

Surrogacy — A Reality Eclipsed by Ethical, Social, Legal Issues - Indian Perspectives

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I. Introduction:

King Solomon had only two claimants for the baby whose fate he was to decide. With the new reproductive technologies, several people may assert claims to a child whose existence would have been permissible until only recently and a mass of legal and ethical problems, have been created that and barely have been envisaged even half century ago².

Some insist that surrogate motherhood is as old as the story of Abram, Sarai and Hagar in Genesis 16. Others underline the novelty of such arrangements. In fact, the first recorded surrogate arrangement involving artificial insemination was made in 1976 in Dearborn, Michigan, by Noel Keane, a lawyer who founded surrogate Family Services, Incorporation; an agency that matches infertile couples and women willing to act as surrogates. Three years later Richard Levin, MM.D. SET UP SURROGATE Parenting Association, Inc, in Louisville, Kentucky. To date there have been several hundred surrogate births³.

After BPOs ,KPOs & LPOs, surrogacy industry i.e. genetic pool banks of India are the latest outsourcing industry from India . India is emerging as a leader in commercial surrogacy and a destination of the so called fertility tourism. Relatively low cost of medical services, easy availability of surrogate wombs, abundant choices of donors with similar racial attributes and lack of effective law to regulate these practices are the major reasons for the growth of it.

It is reportedly estimated at Rs. 25,000/- crores today. The estimated 200,000 clinics across the country offer artificial insemination, IVF and surrogacy. More than three million children have been born as a result of assisted reproductive technology since the birth of the ‘first test tube baby’ in 1978. While the majority of the children are healthy and normal, as a group, they are at greater risk of certain kinds of birth defects⁴.

Surrogate arrangement no doubt provides a big relief to a childless couple. No Indian law prohibits surrogacy till date. Surrogate arrangement in India is a

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2 <http://psycynet.apa.org> downloaded on 17-1-2010 from Journal of Family Psychology- vol.17(2) – June- ‘A nightmare for King Solomon- new reproductive Technology’

3 <http://bioethics.georgetown.edu> downloaded on 18-1-2010 scopenote-6,National Reference Centre for Bioethics Literature, Washington- Article titled- ‘Surrogate Motherhood-ethical and legal issues’ by Sue A. Meinke

4 ‘Medical News Today’ dated 23-2-2010 accessed from www.medicalnews.com on 7-9-10.

reality characterized by confusion and uncertainty.

This article examines various social, ethical, legal issues relating to artificial insemination and surrogacy and the legal responsibilities of the clinics involved in it. The issue needs a serious debate before the Bill is converted into the law.

II. Concept of Surrogacy:

The word 'surrogate' has its origin in Latin 'surrogatus', meaning a substitute. Thus a surrogate mother is a woman who is pregnant with the child and intends to relinquish the same after birth. The intended parents are the individuals or a couple who intend to rear the child after the birth.

Where the woman cannot produce eggs, they enter into a contract with another woman to be artificially inseminated with the husband's sperm and she bears the child for them. Also where the woman can produce eggs but she is unable to carry it to a term, the embryo is externally formed by in-vitro fertilization of husband's sperm and wife's ova, the embryo is implanted in surrogate mother's womb and she bears the child for them. This can be done by the conventional method of direct sexual intercourse or by IVF and the embryo is implanted into the uterus of the surrogate mother. In this case the child would inherit the genetic code of the contracting couple and the sanctity of the marriage is maintained.

The Black's Law Dictionary categorizes surrogacy into two classes-traditional surrogacy and gestational surrogacy. It may be commercial or altruistic depending upon whether the surrogate receives financial reward for her pregnancy or relinquishment of child. In any of the cases there can arise a number of controversies as it involve the social, ethical as well as legal issues into it.

III. Concerns Regarding Surrogacy:

Ethics is a notion that keeps on changing from time to time and place to place. Law also is an instrument of social change and reflects the ideas of moral and social values in it. When a society changes rapidly, its ethical norms are challenged in the light of the new knowledge and the resulting new practices. The conflicts between the new practices and the old established traditions create tensions in the society and the law plays a vital role in such a situation.

