



Surrogate Motherhood - Ethical or Commercial in Indian Perspective

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Embryo Transfer, Pregnancy, Surrogate Mother, Law, Ethical,

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ABSTRACT *Surrogacy is a complex and Challenging topic that is plagued with controversies for the past several decades. There are many legal, social and ethical aspects of the pregnancy involving a surrogate mother. There have been some infamous cases which garnered public attention and have given rise to endless debates in favour of as well as against the procedure. India created history by being the first country to legalize commercial surrogacy in 2002. Internationally, India has become the preferred destination for couples desiring pregnancy through surrogacy although it is difficult to estimate the prevalence of surrogacy in India. Today surrogacy is a business which leaves behind the traditional values and ethics.*

Introduction

In the past two decades, there has been enormous advancement in reproductive techniques. Although the newer technologies, i.e. donor insemination, in vitro fertilization (IVF) and embryo transfers have given hopes to childless couples, but the advent of surrogacy has changed the concept of parenthood and brought in various controversial social, medico legal and ethical issues. Surrogacy is a method of assisted reproduction where in a woman carries a pregnancy and gives birth to a child, acting as a substitute for another woman.

The roots of surrogacy can be traced long back in Indian history. Today surrogacy is one of the most debated topics of discussion globally. Although generally believed to have been in vogue for at least hundred years, the first formal arrangement of surrogate mother was recognized in 1976 in USA.¹ The world's Second and India's first IVF is a baby Kanupriya alias Durga in 1978. Since then the field of Assisted Reproductive Technology (ART) has developed rapidly. But legally the laws related to surrogacy are still in the nascent stage. At present the agreement between the parties based on the ART guidelines are the guiding force of such treatment and the codified law is yet to be adopted and implemented with the recent growth in the intended parents opting for surrogacy, India has become the much sought after surrogacy destination.

Indications of Surrogacy

The conditions which make the woman incompatible for bearing pregnancy, i.e., recurrent abortions, repeated failure of IVF (In Vitro Fertilization), and severe medical complications are the common indications for Surrogacy. It has also been tried in women with congenital absence of uterus and in hysterectomised women. At times, same sex couple or single parent has also taken the assistance of surrogates to have babies.

Surrogacy- Nature

The word surrogate originated from Latin word Surrogatus (Substitution) which means "to act in the place of"². Surrogacy is dubbed as "rent-a-womb". It is a procedure by which a woman carries another's fertilized egg to term, usually in cases where the biological mother's uterus is damaged, i.e. when a woman carries a pregnancy and gives birth to a baby for another woman. Surrogacy is a method of assisted reproduction³. Surrogacy is gaining

popularity all over the world as it is the only method for a couple to have their own child.

Types of Surrogacy⁴

• Natural / Traditional/ Partial Surrogacy

In this form of surrogacy, the embryo is genetically related to the surrogate, being conceived with her own ovum. Sperm can be obtained from commissioning father, wherein he also becomes the biological father of the child. Alternatively, the Sperm may be obtained from an anonymous donor, i.e. where the two females are 'commissioning couple' or the child is commissioned by a single woman. The pregnancy may be conceived by sexual intercourse or intra uterine insemination (I U I) or IVF.

• Gestational / Full Surrogacy

In this form of surrogacy the surrogate acts only as a 'carrier' of the embryo, it is not related to her genetically. The Pregnancy is conceived by IVF and the fertilized embryo is implanted in the uterus of the surrogate. The embryo can be the result of fertilization of gametes of the commissioning couple, or may be as a result of anonymous donor insemination.

• Commercial Surrogacy

In this type of surrogacy, the surrogate is given a monetary compensation to carry the child. This procedure is legalized in India. Many terms have been used for this pregnancy like 'Womb for rent', 'outsourced pregnancy' and 'baby farming'.

• Altruistic Surrogacy

This is a form of surrogacy where the surrogate does not stand to achieve any financial benefit for carrying a pregnancy. The pregnancy related expenditure is borne by the intended parents such as medical expenses, maternity expenses, etc.

