



Ethical and legal dilemmas of surrogacy with special reference to surrogacy in India

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Abstract

The feeling of becoming a parent is the dream of every couple, but for some couples it remains a dream due to infertility. With the advancement of technology and medical science, the introduction of *in-vitro* fertilization made it possible for couples to feel the breath of their own blood. Surrogacy process is a boon for India. Surrogacy has invited a large number of childless couples from all over the world to India, where one can find many women who are ready to be a surrogate for another's child. Today India is called the hub of surrogacy. Even before the introduction of IVF, traditional surrogacy was in vogue. Surrogacy was legalized in India for the first time in 2002. But, still, there is no law to regulate surrogacy in India. Currently, the Lok Sabha has passed surrogacy. The Amendment Bill, 2019 and it is tabled in the Rajya Sabha for approval. The Bill made commercial surrogacy illegal and focused only on altruistic surrogacy (i.e. unpaid surrogacy). In addition, India has restrictions on foreign infertile couples to have a child through the surrogacy process. Surrogacy is more likely to have ethical and legal implications, which are discussed in the article. Furthermore, at the end, I have concluded the article with my opinion and some modifications.

Keywords: Surrogacy, ethical dilemmas, legal issues, India

Introduction

The happiness of being a mother is more than all the happiness in the world. It is the most expensive pleasure that a woman can enjoy after suffering from labor pain for 9 months. But becoming a mother is not in everyone's destiny. Nature does not allow some women to become pregnant (due to problems in their reproductive system). About 80 million couples suffer from infertility. In the context of surrogacy, 'infertility' is basically the inability of women or couples to reproduce.

A new process was started for them which were named surrogacy. In surrogacy, a woman is contracted to carry a pregnancy for another married couple. India is considered the hub of surrogacy as a lot of foreign couples come to India for this purpose. It also makes India famous for fertility tourism. In India, commercial surrogacy has been legalized in 2000. In surrogacy, a woman is hired to conceive and give birth to a child for another couple (who are not able to reproduce) in exchange for money.

Surrogacy is an Alternative Reproductive Technology (ART), introduced as a last resort for infertile couples. ART is a gift of human advancement and technologies in the field of medical science. In India, surrogacy is affordable as compared to rest of the world i.e. around 10-12 lakhs, which any foreign couple can afford. The first child through gestational surrogacy is reported to be born in Chennai.

But after the amendment, in December 2018, commercial surrogacy was made legal only for infertile couples in India who have been married for at least 5 years and are still unable to conceive a child. This means that if foreign couples contract surrogacy in India, it is illegal. Apart from India, surrogacy is legal in the United States of America (California), Russia and Ukraine, which facilitates couples who want to become parents but whose country of origin does not allow surrogacy or if they cannot find such a woman can't find someone who is ready to be a parent. Surrogate mother, abroad (in these countries) and avail the

facility. Whereas, surrogacy is illegal in England. Surrogacy is not yet recognized in Sweden, Germany, Norway and Italy.

Surrogacy has a wide role in the life of those married couples who are having sex for 5 or more than 5 years but still unable to give birth to their child. Surrogacy is an attractive process for such couples. It also opened the door for same-sex couples to gain parenting experience. But surrogacy and surrogate child birth is a complex issue from both an ethical and a legal point of view.

There have been some medical complications and health issues for surrogate mothers. Since, economically weak women are mostly involved in the surrogate practice; it often leads to abuse of women and advertisements for childbearing. Legislation has been made to avoid this legal complication and to ensure the health of women, but still, there are certain areas which are outside the pre-existing legislation which need to be resolved.

Meaning and types of Surrogacy

Simply put, surrogacy is a process in which a woman gives birth to a child and gives it to another couple. 'Surrogacy' is an arrangement where an agreement is made with a woman to bear a child for 9 months and then hand it over to another married couple. The woman who gives birth to the child is known as a surrogate mother and the child born through this arrangement is known as a surrogate child. Women get involved in surrogacy business because of money. This is a good business that earns a lot of money.

