



Emerging Trend of Surrogacy: Legal and Ethical Issue

Asst Prof Anisa
Shaikh

ASST.PROF, BVDU NEW LAW COLLEGE PUNE

ABSTRACT

Having a child is the ultimate happiness in life. Inability to have a child is painful for couples who are infertile. Rising infertility rate has led to advancement of assisted reproductive techniques. These techniques are known as fertility techniques. They encompass various procedures ranging from relatively simple intra uterine insemination to other variants of in vitro fertilization and embryo transfer known as test tube baby technology. Surrogacy is an arrangement which included under the umbrella of Assisted Reproductive Technology. No doubt assisted reproduction is a great scientific achievement. But the legal and ethical sides of these methods are always debatable issues. This paper highlights the legal and ethical issues relating to surrogacy and is also aimed to reflect the legal provisions of surrogacy in India. This paper also emphasizes on commercial surrogacy and related problems.

KEYWORDS : surrogacy, Infertile, ART, IVF

"Little Souls find their way to you, whether they are from WOMB or someone else's."¹

Human is wonderful and human body is a wonderful machine. To understand such machine is still a riddle. New scientific technologies have introduced incredible and unbelievable possibilities in the state of world. With new technologies now infertile mother can be mother. The fact is that one out of every six couples is affected by infertility. For such couple surrogacy is the best gift given by human to human through scientific technology.

The word surrogate has come from Latin word subrogare means appointed to act in the place of. Surrogacy is a well known method of reproduction where by a woman agrees to become pregnant for the purpose of gestating and giving birth to a child for another woman. The mother who is interested to give birth to a child for another is called as surrogate mother. The intended parent is the couple or individual who intends to rear the child after its birth. Surrogate mother may be a carrier to deliver after having been implanted. See can also lend her womb to become surrogate mother to help another woman.

Surrogacy can be traditional, gestational, altruistic or commercial. In traditional surrogacy (also known as straight method) the child may be conceived via home artificial insemination using fresh or frozen sperm or impregnated via IUI or ICI which is performed at a fertility clinic. In gestational surrogacy (also known as Host method) the surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. Altruistic surrogacy is a situation where she receives no financial reward for her pregnancy or relinquishment of the child. Commercial surrogacy² is a form of surrogacy in which gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couple who can afford the cost in world.

The first child was conceived from IVF in the united state in 1983.³ Since then the use of IVF and related procedures (including intracytoplasmic sperm injection and pre-implantation genetic diagnosis) has increased substantially. studies from 1998 indicate that more than 20000 live-birth deliveries related from ART, of which 1265 were with the assistance of gestational surrogates.

ARTs are a recent development; the practice of artificial insemination became common in the midtwentieth century. The first known example of artificial insemination dates as far back as 1785 was conducted by a Scottish surgeon, John Hunter. In 1866, the Italian physician, Montegazza speculated whether it would be possible for soldiers going into battle to have their sperm frozen beforehand, in the event that they were killed in battle, so that their wives might use the sperm to posthumously beget heirs. The first known birth through donor insemination (DI) took place in 1884 in Philadelphia. The technique of cryopreservation of human sperm was perfected in the early 1950s. The world's first test-tube (IVF) baby, Louise Brown, was born UK, in 1978. In 1978, just after the birth of Louise, Durga was born in Kolkata under the 'care' of a Kolkata-based fertility specialist, Dr Sub-

hash Mukherjee. It was claimed that Durga was the second IVF baby in the world..

