



Surrogacy– Ethical or commercial

Smriti Raturi

Research scholar, Amity institute of advanced legal studies, Uttar Pradesh, India

Abstract

Infertility affects about one out of every six couples. Since the 1970s, the number of infertile couples has increased worldwide. Reasons varied from biological incapacities to conceive, to stress, anxiety or lack of time. Increase in number of working women who wish to marry late and therefore bear children late, has also effected the average child bearing age, which has come upto 22 years. In the past, couples unable to conceive were expected to turn to adoption to achieve their parenthood dreams. Over the years the social attitudes towards medical interventions like IVF have changed. As a result, infertile couples have become less reluctant to seek help, which is reflected in the higher percentage of infertile couples registered by the Fertility Clinics. Moreover, there are many options available for infertile couples, as well as singles and homosexuals who want children.

The urge of motherhood leads childless couples to seek alternative solutions like Artificial Reproductive Technology, In-Vitro Fertilisation, Intra-Uterine Injections etc infusing hope into many infertile couples, who long to have a child of their own genetic makeup. Urge to have a child of own genetic make-up creates a sense of completeness among these couples. With advances in medical sciences and technology, particularly in assisted reproductive techniques which have come in with techniques like donor insemination, embryo transfer methods, etc. revolutionizing the reproductive environment such methods such as ‘surrogacy’ are also gaining popularity.

India is becoming a popular destination for surrogacy arrangements to many foreigners especially rich westerners. Further, the Indian Govt. has built medical tourism into its National Health Policy, which “strongly encourages” medical providers to seek foreign clients. Amit Sengupta, a health analyst and associate coordinator in People’s Health Movement, points out that it is an irony that in our country where only 17.3 percent of women have had any contact with a health worker and a very large number of women are denied basic health care, women from across the globe flock India to take advantage of the booming market for assisted reproductive technologies.

With the entry of financial arrangements in exchange of surrogate child, the child becomes a ‘saleable commodity’. Thus, complications arise and issues got involved such as the rights of the surrogate mother, the child and the commissioning parents.

The present research paper tries to study the issues related to surrogacy and surrogacy arrangements and seeks to find out whether Indian laws are equipped to deal with urgencies arising out of such arrangements. If not, what could be the probable legal mechanisms which could be adopted to deal with the issues arising out of surrogacy.

Keywords: national health policy, IVF, childless couples

Introduction

The word ‘surrogate’ means ‘substitute’. Women who are willing to undergo the procedure come from lower middle class backgrounds, are married, and are in need of money. Childless couples negotiate a better price as a result of the competition. The need and necessity to protect the interest of the surrogate mother is apparent. Not only this, there is a growing demand for fair-skinned, educated young women to become surrogate mother to foreign couples.

Surrogacy turns a normal biological function of a woman’s body into a commercial contract. Surrogate services are advertised. Many studies have shown how surrogacy and surrogacy arrangements are commercialized. Surrogates are recruited and operating agencies make large profits. The commercialism of surrogacy raises fears of black market and baby selling and breeding farms. The whole process turns impoverished women into baby producers and the possibility of selective breeding at the best price. Surrogacy degrades a pregnancy to a service and a baby to a product. Experience and studies shows that like any other commercial dealing the ‘customer’ lays down his or her conditions before purchasing the goods.

The surrogate may be forced to terminate the pregnancy if so desired by the contracting couple and she will not be able to terminate it if it is against the desire of the couple. There have been instances where the contracting individual has specified the sex of the baby as well and refused to take the baby if it was not normal and filed a suit against the surrogate saying she had broken the contract. The supposed benefits of surrogacy are created by a capitalist patriarchal society. It is assumed that there is an equal exchange, money paid for the service rendered.

In reality the contract between the parties to surrogacy would not exist if the parties were equal. The woman must give more than her egg in order to gestate a child, an important gender difference. Within this framework the contract is always biased in favour of the financially secure male. The freedom of the surrogate mother is an illusion. The arbitration of rights hides central social and class issues which make surrogacy contracts possible.

