



Surrogacy: A bought motherhood

Parantap Kumar Das¹, Shabnam Kisa²

^{1,2} Head of the Department, Research Scholar, School of Law and Legal Affairs (SLLA), Noida International University, Greater Noida, Uttar Pradesh, India

Abstract

Motherhood plays a very significant role in social life. It is obligatory to be a mother and not only that but to be a mother of sons. In a family the mother of children enjoyed a social superiority over the barren or childless women or co-wife. Infertility or the inability to have children on the other hand affects both men and woman of reproductive age in all parts of the world. What's more basic perception rising starting with just about the greater part about these will be that it may be lady who convey those loads of obligation to childlessness. Parenthood enhances status. Also confers prestige. Inability to conceive gives rise to feeling of low self-esteem in woman and increases their susceptibility to physical and verbal abuse, plane zealot. Women wilt the soft targets of covert and overt pressure both from the family and the society at large. This stimulates them to wangle various types of treatment for infertility. Present day medical science has provided with lots of strained techniques which helps in conception and delivering the pregnancy to the full term. Surrogacy is considered as a very sensitive and emotional issue which has far reaching impact on all the parties involved in it. The under structure of every surrogacy arrangement is derived from a desire of an individual to beget a child, which unfortunately some are unable to fulfil. India has become a favoured destination for reproductive tourism at a rapid rate. It has become the Mecca for all treatment option for infertility and thereof opened a new avenue for medical tourism or largest tabbed as the Fertility Tourism.

Keywords: surrogacy, fertility tourism, assisted reproductive technologies

1. Introduction

Surrogacy is the practice of gestating a child for another couple and could involve any of the various assisted reproductive technologies like AI, in-vitro fertilization etc. The fertility market is estimated at Rs. 25000 crores today with reproductive tourism industry growing by leap and bounds. The concept of surrogacy which in general meant for 'Womb on Rent' is not new; it was in prevalence in all societies all over the world in one or other form. Surrogacy gain popularity due to conflicting interest involved in this practice and the practice of surrogacy is also criticized on the ground of its commercialization all over the world.

In India, the first gestational surrogacy took place in 1994 in Chennai. First surrogate baby was delivered on June 23, 1994. In 1997, the First Commercial Surrogacy was reported in India.

Surrogacy contracts alienate a woman from her love for the child and frequently involve exploitation. Surrogacy leads to the weakening of the link between parent and child". - Elizabeth Anderson

In this modern age of medical advancements, infertile couples have a variety of options which can give them a child that they have been dreaming for. The option of having a surrogate woman impregnated with their genetic material often appears to be an attractive alternative for infertile couples who wish to have a child that is genetically linked to them ^[1]. As society and reproductive technology have advanced, the concept of surrogacy has become more widely recognized.

Sometimes it is difficult and problematic for women to have natural pregnancy to be conceived. Among them some are

once have passed their healthy time for reproductive and fertility session. But these women do possess a wish to have a particular child ^[2]. So, for doing the same, many of them go in search of the developed high-tech, low forfeit help from variegated developing nations. India is one among them. Or sometimes they tideway nations that are relatively poor and under developed Eastern European countries like Russia or Hungary.

2. Different Types of Assisted Reproductive Technologies Used for Human Production

Some of them are discussed hereunder

1. Artificial insemination
2. In Vitro Fertilization (IVF)
3. Gmete Intra – Fallopian Transfer (GIFT)
4. Zygote Intra – Fallopian Transfer (ZIFT)
5. Reproductive Cloning
6. Surrogacy: Gestational, Closed, Open
7. Intra Cytoplasmic Sperm Injection (ICSI)

Social, Political, Moral and Legal Implications of Surrogacy

Indian society is considered to be economically feeble, but ethically and traditionally it is very potent. It is a society which boasts of its ideologies and its uneasiness for the welfare of all. The question arises, how a country with such an ideology can legalize renting or loaning a womb of a women's body, the one that is in favour of legalizing

¹ Available at <http://www.samawomenhealth.org>

• ² Gupta, Jyosna Agnihotri, New Reproductive Technologies. Women's Health and Autonomy, 2000.