• Surrogacy in India

India created history by being the first country to legalize commercial surrogacy in 2002. In most of the countries in the world it is still not legal. Many countries permit only Altruistic Surrogacy like the UK, Canada, Newzealand and USA.

India is also one of the few countries in the world which recognize commissioning parents as the legal parents of

the surrogate baby. In fact, the birth certificate of baby contains the names of commissioning parents. With the reiteration of its stance on commercial surrogacy by the supreme court of India in 2008, this form of assisted reproductive technique (ART) is on the rise in India⁵. India has become the preferred destination for foreign couples desiring pregnancy through surrogacy. A 2012 study by the confederation of Indian industry estimated that nearly 10,000 foreign couples visit India yearly for reproductive services and nearly 30% are either single or homosexual⁶. The relatively low cost (10-15 lakhs) involved (an average Surrogacy package costs almost 50% less as compared to other countries), easy availability of a large pool of surrogates, good medical infrastructure with more than 2 lakh IVF clinics and legal freedom which does not restrict single, gay or unmarried couples from availing this form of ART, has taken India to spiraling heights in the field of international surrogacy. These factors have pushed the surrogacy beyond its legitimate place. The technology which has evolved to give the joy of parenthood to infertile couples has now become a business leaving behind the traditional values and ethics.

Process of Surrogacy

In India the process starts with pre surrogacy legal counseling of the commissioning couple and intended surrogate, surrogacy agreement and finalization of the contract. In case of a married surrogate, her spouse is a necessary party and has to be full agreement with the procedure.

The commissioning couple agrees to entrust their baby's care and nature to the surrogate. The expenditure of the surrogate during pregnancy and postpartum (relating to pregnancy) is supposed to be borne by the commissioning couple. The surrogate is also entitled to monetary compensation from commissioning couple, however the details are decided between the two parties. Prospective couple along with surrogate mother are explained about the medical risks associated with surrogacy especially multiple pregnancies, possibility that the baby may have a handicap, failure of pregnancy etc.,

Surrogacy Laws in India

The booming 'baby industry' is highly unregulated with lack of adequate guidelines and legislation. Presently, the only existing guidelines are the non statutory ones issued by the Indian Council of Medical Research (ICMR) in 2005. Today there exist no stipulations if the 'contract' between commissioning couple and surrogate is violated⁷. In its 228th Report on ART Procedures, the Law Commission of India made pertinent observations on surrogacy⁸. It suggested abolition of commercial surrogacy and inclusion of a life insurance cover for surrogate. It also proposed financial assistance to the surrogate child in the proposed financial assistance to the surrogated child in the event of refusal by either party to accept the baby later on, as may happen in case of divorce or death of the commissioning couple. It stressed on prohibition of sex selective surrogacy and stated that all abortion should be governed by the Medical Termination of Pregnancy (MTP) Act 1971.

Legally, the surrogate agrees to forfeit her privacy and not to place the baby at risk by any high risk behaviour such as taking non prescription drugs, smoking and alcohol consumption. Her husband has to submit himself to medical examination and abstain from practicing sex at certain times as deemed appropriate by the doctor. The surrogate agrees to relinquish all parental rights over the child in writing.

All parties must agree to provide affidavits, a court appearance, and testimony to effectuate the designated mother and father of the unborn fetus. The courts will honour contracts and agreements between surrogate and intending parents, unless circumstances significantly change that will jeopardize the best interest of child. The surrogate mother is required to register as a patient in her own name⁹. At the time of registration, she is further required to state that she is a surrogate mother, and provide information about the commissioning parents. She cannot register in the name of the commissioning father of the baby. The birth certificate is issued in the name of commissioning parents. The couple is legally bound to accept the custody of the baby irrespective of any anomaly.