'Salus Populi est Suprema Lex'. The welfare of the people is the supreme law.

Jeremy Bentham looked upon law as an instrument of securing the greatest good of the greatest number and correctly so.

In considering the interrelated ethical, legal, social aspects of surrogacy, we acknowledge that the society has long accepted the delegation of various functions and explore the role of a surrogate in relationship to this as well as alluding to common comparisons with adultery, prostitution and babysitting. In particular, the 'birth mother rule', the public antipathy to 'commercial surrogacy' and restrictive legislation are explored and found to be inappropriate.

IV. Ethical Issues:

Many argue that surrogate arrangements depersonalize reproduction and create a separation of genetic, gestational and social parenthood. It is also argued that the child is conceived not for their own sakes but for another benefit.

What is the degree of stress on the couple and on the surrogate mother? Can anyone predict the intensity of emotions attached to that baby? What are the adverse psychological effects on the child when it is separated in his early infancy from the mother giving birth? What identity crisis might ensue? Will there be desire on the part of the child to know his gestational father or mother?

Will surrogate arrangements be used only for infertile couples or even for same sex couple or just for the sake of convenience of the couple who want the child but are not ready to bear pains for that?

What happens when the child is born handicapped and no one wants it? Should the surrogate and the couple be unknown to each other? Should the child be told or there should be total confidentiality?

What if wife's sister donates the eggs and the husband's brother donates the sperms and the fertilization in vitro is carried out and subsequently it is implanted into the wife's uterus?

When after the multiple implantation the time comes to selective abortion, what criteria should be applied and which foetus is to be aborted? Will there be sex selective abortion?

The ends do not justify means. In the market of reproduction it is seen that the sperms and the eggs are sold and wombs are rented. The use of technology to bear a child by such means is contrary to the unity of marriage and the dignity of procreation of human being. Every human being is always to be accepted as a gift of God. However, from the moral point of view, a truly responsible procreation vis-à-vis the unborn child must be a fruit of marriage⁵.

By passing the natural method of conception, fertilizing more embryos than needed, discarding excess embryos, unnatural environment for embryos, freezing them and destroying them in research are the issues involved in misuse of technology. If during the time in which the embryos are in storage if the couple divorces what is to be done with it and by whom? The religious concepts believe that life begins at conception; it may amount to abortion which is contrary to both law and ethics. Since more embryos than required are fertilized in the lab, the spare embryos are frozen. In the process some of them are killed. The remaining embryos are human lives that, given a chance, would develop in to a man or women. They are used even for experimentation which can be fatal to them. Donation of sperms or ova involves separation of biological and social roles of parenthood and is equivalent to adoption. In this view there needs to be

5 Vatican, congregation for Doctrine of the Faith.

change into the adoption laws⁶.

Surrogacy contracts reduce the embryos/children to the objects of barter by putting a price tag in them which is immoral and illegal as well.

Whether the human body is an object possessed by an individual? Is he the owner of the body so as to be entitled to put it through abuse? And Can ART for procreation be categorized as abuse? — To begin with— Jurisprudence cannot be divorced from history, nor can it be divorced from philosophy. It must be an endeavor of the law to relate the empirics with the ideals⁷.

V. Social Issues:

New reproductive technology claim to help human beings through creative interventions that reduce suffering and have the potential to transform the society. The commercialization of surrogacy however creates several social conflicts rather than resolving a few. It generates the family pressure on the poor women to offer their wombs for a price. In the other part of the world the debate focuses on the ethics of surrogacy rather than on the economic advantage of any particular region. On the other hand the economic advantage is the main criteria behind going for surrogacy. Majority of the women becoming surrogates are extremely vulnerable due to poverty, lack of financial resources, low educational levels. For them the financial gain is the key factor. This makes their economic exploitation much easier for the agents for commissioning parents⁸.

The surrogates often face the dilemma that being a surrogate is socially unacceptable when they frankly accept monetary consideration. So rather than telling their neighbours that they gave away their child, they tell them that the baby died.

