties regarding surrogacy which are enshrined in this draft bill are mostly client (intended parents) biased. No physical integrity is provided to the surrogate, even the right to terminate this pregnancy is not given to her and infact a declaration is demanded from her and her husband that they have not been involved in any sort of extra marital sex from last 6 months.¹⁸⁰ Even the right to have the name of surrogate on the birth certificate of the child is not provided, if they want a provision of adding the name of all the three parents could be introduced. Before getting into this agreement a medical test of surrogate is conducted in order to check her medical fitness and to see that she is HIV negative but no such test is conducted on intending parents, thus completely ignoring the probability of surrogate getting AIDS

¹⁷⁶ Ministry of Health and Family Welfare, Government of India; Assisted Reproductive Technology (Regulation) Bill, 2008

¹⁷⁷ Ministry of Health and Family Welfare, Government of India; Assisted Reproductive Technology (Regulation) Bill, 2008

¹⁷⁸ *Ibid*

¹⁷⁹ *Ibid*

¹⁸⁰ Imrana Qadeer and Mary E. John, The Business and Ethics of Surrogacy, *Economic and Political Weekly*, Vol. 44, No. 2 pp. 10-12, Jan. 10 - 16, 2009

through the transferred embryo. The bill also talks about three successful live births along with permitting three Embryo Transfers for a particular couple which will legally allow surrogate to undergo nine cycles, which may result in hazardous consequences for her health.¹⁸¹

Leaving aside the health aspect this bill is a mere lucrative for ART clinics and Semen banks as the couples coming for surrogacy pay most amount to these clinics and banks and the clauses of agreement between surrogate and client is left upon them. knowing the fact that most woman agreeing for surrogacy belong to a poor family and are illiterate and the gap between them and their clients is huge because of which they are unable to understand the terms of contract and negotiate upon them inspite of this there is no provision in the bill regulating this contract. The bill has thus ignored the role of legal support required by a surrogate in order to get a fair contract.¹⁸² Moreover the bill nowhere talks about the situations which may turn up during pregnancy. What if the woman dies while delivering the child or what if a miscarriage happens or the child is still born. No such situation is discussed in the bill, a provision of insurance for the surrogate by the clients must be insured by the bill.

Section 35¹⁸³ deals with the determination of status of child born with assisted reproductive technologies. A child born with the help of ART is considered to be a legitimate child. In case of surrogacy as soon as the child is born it is taken away from the surrogate and hence is deprived of the right of breast feeding. This early separation from surrogate is at the cost of baby's immunological and psychological health thus depriving him the right to breast feed even for 3 months.¹⁸⁴ The citizenship of the child belongs to the country to which the intended parents belong and not to India.

The Word of Judges

The history of surrogacy starts with the first case of surrogacy which happened in year 1988 and lead to the formation of surrogacy laws in New Jersey.

¹⁸¹ Sama Team, Assisted Reproductive Technologies: For Whose Benefit?, *Economic and Political Weekly*, Vol. 44, No. 18 pp. 25-31, May 2 - 8, 2009

¹⁸² Imrana Qadeer and Mary E. John, The Business and Ethics of Surrogacy, *Economic and Political Weekly*, Vol. 44, No. 2 pp. 10-12, Jan. 10 - 16, 2009

¹⁸³ Ministry of Health and Family Welfare, Government of India; Assisted Reproductive Technology (Regulation) Bill, 2008

¹⁸⁴ Imrana Qadeer and Mary E. John, The Business and Ethics of Surrogacy, *Economic and Political Weekly*, Vol. 44, No. 2 pp. 10-12, Jan. 10 - 16, 2009

In Re Baby M Case¹⁸⁵

In this case traditional surrogacy was done by a couple. The surrogate was impregnated by the way of artificial insemination and an agreement was made wherein the intended parents agreed to pay \$10,000 to the surrogate. The baby was to be given to the biological father after the birth and his wife was to adopt the baby as hers thus relinquishing all the rights of surrogate over the baby. After the delivery of baby M the surrogate was unable to separate herself from the baby and thus filled an application in the court demanding the custody of child.

The court of New Jersey analysed the situation and said that they invalidate this contract of surrogacy as it conflicts with law and is against the public policy of the state. While the court recognized the depth of the yearning of infertile couples to have their own children, they find the payment of money to a "surrogate" mother illegal, perhaps criminal, and potentially degrading to women.¹⁸⁶ They accepted surrogate to be the natural mother of baby, but gave the custody of the child to the biological father allowing a mother's visitation rights to the surrogate.

Johnson v. Calvert¹⁸⁷

In this case Johnson, the surrogate mother was in no way connected to the child, the embryo completely belonged to the intended husband and wife. According to the agreement the intended parents agreed to pay the amount decided in installments. While the surrogate was pregnant she demanded the whole amount and said in failure of which she will hold the baby. The biological father filled a case seeking his rights as a legal parent.