Surrogacy is derived from the Latin word surrogate which means replacement. The Black Law dictionary's definition of surrogate is applied to a woman who agrees to bear and deliver a child on behalf of a couple. In other words, surrogacy is the result of innovative thinking and advanced technologies of human beings which facilitate those married couples who are infertile to have a child, to enjoy the joy of parenthood. Surrogacy is a process of assisted reproduction,

in which intended couples coordinate with a surrogate mother who is prepared to carry the pregnancy for 9 months and deliver the child to the couple.

Surrogacy is done in two ways

Traditional Surrogacy

As the name suggests, traditional surrogacy is one where the induction of surrogate mothers is either natural or artificial. The child born through this method may have genetic characteristics of the surrogate mother. In the traditional type, the surrogate mother's eggs are used and the donor's (intended father's) sperm is inserted inside the woman's body. Thus, the child born out of such process is the biological child of his surrogate mother. Traditional surrogacy was practiced before *in-vitro* fertilization (IVF) technology was recognized.

Gestational Surrogacy

This is the most prevalent modern method at present. In this method, the egg and sperm of the intended couple are taken out and mixed in the laboratory to form a zygote and then it is implanted into the surrogate mother's womb using IVF technology. Unlike traditional surrogacy, here the surrogate mother is not the biological mother of the child. The child has the genetic traits of its intended parents. Even pre-implantation genetic diagnosis (PGD) is done to ensure the health of the child and to detect any diseases that the child may have in the future, which is not the case with the conventional type.

Apart from these two major types of surrogacy, there are two more categories of surrogacy:

Commercial Surrogacy/Paid Surrogacy

Most surrogacy falls into this category. This means paying the expenses to the surrogate mother for carrying the child for 9 months and then giving birth to the child. These are borne by high-income childless couples. Couples pay for all medical and other expenses related to surrogacy. Surrogate mothers are paid for the service they provide. Interested couples draw up contracts, which also include the payment of expenses in anticipation of the child. In simple words, desired couples produce children after paying a certain amount.

Altruistic/Unpaid Surrogacy

Surrogate mothers are not paid any money for the services they provide. They do this for the welfare of the society and for the happiness of the childless parents. She is paid only for her medical and pregnancy related expenses. This is usually done by a person who is associated with the prospective parents, either as a friend or as a relative. Here surrogate women do such a favor that childless women can also feel the feeling of motherhood at least once.

Origin of Surrogacy

The concept of surrogacy is not new to the world and it originated in ancient times. In Greek mythology, the word 'Eros' means 'the god of lust, love and intimacy.' Even in Hindu mythology, marriage is considered a sacred bond made to beget a son. To get children, women used to worship 'Shivling', which is considered a symbol of fertility. The epic saga of Mahabharata also describes Niyoga (i.e. IVF in today's context) as a solution to the problems faced by the Kuru brothers Pandu and Dhritarashtra.

Babylonian customs and laws provided for another woman for the couple to bear the child. She had become pregnant by her intended male partner. After the birth of the child, it was handed over to couples who ensured its aftercare. Subsequently, several amendments were made and due to advancements in medical science and legalities, contemporary commercial surrogacy was introduced. In 1936, the pharmaceutical and drug companies Schering Kahlbaum and Parke-Davis began producing estrogen in the US. In 1944, Professor John Rock (of Harvard Medical School), was the first person to fertilize a female ovum outside the uterus.

Then, in 1953, cryopreservation of sperm was performed by researchers for the first time. In the USA (1980), Noel Keane (a Michigan attorney) contracted the first surrogacy. Earlier in 1971, the first commercial sperm bank was opened in New York, which became the highest grossing business. The first test tube baby was born in England in 1978 using the IVF system. The first case of surrogacy occurred in New Jersey in 1986, where a surrogate mother (Mary B. Whitehead) refused to give up her child to a couple and went against their agreement. A New Jersey court ruled in favor of the biological father, allowing him to have custody of the surrogate child instead of the surrogate mother. Later, a conference was held in Chile (in 1994), where Latin American fertility experts attended and discussed the ethical and legal status of assisted reproductive technology.