There are different countries that have recognized surrogacy in their countries like India, United Kingdom, South Africa, Australia and Canada. There is lack of uniformity the principles being followed in these nations. United Kingdom was the first country ever to enact surrogacy legislation. It passed the Surrogacy Arrangements Act in 1985 whose main aim was to abolish commercial surrogacy. Commercial Surrogacy is legally approved in India. India is the first to provide comprehensive services related to surrogacy and egg donation program. There is no specific law to regulate surrogacy in India. But there are certain guidelines framed to control surrogacy.⁴ They are as follows:-

A medical surrogacy VISA for surrogacy arrangement could be granted on the fulfillment of the following conditions-

- The foreign man & woman are duly married and the marriage should have sustained at least for two years.
- A letter from the Embassy of the foreign country in India or the foreign ministry of the country should be enclosed with with the visa application stating clearly that
 - ✓ The country recognizes surrogacy.
 - ✓ The child to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child of the couple commissioning surrogacy.
- The couple will furnish the understanding that they would take care of the child born through surrogacy.
- The treatment should be done only at one of the registered ART clinics recognized by ICMR.
- The couple should produce a duly notarized agreement between the applicant couple and the prospective Indian surrogate mother.
- It has been decided that till the enactment of the law on the ART Bill 2013, the guidelines issued by the Ministry of Home Affairs will prevail till then.
- Restricting surrogacy to infertile Indian married couples only, and debarring all foreigners other than OCIs, PIOs and NRI married couples, is a turnaround in the thought process.

The Law Commission of India in its 228th report⁵ submitted to Union Minister of Law and justice recommended for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy. There are altogether nine recommendations proposed by the Law commission which is as under:

- 1) Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical proce-

dures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes.

- 2) A surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before deliver of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.
- 3) A surrogacy contract should necessarily take care of life insurance cover for surrogate mother. One of the intended parents should be donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.
- 5) Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.
- 6) The birth certificate of the surrogate child should contain the name(s) of the Commissioning parent(s) only.
- 7) Right to privacy of donor as well as surrogate mother should be protected.
- 8) Sex-selective surrogacy should be prohibited.
- 9) Cases of abortions should be governed by the Medical termination of Pregnancy Act 1971 only.

In 2002 the Supreme Court of India held that commercial surrogacy was legal in India in *Jan Balaz verses Union of India* the Gujarat High Court conferred Indian citizenship on two babies fathered through compensated surrogacy by a German national in Anand District. In India, according to the National Guidelines for Accreditation, Supervision and Regulation of ART Clinic, evolved in 2005 by the Indian Council of Medical research and the National Academy of Medical sciences, the surrogate mother is not considered to be the legal mother. The birth certificate is made in the name of the genetic parents. The US position as per the Gestational Surrogacy Act, 2004 is similar to that of India.

Surrogate birth is very controversial issue both ethically and legally the practice of renting a womb and getting child is like outsourcing pregnancy. Number of cases of surrogacy is believed to be increasing at high in India. But surrogate motherhood as an arrangement, in which a woman carries a baby for another but takes no ownership of the child born, has also raised moral, ethical and legal issues about surrogate mother and baby

The legal aspects of surrogacy in any particular jurisdiction tend to hinge on a few central questions:

- √ Are surrogacy agreements enforceable, void or prohibited? Does it make a difference whether the surrogate mother is paid or simply reimbursed for expenses?
- √ What, if any, difference does it make whether the surrogacy is traditional or gestational?
- √ Is there an alternative to post-birth adoption for the recognition of the intended parents as the legal parents either before or after the birth?

CONCLUSION:

Science and technology have made tremendous contributions to the society. Surrogacy is the one of the contributions towards society. But the fact is that it is not ethically right. This medical procedure is acceptable in several countries including India. In India due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms "wombs for rent", "outsourced pregnancies" or "baby farms".

It seems that couples are adopting the practice of surrogacy where nearly twelve million children are orphans in India. Adoption in India is complicated and a lengthy procedure for childless people who

want to give a home to these children. Even sixty years of independence have not given a complete adoption law applicable to all citizens, irrespective of religion or country where they live in as NRIs, PIOs or OCIs. As a result, they opt for IVF or surrogacy.

If no one does anything to stop the spread of commercial surrogacy, the situation will become even more complicated, as in the future, surrogacy will not only be used as last option but rather as an alternative for women who do not wish to have stretch marks or might not want to be pregnant because of careers. Commercial surrogacy should not be promoted. Laws should be framed and implemented to cover the debatable issues and to control surrogacy. Provisions must be framed to protect the rights of woman and children.