Johnson alleged that she is the biological mother of the baby, on testing it showed that she was nowhere related to the baby. The court held that when a fertilized egg is formed from the reproductive cells of a husband and wife and is then implanted into the uterus of another woman, resulting in a child that is unrelated to her genetically, the natural parents are the husband and wife thus, taking away all the parental rights from surrogate and declaring the biological parents as the legal parents.

¹⁸⁵ (1988).NJ.41301

¹⁸⁶ In Re Baby M Case (1988).NJ.41301

¹⁸⁷ 5 Cal.4th 84 (1993)

***In Re Marriage of Moschetta Case*¹⁸⁸**

The intending couple wanted a girl child as they already had three sons. They had a contract with the surrogate for carrying a child for them. On delivery twins were born one boy and one girl, the intending parents took away the girl and left the boy in the nursery. Aggrieved by which the surrogate filed a case demanding custody of both the kids.

Court said that this act of intended parents is punishable and gave the custody of both the kids to the surrogate.

***Baby Manji Yamada vs. Union of India and Anr.*¹⁸⁹**

This is one of the leading cases of surrogacy in India. Here, a baby Manji Yamada born to a surrogate in Anand for a Japanese couple was left without guardian after the divorce of her intended parents. The dispute was regarding the custody and citizenship of this child.

The court handed over the custody of baby to her paternal grandmother who came down to India in order to take the child with her. In this case court in detail explained what is surrogacy and laid down guidelines regarding citizenship of such children and said that children born as such will be the citizens of the country to which the intending parents belong. Also a few more guidelines were laid down saying that in case of couple opting for surrogacy in India they need to get a declaration from the government of their country that they will accept the child so born as their citizen.

***Jan Balaz vs. Anand Municipality*¹⁹⁰**

The principle that in case when there are no rules prescribed in the country to which the intended parent belongs government will issue identity document for child to exit the country without passport. In this case twins were born to a gestational surrogate in Anand for a German couple. But, these twins were not being issued passport as a citizen of Germany so Indian government accepted them as Indian citizens providing them overseas citizenship and issued them an exit pass so that they can reach Germany. Later their biological parents adopted them in Germany according to the rules of Germany thus entitling twins the German citizenship.

¹⁸⁸ 25 Cal.App.4th 1218 (1994)

¹⁸⁹ AIR (2009) SC 84

¹⁹⁰ AIR2010Guj21

DISCUSSION

History

This concept of surrogacy is no new to the human race it has been prevalent from the biblical times. As available in chapter 16 of the book of genesis Sarah the wife of Abraham could not produce a child so she asked her handmaiden Hagar to do so for her. The evolution of traditional surrogacy has thus been showcased from biblical times. Through genesis of medical science more has been added to this when the first test tube baby was born and when for the first time a female donated ovum for someone else's child this all lead to the evolution of medical sciences thus supporting the growth of assisted reproductive technology. The genesis and evolution of all this has today made this dream of parenthood possible for all with the help of methods like oocyte donation, spermatozoa donation, embryo donation and embryo implantation in the body of a surrogate.

The Social Stigma

At one side feminists have denounced surrogacy as the ultimate form of medicalization, commodification and technological colonization of the female body, and as a form of prostitution and slavery resulting from the economic and patriarchal exploitation of women.¹⁹¹ On the other even the Indian society disregards it and compares it with prostitution and slavery. The gestational surrogacy which is followed in India is also followed in countries like California but the women going through surrogacy in these countries are not stigmatized whereas women going through surrogacy in India have to go through a great deal of stigmatization.

People in India parallelize surrogacy with prostitution as a consequence of which most surrogates hide this occupation of theirs from the society and their relatives. In order to do so they usually at the earlier stage claim the child to be theirs and at a later stage shift to the hostels and after delivering the child when they return, they give excuses that a miscarriage happened or the child was a still born. In a survey while interviewing a surrogate in Anand she said that "my parents live nearby in Ahmedabad but we didn't tell them, when it started showing we said that it is ours and later said that it died while delivering."¹⁹² She believes that even though

¹⁹¹ Amrita Pande, Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker, *Signs*, Vol. 35, No. 4, pp. 969-992

¹⁹² *Ibid*

they are her parents still they will misunderstand her situation and will think that she is sleeping with some other man.

The stigma attached is not only with the women acting as surrogates but also with their husbands. Husbands in Indian society are considered to be the breadwinners for the family, when someone knows that the wife is acting as a surrogate then husband is criticized for not fulfilling his duty as the bread earner of the family and many a times referred as 'not man enough'. Most surrogates in such cases also try to defend their husbands from such stigma by stating that "My husband is unemployed but he is a very good person. He takes care of the children. He stays at home mostly so he knows what to feed them. Most husbands would not agree to let their wives do this [be a surrogate] but he agreed. I am very lucky. We had no problems with getting the surrogacy contract because his history is so clean. He doesn't smoke or drink."¹⁹³

Though surrogacy being stigmatized and compared to a work of slaves and prostitutes still various surrogates ignore this conception of society and work as a surrogate in order to become breadwinners for their families. It's their financial and economic conditions which make them opt for such occupations. There are a few surrogates who do not give any weightage to what society thinks and do their work without worrying about anyone and even discusses this occupation of theirs with the society and say that whatever they are doing is not wrong at least they are not sleeping with anyone for money. They clearly distinguish between a sex worker and a surrogate.