Prospects and Laws of Commercial Surrogacy in India

As stated earlier, India is a hotbed of commercial surrogacy as the status of women compels them to indulge in such acts. Lots of tourists from all over the world come to India to make their lifelong dream a reality and the cost is also affordable for them. Women ready to become surrogate mothers are easily available in India at very nominal rates. This could be one of the reasons why foreigners choose India for surrogacy.

India legalized commercial surrogacy in 2002. It attracts many infertile couples from outside the area looking for a woman who can be a surrogate mother for their child. This resulted in the setting up of various foreign companies in India, helping the foreign infertile couple to find Indian women for such activity and to complete other formalities and paperwork related to the process.

The process of commercial surrogacy had taken a toll on the health of women. This directly affects the reproductive health of women and ultimately leads to exploitation of women. Poverty was the main reason behind women renting their womb. Later, in 2005 the Indian Council of Medical Research (ICMR) laid down some guidelines for the charge, direction and regulation of ART (surrogacy) clinics in India but these were not followed.

Then, came to the case of Baby Manji Yamada v Union of India in 2008, in which a child was born through surrogacy and handed over to a Japanese couple, but she was unable to leave India as her nationality was yet to be determined was done. In this case, the top court legalized commercial surrogacy in India and issued a travel certificate to the girl and the Japanese government granted her a one-year visa on humanitarian grounds.

At the same time, the ART Bill, 2008 was prepared but not presented before the Parliament. With regard to this problem, the Law Commission of India in its 228th Report

(in 2009) suggested abolition of commercial surrogacy and continuation of altruistic surrogacy by enacting suitable legislation.

Eventually, the ART Draft Bill of 2010 came into being, which provides a national framework to prevent misuse of ART techniques and use them safely. But the Bill also had some loopholes, including missing out on the important implications of surrogacy. Then, several amendments and amendments were made, and later in 2014, a bill was passed which was named as Assistive Technology Regulation Bill, 2014.

During this the Surrogacy (Regulation) Bill, 2016 was passed. The 2016 draft bill was placed before the lower house on 21 November 2016. The Lower House referred the Bill to the Standing Committee on 12 January 2017, which submitted its report on 10 August 2017. Based on the report passed by the standing committee, the lower house finally passed the bill on 19 December 2018.

Later, the Surrogacy (Regulation) Bill, 2019 was introduced in the Lower House by Dr. Harsh Vardhan (Union Minister for Health and Family Welfare) on 15 July 2019 and passed on 5 August 2019. 2019 to the Standing Committee on 21 November 2019 and the Committee submitted its report on 5 February 2020. The bill is currently placed before the Upper House.

Important provisions in the 2019 Bill

The Surrogacy Regulation Act of 2019 banned commercial surrogacy for outsiders (foreigners). This means that it is now illegal for foreign couples to come to India to avail surrogacy related benefits. Even, only those Indians can avail surrogacy that are a married couple for 5 years and have a certificate of infertility issued by the District Medical Board after fulfilling certain criteria.

This means that bachelors and live-in couples cannot enter into a surrogacy agreement. The bill focused more on altruistic surrogacy because the drafters considered commercial surrogacy to be the root cause of abuse of surrogate mothers. This point was inserted keeping in view the suggestion made in the 228th Law Commission Report. The Bill also laid down certain criteria for the surrogate mother, such as she can surrogate only once and must be a close relative of the couple.

Must be aged between 25-35 years and must be married, must have a child of their own, must have a certificate of fitness (both medical and psychological) for surrogacy. Registration of clinics for surrogacy purposes should be done by the appropriate authority appointed by the Central or State Government as the case may be. National and State Surrogacy Boards will be set up by the Central and State Governments, respectively, to advise surrogacy clinics and provide a code of conduct.