Surrogacy poses a series of social, ethical and legal issues which remains unanswered as of now like: is it legal to become surrogate mother in India? Will the child born to an Indian surrogate mother be a citizen of this country? Who arranges for

the birth certificate and passport that will be required by the foreign couple at the time of immigration? Whose name will appear on the birth certificate? How will the commissioning parents claim parenthood? What happens if the surrogate mother changes her mind and refuses to hand over the baby or blackmails for custody? Who will take the responsibility of the child if the commissioning parents refuse to take the child? What would happen if the child is born disabled? What would happen if the sex of the child is not to the liking of the commissioning parents? All these need to be analysed thoroughly before designing any policy relating to surrogacy and making legal provisions in India. Additionally, Global Surrogacy market is expected to beat USD 27.5 billion by 2025, according to a new research report by Global Market Insights, Inc. Rising number of people suffering from infertility problems will primarily drive the surrogacy industry growth over the projected timeframe.

Increasing number of people suffering from infertility problems including reduced sperm count, problem in egg/sperm production will act as high impact rendering factor for the growth of surrogacy market. Factors such as hormonal changes, stress, alcohol consumption, steroid use and others has led to rise in infertility cases thereby positively impacting the business growth. Therefore it becomes essential for the Indian government to look into all the perspectives before designing an appropriate framework for the Surrogacy Laws.

Government initiative on Surrogacy and Surrogacy arrangements

According to the Artificial Reproductive Technique (ART) Guidelines,

surrogacy is 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 of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a ‘surrogate mother’ is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents(s)”.

To address and to regulate surrogacy arrangements the Government of India has taken certain steps such as introduction and implementation of National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technology (ART) Clinics in India, 2005 by the Indian Council of Medical Research (ICMR) under the Ministry of Health and Family Welfare, Government of India. But, till today there is no such legal provision directly dealing with surrogacy laws to protect the rights and interests of the surrogate mother, the child or the commissioning parents. Hence, the risk and the disadvantages involved in this type of arrangements many a times prove detrimental to the interest of the surrogate mother and the child in particular. At times the commissioning parents also face legal hassles.

Pro surrogacy Arguments

Advocates of surrogacy argue that the surrogacy agreements are beneficial for all parties involved as the needs of two desperate women are met. It is often said that in the surrogacy arrangement ‘the barren gets a baby, the broke gets a bonus’. The surrogate

mothers often really utilize the money they earn in the education of her children or buying a new house.

Others claim that the right to procreate is an important right. For example, in the United States this right is protected by the Constitution. The couple may exercise this right in the most practical way available to them given their infertility. The liberal argument for surrogacy is autonomy and free choice. As long as one does not harm others, one has a wide sphere for doing what one wants. This relates to the intended parents as well as the surrogate mothers. Practice often tends to be slightly different though, because duress and coercion affect the extent to which someone has free choice.

An economic argument, expressed by Judge Posner (1987), is that efficiency will improve with free trade. This will happen when there are parents who are eager for children and women - anxious to be surrogates. However, once this trade of parental rights is prohibited, black markets will come into existence. Posner (1987) states that due to the complicated adoption regulations in many countries, people go to other countries to evade the regulations creating a vast black market. As a result, it is better to acknowledge the existence of such a market in order to better control it and make it more efficient.

Arguments against surrogacy

The most sensitive question that arises out of surrogacy arrangements is the reproductive rights of women. While a poor woman is “advised” to go for sterilization, richer ones are “advised to attain ways to have child of their own.” Does this mean an all new version of class division with respect to reproductive rights of women? Assisted Reproductive Technology Bill of 2010 is vague in terms of its language. The bill seems to make the process run smoother, rather than making it harder for non-Indians to use Indian women to incubate their babies.