The Ethics of Surrogacy

While counseling a surrogate it is very well informed to her that she is only a vessel and they are not having any sort of genetic connection with the baby and that it will be taken away from them soon after the delivery¹⁹⁴, with this they are also trained to treat this baby as theirs and care for it as much as they can. Even the surrogates involved in this, care for the baby as if it's their own. During a survey one of the surrogates after her fetal reduction said "both Nandini *didi* [the genetic mother] and I wanted to keep all three. I told Doctor Madam that I'll keep one

¹⁹³ Amrita Pande, "At Least I Am Not Sleeping with Anyone": Resisting the Stigma of Commercial Surrogacy in India, *Feminist Studies*, Vol. 36, No. 2, *RE-INVENTING MOTHERS*, pp. 292-312

¹⁹⁴ Amrita Pande, Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker, *Signs*, Vol. 35, No. 4, pp. 969-992

and *didi* can keep two. After all, it's my blood even if it's their genes"¹⁹⁵ the surrogates always consider that there is a part of them in the baby they are carrying and hence they always nurture and tender it as their own.

When asked to them about the money that they take in exchange of this work they always back their acceptance of money with the financial crisis they are going through. Many term this occupation of surrogacy as a '*majboori*' for them saying that if we would have had option then why would ever turn up to a occupation like this which is so stigmatized. Still they say that we are not doing this for our personal gains, we are doing this for our kids and family. Some want money to get their daughters educated so that they don't have to lead a life like this, some need it for building a house, some want to save it for their daughter's marriage. They hide this acceptance of money behind their '*majboori*' of financial crisis.

The Changing Definitions of Motherhood

Motherhood which is considered to be the most pure and responsible duty on this earth has now attained versatile definitions. Earlier the one who carried a baby in her womb and nurtured her and saw her growing was always one single woman accredited with this term of motherhood. But, in today's scenario this definition of motherhood has taken various moulds. Now, the one who carries a baby in her womb and the one who nurtures it to grow both are mothers. Today the definition of mother has changed there can be a mother who carries and looks at her child growing all together, there can be a mother who only donates an oocyte for the embryo, there can be a mother who only carries the baby in her womb and hands over as soon as it is born and there can also be a mother who breastfeeds a child.

In surrogacy the rights of the mother who carries child in womb are not taken into consideration and they are required to relinquish all their rights toward the child which they will produce. There are conflicting views of people when in search of a good surrogate. The surrogate brokers say that only a woman who takes care of her own children properly can be a good surrogate and on the other hand if a surrogate wishes to meet her own children showing her care towards them then that is restricted.¹⁹⁶ These surrogate brokers use the motherhood of these surrogates in order to maintain discipline among them.

¹⁹⁵ *ibid*

¹⁹⁶ Amrita Pande, "At Least I Am Not Sleeping with Anyone": Resisting the Stigma of Commercial Surrogacy in India, *Feminist Studies*, Vol. 36, No. 2, *RE-INVENTING MOTHERS*, pp. 292-312

Being a carrier of a baby for 9 months there are some genuine feelings of a surrogate which are attached towards the baby thus every surrogate tries to contact the intending parents and wishes to keep in touch with the child when so ever possible.

CONCLUSION

From the times immemorial every couple has wished to enjoy the joy of parenthood and it is because of this that such assisted reproductive technologies have evolved. These technologies help such couples make their dream come true. The ART regulation bill will help in regulating such technologies but there are a lot of loopholes which are still to be filled in this bill. The bill needs to look into the rights of the needy and deprived sections, it needs to enhance rights of surrogate mothers and also needs to define in detail the kind of contract which will be pursued between the 2 parties.

This bill and these technologies might diminish the number of adoptions and have objectified children by categorizing them as genetic and non genetic. The concept of adoption at some point must be encouraged instead of going for these new reproductive technologies. Moreover, these new technologies are hazardous for the health of the surrogate; it will lead to deterioration of a woman's body and also has to an extent objectified woman as a carrier and has changed the definitions of motherhood.

Still the stigma adjoined with such occupation must be removed because at the end it is for a benevolent purpose of providing the joy of parenthood. In order to regulate the acts done under ART and to see that no one gets benefitted out of the poor of this country there is a need to have a proper legislation for the same and thus the parliament should work in the direction of amending ART regulation Bill and making it a legislative act.