surrogacy and believes in the liberty of individuals, the other which oppose the above on the grounds of morality and ethics. The surrogacy system has challenged by the society and law in terms of Recognition and regulation. The surrogacy arrangement involves the various social, Ethical, legal, psychological and medical issues. It is moreover so-called that it co modifies the human body, where the child becomes the mere object of a legal transaction, and surrogate mother becomes as an incubator. Therefore, such co modification violates the nobility of both the surrogate mother and the child. In a surrogacy arrangement virtually six people can have the parental right over the surrogate child. One of the dangers of the ethical issues of the surrogacy that use of surrogacy system within the prohibited relationship. According to the International Institute of Social Studies that 'one young girl, inseminated with the sperm of her stepfather for the child of her mother there are many of the cases where women had used the sperms of the brothers for conceiving the child. In almost all civilizations, the marriage serves as the basic institution for reproduction, bearing and raising of children. Procreation of children is the primary biological function of a marriage and it is the family which ensures the continuity of human race. The assumption is that conjugal relations should lead to the birth of children and if it is not done, the continuity of society would cease to exist.

Surrogate Vulnerable In Socio-Economic Background

As per the report of Centre for Social Research published on "Surrogate Motherhood Ethical or Commercial" the majority of the surrogates are uneducated, house maids, sometimes engaged in construction work or nurses and lives in the slum areas. The surrogate women are from lower middle-class family. A woman becomes surrogate because of the various reasons such as an urgent need of money, maintaining families, for buying a house or children's education or for her unemployed and drunkard husband's business ^[3]. Thus numerous ART clinics in the country represent themselves as the destination for couples requiring technological assistance for siring or birth. This assistance is not treatment, and does not address any biological rationalization of Infertility. This has promoted, to describe ARTs as a technological solution to the social problem of not having a child of one's own. The political theory of motherhood in Indian society explains why fertility is so important. There are many reasons for the importance given to biological children in society. For men, having a child is proving their sexual potency. It is important for women, considering for them there is link between feminists and fertility. ART ^[4] requite hope to the infertile couple, who came up to have their own biological child, can now have a child through high technological options like IVF. In India where there is a stigma against infertility and childlessness, this is perceived as a unconfined scientific achievement.

Base of Selection Good Looking, Fairy Skin and Upper Caste

According to Anil Trehan foreigner couples are interested in the women belonging to Northern India, because they are healthy and whitish in colour. Generally, the surrogate women are selected on the very basis of physical

characteristics such as colour of skin, height and weight. Besides these, some other notation like age, number of her own children, caste and religion considered as the base for selection of the surrogate ^[5]. According to SAMA, the commissioning couple said the surrogate's standard of living should be good as well as her beautiful features moreover considered.

3. International Perspective of Assisted Reproductive Technologies and Surrogacy

1. Universal Declaration of Human Right, 1948 (UDHR) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.
2. International Covenant on Civil and Political Rights, 1966 (ICCPR) Article 23 of the International Covenant on Civil and Political Rights recognizes that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. Protection of the family and its members is also guaranteed, directly or indirectly, by other provisions of the Covenant. Thus, article 17 establishes a prohibition on arbitrary or unlawful interference with the family.
3. International Covenant on Economic, Social and Cultural Rights, 1966 This includes the Right to treatment for maternal and infant mortality.
4. Convention on Elimination of all Form of Discrimination against Women, 1979 (CEDAW) It requires States to eliminate discrimination against women in their access to health-care services throughout the life cycle, particularly in the areas of family planning, pregnancy and confinement and during the post-natal period.
5. The Convention on the Rights of Person with Disabilities, 2006

Article 23 - Respect For Home and Family: - States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others.

It is expected that 9% of the intended-couples internationally are impotent and cannot give birth to the child.

- a. In Australia and Canada, the altruistic surrogacy is permitted as the legal surrogacy. It only has been permitted but not yet implemented. There is total ban on the commercial surrogacy.
- b. In Arkansas, Ireland and Georgia, here all the types of surrogacy treatments are considered legal and are permitted through laws.
- c. In China, Iceland, Pakistan, Quebec, Saudi Arab and France, surrogacy is grey area, means all kind of surrogacy arrangements are prohibited and illegal.

4. Legal Complexities Involved in Surrogacy: Indian Scenario

In India legal complexities are increasing due to the sparsity of unobjectionable law and many increasing by laws taking into place. The legal aspects surrounding a surrogacy are complex, diverse and unsettled which results into hardships

³ Patel T, Fertility Behavior, Population and Society in Rajasthan, 1994.