As the surrogacy involves implantation of multiple foetuses, the unwanted foetus is aborted during the course of development. The misuse of PNDT in the process can eliminate the female foetus resulting into imbalance of sex ratio in the country.

There are cases where the surrogate mothers have refused to part with the baby. In other cases the commissioning parents have refused to accept the child with the deformity. In Baby Manji's⁹ case as there was divorce between the commissioning couple the problem arose as to the custody of the new born baby.

In many cases, the caesarean delivery needs to be performed. For such surgery the consent of surrogate mother is to be obtained. Her refusal may imperil

6 <http://www.ispub.com> – 'the internet Journal of law-healthcare and ethics' downloaded on 18-1-2010 from vol. 4, No. 2 of 2007 edition written in the article by Dr. Deepa Kharb on 'Assisted Reproductive Techniques- ethical and legal concerns'.

7 F.K. Won Savigny, System of Modern Roman Law(1840)

8 'Social and ethical basis of legislation on surrogacy- need for debate' written by Imrana Qadeer in Indian Journal of Medical Ethics- Vol. VI- No. 1 March 2009, page-28.

9 Writ pet. No. 369/2008 Baby Manji v. Union of India- decided by S.C. on 29-9-2008

the life of the child. Confusion also exists where a surrogate mother fails to take standard care and precaution during pregnancy as a result of which harm is caused to the fetus. The high aspirations of the intending parents are ruined because of this.

Surrogacy can also affect the children's perception of the values and integrity of their family. Secrecy and anonymity create a negative environment that affects human relations within and outside families. It also involves the issues of children's right to information about the identity of their parents. Secrecy and anonymity are routed in the social value of the primacy of 'blood relations'. The present practices push such children into a search of identity, a sense of shame and anger against their social parents, an open and frank environment could be much more conducive to accepting their states.

In the United States the surrogates are provided better facilities in addition to medical expenses. They are given health insurance for the period involvement, medical insurance for her family, and expenses including for maternity care and clothing. Even the expenses the independent lawyer in case of need is paid. In USA almost 50% of the cost of ART goes to the surrogate where as in India most of the money is appropriated by the clinics, lawyers and sperm banks.

VI. Legal Issues:

Closely linked to such ethical questions are a multitude of legal questions concerning surrogacy, because laws were written for other circumstances, not specifically for surrogacy.

Are surrogacy contract enforceable? Are they illegal? Is payment of fees in violation of baby-selling statutes i.e. is payment of services rendered or for the child? Is the contract counter to public policy? What happens if the surrogate decides to keep the child? What would be the appropriate damages for the breach of a contract? Would they be monetary, or would they require specific performance? How could the dispute over visitation rights be resolved? Who is the legal mother? How can the husband of infertile woman establish his paternity rights? Who should participate in the decisions affecting the welfare of the fetus and the newborn? Would prohibition of surrogate arrangements violate constitutional rights to privacy?

Human rights of the child are heavily biased in this regard. It requires the surrogate mother not to get too involved with the baby in her body. The baby has no say in the matter and has to live the consequences of the social process. The baby's right to bonding and the breast feeding for minimum period of 3 to 6 months is denied. Also the very right to survival of all babies born out of ART – whether disabled or of a multiple pregnancy – is undermined as they are not treated at par with other babies but depend upon the whims of their commissioning parents for survival¹⁰.

¹⁰ supra- note-7.

Surrogacy is about making designer babies for the sake of making babies for the sake of adults and not for the sake of babies.

VII. Legal Position in India:

As far as legality of the concept is concerned, the reference to Article 16.1 of the **Universal Declaration of Human Rights 1948** says, that “men and women of full age without any limitation due to race, nationality or religion have right to marry and find a family.” **Thomas Hobbes** opines that an individual has a property in his person. He may utilize it to utmost. This freedom stops short of only of self destruction. Man is entitled to the fruits of his labour. The Judiciary in India too has recognized the reproductive right of humans as a basic right. In **B.K. Parthasarthi v. Government of Andhra Pradesh**¹¹, the Andhra Pradesh High Court upheld ‘the right of reproductive autonomy’ of an individual as a facet of his ‘right to privacy’.