According to Kembrell (1988) the practice of surrogacy exploits women economically, emotionally and physically. An important factor is that most women who get involved as surrogates do so because they are in desperate need of the money to maintain their family. In addition, agents are often involved and arrange contracts of questionable legality. Those contracts require the women to undergo all the rigors of childbearing, and eventually they have to give the child away (Kembrell, 1988).

The surrogate mothers are often unaware of their legal rights and due to their financial situation they cannot afford the services of attorneys. Even the attorneys, in the absence any stringent law remain unaware of the consequences. Once the surrogate mother has signed the contract, it is impossible for them to escape the close nexus of contractors, clinics and commissioning parents. Kembrell (1988) goes even further saying: “the practice of surrogacy represents a new and unique form of slavery of women”. This a view supported by Davis (1993). During times of slavery, slave women were often used as birth or genetic mothers and as surrogate mothers nowadays, who possessed no legal rights as mothers.

Conclusions with Suggestions

There is an immediate need for concrete legal framework to monitor and regulate the existing surrogacy system in India. There should be a legislation directly on the subject of surrogacy arrangements involving all the three parties, the surrogate mother,

the commissioning parents and the child. A clearly defined law needs to be drafted immediately which will pronounce in detail the Indian government's stand on surrogacy; so that discrete activity leading to exploitation of the surrogate mother can be stopped. Although bearing a child for another couple may be a noble idea, but, then relinquishing it for adoption, not regulated by law may raise a number of confusions. It has to be regulated whether paying the mother a fee for adoption beyond medical expenses is a crime (like in some countries) or not. In case it is recognized as crime and one pays extra charges then it should prevent the adoption from being approved. There should be a substantial regulation designed to protect the interests of the child.

The government should check and control the proliferation of commercialization of surrogacy. The government needs to monitor the surrogacy clinics, shelter homes and agencies for ensuring the rights of surrogate mothers, commissioning parents and the child born through surrogacy arrangements. The state government must look into poverty alleviation schemes particularly in and around the areas where surrogate mothers live. The state government should encourage employment generation schemes in those pockets where surrogate mothers live. There is a need of right-based legal framework for the surrogate mothers, as far as the ICMR guidelines are not enough. The surrogate mother should be provided free legal assistance and her interests should be taken into account. It happens that very often decision is taken by the intended parents and the clinic while surrogate mother does not have any say in this matter. In order to protect the rights of surrogate mother, clear guidelines should be mandated as to her position and rights. Her health and medical expenses post the child birth should be considered. The insurance sector which has kept itself away from these arrangements should be brought under the umbrella of rights to be conferred to surrogates.

References

1. 'Surrogacy from a feminist perspective' by Malini Karkal, published in Indian Journal of Medical Science (IJME),1997,5(4). link; <http://www.Issuesinmedicalethics.org/054mi15.html>.
2. The Assisted Reproductive Technologies (Regulation) Bill-2010, Indian Council of Medical Research (ICMR), Ministry of Health & Family Welfare, Govt. of India,4(aa).
3. 'National Guidelines for Assisted Reproductive Technology: Ethical issues in Surrogacy'- Paper presented by Dr. R.S. Sharma, DDG (SG), Division of RHN, Indian Council of Medical research, New Delhi at the meeting-cum workshop organized by the Ministry of Women and Child Development, Govt. of India on 25th June 2008 at India Islamic Centre, New Delhi.
4. Johnson, Mark A, Checklist on the Law of Surrogacy,1996,44.
5. Unnikrishnan CH. 'Bill to Regulate IVF Clinics to be Tabled Soon', The Wall Street Journal,2008.
6. Mukhopadhyay P. Surrogacy Law on the Anvil in India', One World South Asia,2008.
7. 'Surrogate mothers: Outsourcing pregnancy in India' article by Joseph Gothia,2008. link: http://india.merineews.com/cat_Full.jsp?articleID=136421

8. 'Surrogacy Boom', article by Shuriah Niazi,2007. by arrangement with WFS, Source: <http://www.boloji.com/wfs6/wfs1027.html>