⁴ Available at <http://www.ijme.in1170032>

⁵ Jyoti Bhakare, surrogacy- a reality edpsed by statically social legal issues Indian perspectives, Indian Journal of Law and Justice, vol 2(1), March.

regarding defining the legality of surrogacy contracts, determining the status of surrogate child, commissioning parent, settling disputes regarding custody, citizenship and parentage of surrogate child. Though there are certain guidelines of ICMR which are providing few directions to settle all these issues but have no binding effect and existing law is moreover not sufficient to meet the situation.

Legitimacy of Surrogate Child

Another concern about the practice of surrogacy is about the legitimacy of surrogate child where the law creates conflicts. The law in India recognizes this relationship by blood or marriage and adoption is included in the category by the legal presumption of the adopted child being at par with the natural born child^[6]. In our country, legitimacy issues are governed by section 112 of the India Evidence Act, 1872, where under the child would be legitimate child of the woman and her husband, and the artificiality of the process would make no difference, which signifies that when the techniques of strained reproduction is used with the wife then, child born out with the result of these techniques is presumed to be born out of as the child is naturally born within a legitimate wedlock^[7]. The Hindu Marriage Act, 1955 and The Special Marriage Act, 1954 confer legitimacy to the children.

Custody of Surrogate Child

In surrogate births, there are three entities the intending mother^[8], the biological mother^[9] and the genetic mother^[10]. There may be overlap between the three in numerous cases. In India, the custody of the child is covered under the Hindu Minority and Guardianship Act, 1956. In the current scenario, considering India for the surrogacy, it is just a morale connection of the needs and requirements within the lady being the surrogate mother and the commissioning parents that is converted into an agreement or contract.

Parentage and Citizenship Issues with Respect to Foreign Couples

In India, under The Registration of Births and Deaths Act, 1969., the Medical Officer or a Hospital or Health Center Designee is charged with providing information to register about births occurring in its faculty and should moreover provide with details of father and mother's name in data sheet^[11].

Downcast of Surrogacy

In a developing country like India, where still poverty is a major concern the poorer husbands are driven to direct their wife for surrogacy as an income generating option. Pregnancy affects the woman's health and one cannot know all the long-term consequences of repeated pregnancies. Careful consideration must be given to the medical, emotional, legal and practical issues and to the implications of surrendering the child at birth.

⁶ Available at Law commission's report on surrogacy at www.Lawcommissionofindia.nic.in.

⁷ Raghav Sharma, An international, moral and legal perspective: The call for Legalization of surrogacy in India. All India High Court Cases, 2008, p109

⁸ Mother who wants the child

⁹ Mother who gives birth to child.

¹⁰ Mother who provides Ovum

¹¹ G.V. Mahesh Nath, A critique on surrogacy contracts, at <http://ssrn.com/abstract=998512>

“The labor of bearing a child is more intimately bound up with a women's identity than other types of labor. The work of pregnancy is long term, complex and involves an emotional and physical bonding between mother and fetus.”
– Margeret Jane Radin and Carole Patemanstres.

Exploitation in Payment of Compensation

The surrogate women are even exploited in payment of compensation. No fixed criteria about the amount of compensation to the surrogate. It is subjectively fixed by the ART clinics. Generally, approximately Rs. 12-15 lakhs surrogacy amount is charged by the clinics for the providing surrogacy facility to the commissioning couple. 590 However, the surrogacy cost varies from clinic to clinic as no fixed guidelines for the payment of remuneration to the surrogate.

Psychological and Emotional Exploitation

Generally, most people use the phrase “surrogate mother” “to designate a woman who gives up a child born to her to be raised by another woman and her husband, the latter being the child's biological father^[12].”

The most psychologically and emotionally difficult part of the surrogacy is the “relinquishment of the child” to the commissioning couple. It is said that the processes of pregnancy and birth of child create not only a social but moreover a special biological bond between child and birth mother, but if it is intentionally wrenched then it victimizes both the surrogate mother and the child.