The Ministry of Health and Family Welfare, Government of India has drafted the Assisted Reproductive Technologies (Regulation) Bill in 2010. The Bill proposes that surrogate should be of 21 to 35 years of age and she should not have had more than five successful live births in her life, including her own children. The women should be medically examined and tested for sexually transmitted and communicable diseases which might be hazardous for the baby. She is also expected to declare in writing that she has not been the recipient of blood or blood products in the past 6 months. Anyone can act as a surrogate in India-known or unknown, related or unrelated. However in case of a relative acting as a surrogate, she should belong to the same generation as the commissioning mother. As regards to embryo transfer, the bill seeks to prohibit the commissioning couple to obtain services of more than one surrogate at a given time, also disallowing simultaneous transfer in the intending mother as well as surrogate. A women will be allowed to undergo embryo transfer only three times for a couple.

The bill further proposes stringent guidelines for foreigners and non-resident India couple opting for surrogacy in India. They are required to submit an official document issued by their government stating clearly that surrogacy is permitted in their country and the child will be 'accepted and permitted to enter the foreign country as the biological child of the commissioning couple'. The couple is also required to appoint a local guardian who will be legally responsible for taking care of surrogate till the child is delivered to the commissioning couple. In case the child is not accepted by the couple, it will be the local guardian's responsibility to take care of the child.

It is expected that legislation regarding surrogacy in India will become stronger after this bill is passed, thus ensuring fairer practices. Globally, in whichever country surrogacy is allowed including India, now the primary condition is that at least one of the intended parents must be biologically related. Thus a scenario where either of the intended parents is not biologically related is not allowed¹⁰. In India, an oocyte (egg) donor cannot act as a surrogate mother for the couple to whom the oocyte is donated. The third party donor and surrogate mother have to relinquish all parental rights concerning the offspring in writing.

The new ART (Assisted Reproductive Technologies) Regulation Bill and Rules 2010 by the Government of India proposes to guarantee legal protection to the parties involved and mandates legally enforceable agreements between stake holders, violation would be a cognizable offence punishable with imprisonment and fine. However the bill is still in its preliminary stages.

Concerns about surrogacy

Surrogacy is fraught with unknown psychological stresses to all the parties involved commissioning parents, surrogate and child. Detractors of surrogacy argue that it involves dehumanization of women's reproductive labour¹¹. It expects that a woman should be pregnant without being conscious about pregnancy. In other words she is likened to a 'human incubator' for someone else's child. It is believed to destruct the relationship between expecting mother and her pregnancy. Surrogacy has been accused of failing to perceive the subtle and poorly understand bond between mother and unborn baby.

Surrogacy is a form of exploitation wherein one takes advantage of another's economic need to secure something for considerably less than its value. A 'Priceless' bargain is made for a small price. At times it has been equated to a form of prostitution and by others to 'organ trafficking', wherein working class women are forced by economic necessity to sell their 'wombs'¹². A study conducted by the Ministry of Women and Child Development reported that 46% of surrogates in Delhi and 44% in Mumbai received around 3 lakh to 4 lakh for their services. Most of these women were working as domestic helps and were poor, illiterate or semi literate. These women were not given any copy of the written contract, they were not even aware of the clauses contained therein. Besides, most of them had minimal understanding of the medical procedures they had been subjected to¹³.

The Commercialization of pregnancy is deemed unnatural. There is apprehension that surrogacy may be inappropriately used as a convenience for nonmedical reasons¹⁴. The surrogate mother shares a special bond with the unborn baby¹⁵ and at times giving away the baby may prove divesting to her mental health. The emotional upheaval of pregnancy, delivery and separation from the baby can result in postpartum depression.

At times, the prenatal test may diagnose a disability or congenital anomaly in the baby and the commissioning parents may desire abortion. Any pregnancy whether natural or through ART poses certain health risks to the mother. This is especially significant to latter. A special point of note is that a surrogate mother bears this risk without the benefit of joys of motherhood. Incidents of maternal mortality seem futile in such cases, i.e. an instance of Altruistic Surrogacy is reported where a woman aged 29 years died soon after delivering a baby due to high blood pressure and ruptured aorta.