In the existing legal framework there can be possibility of disputes relating to the property rights in view of the rights related to marriage, succession etc. Even the concepts of the mother, father, son, daughter need to be reframed or redefined. The provisions under MTP Act regarding consent for termination need to be reconsidered.

In the complicated case of **Baby Manji v. Union of India**¹², the Supreme Court of India has indirectly recognized even commercial surrogacy.

ICMR Guidelines- In the absence of specific law regulating these issues, the only ray of hope was in the form of Guidelines laid down by Indian Council of Medical Research (ICMR). But after all, these guidelines are not laws. Hence they lack sanction behind it. They issued the guidelines for accreditation, supervision and regulation of ART clinics in India. These guidelines are silent on many major issues. After they were introduced in 2005, the incidences of malpractices, surrogacy trafficking have gone undeterred.

‘The Assisted Reproductive Technology (Regulation) Bill and Rules-2008’- After baby Manji’s case, this were prepared by ICMR. The committee preparing the Bill consisted of experts from ICMR, medical specialists and other experts from the Ministry of Health and Family Welfare.

Lacunae in the Bill

- a) The Bill prima facie condemns commercial surrogacy but does not provide for means to prevent it.
- b) The Bill neither creates, nor designates or authorizes any court or quasi-judicial forum for adjudication of disputes arising out of surrogacy.
- c) The Bill suggests for a national framework and regulation and supervision

11 AIR 2000- A. P. – 156.

12 Supra- note-6.

- of assisted reproductive technology and the issues connected therewith.
- d) It has proposed that the state government will constitute the Registration Authorities before whom all the concerned clinics shall be registered. Under the proposed Act, the semen banks will be delegated responsibilities and authorities regarding sourcing, storage, handling, record keeping etc. The semen bank shall operate independently of ART clinics. The clinics shall work in connection with the semen banks. The major focus is on legalizing and controlling the business of surrogacy.
 - e) It has not touched many of the ethical and social issues related to surrogacy and the rights of a woman and a child. It specifically provides for an agreement, legally enforceable where the surrogate mother can receive monetary compensation. Thus, it approves indirectly the commercial surrogacy.

Is India promoting reproductive tourism? Is it a compromising arrangement as an alternative to unsuitable, outdated adoption laws in India? To address these issues a seminar was held on ‘Surrogacy- Bane or Boon’ at India” International Centre on 13-3-2009. An effort was made to answer the aforementioned issues.

228th Report of 18th Law Commission of India and the Recommendations¹³—

- i. Surrogacy agreements will continue to be governed by contract among the parties and the contract will deal comprehensively with all the rights and liabilities of the parties thereto. But such an arrangement should not be for commercial purposes.
- ii. A surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child or divorce between the intended parents and subsequent unwillingness of none to take delivery of the child.
- iii. A surrogacy contract should take care of life insurance cover for surrogate mother.
- iv. One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship.
- v. Legislation should recognize a surrogate child to be the legitimate child of the commissioning parents without there being need for adoption or even declaration of guardian.
- vi. The birth certificate of the surrogate child should contain the name of the commissioning parents only.
- vii. Right of privacy of donor as well as surrogate mother should be

13 228th Report of 18th Law Commission of India – Published on.

- protected.
- viii. Sex- selective surrogacy should be prohibited.
 - ix. Cases of abortion should be governed by M.T. P. Act only.

VIII. Conclusion:

Surrogate arrangement has no doubt provided a big relief to the childless couples. The arrangement has given happiness of having a child of their own. The proposed Act and the Law commission report have certainly taken into consideration the existing problems and anticipated complexities. But they have not dealt with the ethical issues arising therefrom. It is necessary to create awareness among the common man, medical fraternity in this regard.

The availability of the ART technology itself pushes people to try and have their own child rather than adopt. Instead of talking about the rights and wrong of surrogacy we need to concentrate more about upon keeping check on misuse of the technology at the hands of the technocrats. **Let us regulate technology and not the human lives.**