Surrogates Right to Breastfeed

Generally, the surrogate mothers are not allowed to breastfeed the child because of the fear that surrogate's may develop love for the child. According to the SAMA, the surrogate women were given injections or drugs for stopping lactating of them^[13]. Does this prohibition of breastfeeding is medically and ethically right? The answer is No, because the prohibition from breastfeeding seriously affects the health of both the surrogate as well as the child who is in need and has the right to have milk^[14].

No Specific Legislation

The practice of surrogacy is also charged as unethical, immoral practice because it is similar to the practice of prostitution and slavery. According to Dworkin, surrogacy should be considered as a form of prostitution, it contractually the reproduction just as sexuality has long since been contractualised in the prostitution market. Our law is against prostitution which prohibits the women from selling their bodies for money, hence surrogate should also be prohibited from contracting to use their bodies to produce the child for someone else. Considering the surrogacy law, then we find there absolutely no any international harmonization or uniformity in the world. The surrogacy had to go through many problems had the obstacles. This makes different countries to either have ban or restriction or hectic permission process for the surrogacy treatment.

In absence of legislative measures, The Indian Council for Medical Research has come up with certain Ethical

¹² Available at www.mothersgagette.com

¹³

www.globalpressinstitute.org/global.news/asia/india/bloomingssurrogacyindustry.raises-legalsocialconcerns.

¹⁴ Reetu and Basudutta, surrogacy birth, AIR, Vol.96, July 2009.

guidelines for regulating assisted human reproductive technologies in general. The ICMR guidelines, 2005 was adopted with the main objective to provide ethical guidelines for regulating ART clinics.

- a. The Assisted Reproductive Technology (Regulation) Bill and Rules, 2008.
- b. Law Commissions 228th Report, 2009
- c. The Surrogacy (Regulation) Bill, 2012
- d. The Guardian and Ward Act, 1890

Property Rights Over Human Body and Right to be a Surrogate

The view that the body of an individual is his property can be traced to the liberal political philosopher John Locke. He argued that the principle of autonomy provides a basis for ownership over the body 55. The foundation for the social contract is that individuals own their own bodies and products of the body because the latter come from their labor or other activities 56. This liberal view is followed by many jurists including utilitarian thinkers who consider that ownership based on autonomy gives individuals the most extended rights over their bodies. In this sense an individual can be said to own his body and no one else has a superior claim. An individual can do whatever he wants with his own body as long as it does not affect the rights of others. Thus, an individual can enter into an agreement to work for eight hours a day in exchange for fixed wages; may offer own body for sexual pleasure of another or for medical experimentation etc. All these may be considered as a type of renting of the body of an individual since he is the owner of his body and can decide what he wants to do with it. Thus, theoretically it can be said that one has a property right over ones own body⁵⁷. However, historically, the common law has denied the recognition of property in a living human body. This denial of recognition of property rights over human body was based on the Latin maxim *dominus membrorum suorum nemo videtur* i.e. no one is to be regarded as the owner of his own limbs.

Loopholes of the Surrogacy (Regulation) Bill, 2016

The surrogacy (Regulation) Bill, 2016 was introduced in Lok Sabha on November 21, 2016. Some issues in the Bill presented below ^[15]:

ISSUE (1) It could be argued that the qualifying conditions for surrogacy should be specified in the bill and not to be delegated to regulations.

(2) The Bill does not define the term 'close relative.

(3) Review process for application for surrogacy not specified.

(4) The bill does not specify a time period by which the appropriate authority will grant these certificates. Further, the bill does not specify a review or appeal in case the application for the certificates is rejected.

5. Surrogacy and Human Trafficking

With the hope that the prospective surrogacy legislation will protect the surrogate mother, surrogate child and the commissioning couple from human trafficking and forced surrogacy. In today's world, it gives the shocking about the various surrogacy rackets and exploitation of surrogate women.