If one does not take into consideration the maternal factors and factors and takes into account only the unborn baby, surrogacy in such a scenario can be likened to child trade. There are debates on infringement of a baby's fundamental right to mother's milk. There are comparisons with a normal pregnancy as regards emotional bonding between mother and baby. Other concerns are the effect upon a child's psyche, it is feared that this child may encounter twin scars of adoption as well as surrogacy. Surrogacy is an arrangement which favours the commissioning couple's need and aspirations and fails to realize the bewilderment and confusion of a child.

The effects of surrogacy on the mind of natural children of surrogate are not yet identified, although the first study on this subject conducted at Cambridge University did not find any detrimental influence. There are many religious

groups that don't accept surrogacy, considering this form of reproduction as unlawful.

Recommendations

- There should be legislation directly on the subject of surrogacy arrangement involving all the three parties i.e. the surrogate mother, the commissioning parents and the child.
- There is a need of right based legal framework for the surrogate mothers as far as the ICMR guidelines are not enough.
- A clearly defined law needs to be drafted immediately which will pronounce in details the Indian Government's stand on surrogacy, so that discrete activity leading to exploitation of the surrogate mother can be stopped.
- Although it is not a crime to bear a child for another, and then relinquish it for adoption, it is not regulated by law and may raise a number of confusions.
- There should be a substantial regulation designed to protect the interests of the child.
- Legal recognition of termination and transfer of parenting rights.
- It is crucially important to maintain and monitor the anonymity of the surrogate mothers.
- The surrogate mother should not undergo more than 3 trials and it has to be monitored.
- The surrogate mother should be provided by the copy of the contract as she is a party in the agreement and her interests should be taken in to account. It happens that very often decision is taken by the intended parents and clinic, while surrogate mother does not have any say in this matter.
- Typically, after the birth the surrogate mother is left without any medical support, it is recommended that there should be a provision of intensive care and medical check-ups of their reproductive organs during the 3months after pregnancy.
- In case surrogate mother gives birth to twins she should be paid double amount or at least 75% of the price for the second child.
- The commissioning couple should try to establish a relationship of trust with the surrogate, yet such a relationship creates reciprocal rights and duties and might create demands for an undesired relationship after the birth.
- The citizenship right of the surrogate baby is also of crucial importance. The Indian government needs to take a stand in terms of conferring the surrogate baby Indian citizenship as she or he is born in the womb of an Indian (the surrogate mother) and in India.
- The rights of the child should be protected and in case she or he is not taken by the commissioning 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 life.
- There is a need of debate and discussion of the stance that public policy and the law should take toward surrogate mothering.
- The government needs to monitor the surrogacy clinics, which generally charge arbitrary prices for surrogacy arrangements. Regulations would enable the government to ensure that the clinics charge fair prices.
- The contract signed between the commissioning parents and the surrogate mother should mention something about insurance and emergency needs that the surrogate mother may require during the pregnancy, it has to mention something about her future.

Conclusion

Surrogacy is a complex and challenging subject that has been plagued with controversies for the past several decades. At one end of the spectrum we have the pain of infertility and craving for parenthood, at the other end. We have commoditization of the reproductive capacity and exploitation of women and children. However, it needs to be reiterated that, viewed in a correct perspective. Surrogacy is a reproductive treatment which can provide many an instance of happiness, fulfillment and satisfaction to an infertile couple.

Contrary to many westerns countries, commercial surrogacy is legal in India and many Indian women have chosen to become surrogate mothers for western couples. The typical reason for couple choosing Indian surrogate mothers over western surrogate mothers is that they are cheaper. While surrogacy in general raises a host of social and ethical problems. Commercialization of surrogacy would create a negative impact on the young minds and harm the Indian culture and ethical values.

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