Before the surrogate child is aborted, the consent of the surrogate mother must be obtained and the appropriate authority must give permission not to violate the rules under the Medical Termination of Pregnancy Act, 1971. Finally, advertising commercial surrogacy, abusing surrogate mothers, rejecting or abandoning a surrogate child, and trading or importing human embryos or gametes for surrogacy purposes is punishable with imprisonment of up to 10 years and a maximum fine of Rs 500. It is possible 10 lakhs.

Ethical and Legal Implications of Surrogacy in India:

However, surrogacy has been started with the aim of providing a sense of paternity to infertile couples and to provide financial support to the surrogate mother who has to struggle every day for her sustenance. But, due to lack of proper surrogacy law, only middlemen make profit, and prospective couples and surrogate mothers are exploited in a way. There are many ethical and legal issues related to commercial surrogacy.

As per the latest Surrogacy Bill of 2019, commercial surrogacy is banned and altruistic surrogacy is allowed. The main reason for banning commercial surrogacy was to prevent exploitation of women, child trafficking and human embryo trafficking. The criteria for a surrogate mother have been mentioned that she should be a close relative of the infertile couple, but this has not been precisely defined. The term close relative makes the concept a bit unclear to understand.

The parents had to wait for 5 years and get medical certificates from doctors and complete some legal formalities, which in itself is a very complicated and time-consuming task. It is also very ironic that surrogacy is not allowed to live-in couples. This in a way discriminates against live-in couples who are not married, as marriage is an essential criterion for having a child.

This means that live-in couples cannot enjoy the feeling of parenthood without getting married. It is practically very difficult to find a woman who is a close relative and is willing to inseminate the prospective couple for free. It becomes more complicated if the woman (in close relative) is working because she does not have time to bear her children, so, how can she find time to conceive for those intended couples? Meanwhile, a big concern about the society comes to the fore that what the society will think about him.

Social and family perception is a big issue as society never accepts such behavior. There is a lack of privacy and everyone in the family and society comes to know about the act and then starts blaming both the surrogate mother and the prospective couples.

The next major concern that arose is the attachment of the mother to her child. It is very difficult for any mother to keep her baby away from her because there is an emotional bond between the pregnant mother and the baby. Surrogacy agreements entered into by prospective couples with women from their relation may also result in genetic disorders in the children. This shows that altruistic surrogacy can also be exploited.

There are no laws that deal with surrogacy contracts precisely. Surrogacy morally lowers the dignity of women in the eyes of society because ultimately it is a woman who conceives for the enjoyment of another couple who are infertile to have a child. There is a possibility that a child may have emotional problems after knowing that he is not the biological child of the commissioning mother.

Conclusion

In conclusion, surrogacy rates are high in India. The irony is that there are innumerable orphan children in India but millions of orphan children are deprived of a family and a healthy environment due to the desire to have 'their own child'. Even for couples who want to adopt a child, it is a difficult task as the Hindu Adoption and Maintenance Act, 1956 has very tight terms and conditions.

Furthermore, this adoption law does not allow non-Hindus to adopt a Hindu child. The last option for such couples is to resort to IVF. Moreover, due to no proper legislation on surrogacy, the process was heavily misused. Even the new amendment bill of 2019 passed by the Lok Sabha is supporting only altruistic surrogacy which has many loopholes and it kills the earning hope of women who are economically weak and have no other source of earning. Source is not. The rights of surrogate women and children are also not protected. There are many other flaws which need to be removed.

The Surrogacy Bill of 2019 needs further changes before it can be forwarded for the President's assent. The law states that ART clinics should be set up, but does not mention the conditions that should be followed in such clinics to maintain hygiene and safe delivery of surrogate mothers (which needs to be clarified). Commercial surrogacy should not be completely banned; it should be legalized with certain limitations for the benefit of both commissioning parents and surrogate mothers.

Making it completely illegal for foreign infertile couples to have a child will certainly not prove to be good, therefore having a child through surrogacy in India for foreign infertile couples should be legalized with proper authorities and regulations in place so that its negative effects are nullified, effect can be stopped. Commercial surrogacy can be abolished. This can play a big role in the spread of medical tourism in India.

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