6. Recommendations

- a. The Law Commission of India submitted the 228th report on ART procedures discussing the importance and need for surrogacy, and also the steps taken to control surrogacy arrangements.
- b. Typically, after the birth of the child, the surrogate mother is left without any medical support; it is recommended that there should be a proper provision of intensive care and medical check-ups of their reproductive organs during the 3 months after pregnancy.
- c. The commissioning couple should try to establish a relationship of trust and faith as well as interest with the surrogate, yet such a relationship creates reciprocal or mutual rights and duties and might create demands for an undesired relationship after the birth.
- d. The citizenship right of the surrogate baby is also having crucial or critical importance. The Indian government needs to take a fix stand in terms of conferring the surrogate baby Indian citizenship as she or he is born in the womb of an Indian i.e. the surrogate mother and in India.
- e. The rights of the surrogate child should be protected and in incident she or he is not taken by the willing couple-parents, then the child should be given Indian citizenship. Health Insurance for both the surrogate mother and the child is essential to ensure a healthy and happy life.
- f. The government needs to monitor the surrogacy clinics, which generally charge arbitrary prices for surrogacy engagements. Regulations would enable the government to ensure that the clinics charge fair prices. Like some other countries there should be only one got hospital for giving these types of treatments.

However, the commercial surrogacy reflects the win-win situation of the infertile couple to have genetic child and the surrogate women's need of money. It is true that the surrogate and child are not genetically related with each other, still the couple's demand for it. According to the Iona Institute research paper that the couple thinks they have invested the money in surrogacy transactions and this economic reason compel them to make such demands for the want of a good-looking child with high academic potential. The report even stated that contracting parents may choose a woman who is capable to produce a "Perfect Baby" by putting questions like education, occupation, career goals, religion, musical abilities and sexual life of a surrogate. Thus, the above studies show the surrogate women are exploited and discriminate on the basis section criteria.

It is said that there is emotional labour to the surrogates, while separating the surrogate baby from them, but such emotional labour remain as unaccounted and invisible. However, presently no data available on such subject, therefore, more research is required because the surrogate may develop the feelings towards the child during the pregnancy, even though surrogacy transaction is created for the money purpose by the surrogate.

In case of dispute about the custody of the child has aroused till passing of the surrogacy law, the commissioning couple can approach to the civil court for declaration of the custody of the child and can enforce the surrogacy agreement under section 9 of Civil Procedure Code, 1908.

¹⁵ Available at <http://economictimes.indiatimes.com>

The Centre for Social Research (CSR) in its research study in the cities of Delhi and Mumbai has reported that the majority (71% out of 100) of the surrogate mothers said that the child born with deformity remains at surrogacy clinic, and the clinic takes the decision of the child.⁷⁹⁸ Another very shocking case of surrogacy reported by the CSR that in India one foreign couple entered into the surrogacy arrangement only for organ transplant for their sick child in their country.⁷⁹⁹ After the study of the above cases the researcher really finds various illegal acts in the surrogacy arrangement. That the pious object to have the child through is moving to the unethical and illegal practice.

Hence, after the conception of pregnancy the surrogate is relied upon the mercy of the clinic and the commissioning couple. It is also revealed by the CSR that the surrogacy contract is always biased in favor of the financially secure male. Therefore, the freedom of the surrogate mother is merely a fantasy. The majority of the surrogate mothers do not received any copy of the contract.

7. Conclusion

The right to procreation is one of the basic and fundamental rights of an individual and is a means to fulfill the innate desire of an individual to beget a child. However, a large section of the population is unable to satisfy this right due to infertility caused by various medical and social reasons and as a result they remain childless. The childlessness has a severe impact on the individual's personal, family as well as social life. Due to the serious impacts of childlessness as well as the stigma associated with it, there has been a search for finding appropriate solutions for overcoming childlessness. Attempts to find solutions for overcoming childlessness are not a new phenomenon but have been in existence since ancient times. Surrogacy in itself is not a treatment for infertility but a method which allows individuals/couples to beget a child genetically related to them. Surrogacy is an arrangement which enables couples or individuals who wish to beget a child but are unable or unwilling to sustain a pregnancy due to various reasons, to become parents of a genetically related child with the help of another. The increased use of surrogacy has generated a huge debate and controversy among the society as well as legal fraternity due to its potential to affect various human rights.

Surrogacy is not against the ethics but it is most important that, how society looks towards it. Most of person doesn't know about surrogacy so the Campion or workshops should make for solving confusions about surrogacy.

References

1. <http://economictimes.indiatimes.com>
2. www.globalpressinstitute.org/global.news/asia/india/bloomingsurrogacyindustry.raises-legalsocialconcerns.
3. Reetu and Basudutta, surrogacy birth, AIR, 2009.
4. GV Mahesh Nath. A critique on surrogacy contracts, at <http://ssrn.com/abstract=998512>
5. Available at www.mothergagette.com