

Legal Issues in Commercial Surrogacy: An Analytical Study

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Abstract

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Surrogacy can be defined as the method of reproduction whereby a woman agrees to conceive for the purpose of giving birth to a child; she will not raise but will hand over to a contracted party. Two types of surrogacy is prevalent at present times, 1) Gestational Surrogacy 2) Traditional surrogacy. In the first one the mother is the child's genetic mother and in the second case she will be the gestational carrier, carrying the fetus till delivery after being implanted with the embryo. When certain compensation is given to the pregnant lady for being pregnant apart from the medical cost the act is termed as commercial surrogacy. In the present times commercial surrogacy has come as a blessing for those couples who cannot get have their own children and also for same sex couples who want to have their own children.

The present legal framework of commercial surrogacy in India is not very clear and no legislation is present to protect and ensure the safety of women. Recent report by law commission tries to provide for making rules relating to commercial surrogacy in India but a lot has to be done to ensure the health of women and to provide for a proper mechanism for the parents who wish to take the services of surrogate mother. One of the serious issues at present is related to the health of the mother carrying the fetus and the right remuneration to be paid for carrying the child for a third party, presently unorganized the business of surrogacy is very prevalent in some parts of India is a very booming industry, an estimate by the United Nation projects surrogacy a booming industry of \$400 million with more than 3,000 fertility clinics across

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India², it is one of the biggest unregulated business activity operated in India. Some serious issues related to commercial surrogacy is the health and regulation of surrogacy as greed might lead to serious health problems for the pregnant lady as well as the child.

Another major problem in the present scenario is its conflict with the citizenship laws, as most of the parents opting for surrogacy are foreigners, a serious problem faced by the judiciary is to decide the citizenship of the infant.

Introduction

In the present times commercial surrogacy has become one of the most discussed topics in the legal spheres due to its implication on the citizenship and the Family laws together, though commercial surrogacy has been a dream comes true for parents who were not able to conceive due to some biological or physical reason, some very serious problems have also evolved in the relation to the citizenship and the parentage of the new born infant. These issues have some very serious repercussions, these issues are very important in the Indian context due to a growing market of commercial surrogacy and no law to regulate and control these issues. Another major problem is related to the contract between both the parties due to unenforceability of these contracts in the present legal system of India. The health of the surrogate mother is another major issue due to the difficulties of continuous pregnancy that can lead to various health risks. Presently the only recourse available to the legal fraternity are the various judicial decisions given by the courts in different matters, but these judicial pronouncements are also not sufficient as many issues are not yet before the courts. Every judge has its own opinion based on his morals and this can lead to a very confusing situation for following the precedent, the present legislature is yet to pass the act to regularize commercial surrogacy but there are many problems like the health (both mental and physical) of the mother which the present draft has not dealt

² Nita Bhalla and Mansi Thapliyal, [India Seeks to Regulate Its Booming Surrogacy Industry](http://www.medscape.com/viewarticle/811861?nlid=35152_2043&src=wnl_edit_medn_obgy&uac=149266AJ&spon=16)
http://www.medscape.com/viewarticle/811861?nlid=35152_2043&src=wnl_edit_medn_obgy&uac=149266AJ&spon=16 Retrieved On 14th November 15, 2013

with. Apart from these problems there are chances of trafficking done under the garb of commercial surrogacy by the supposed parents from foreign countries.

At present the most important thing is to make laws and regulations for making surrogacy laws so that infertility clinics dealing with surrogacy can be regulated in cases related to the health of child and the mother.

What is Commercial Surrogacy?

A standard definition of 'surrogacy'³ is offered by the American Law Reports in the following manner:

"...a contractual undertaking whereby the natural or surrogate mother for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, and to terminate all of her parental rights subsequent to child's birth".

To fully appreciate then the present system of surrogacy in India it is important to understand the different types of surrogacy practices presently prevalent in Indian society, presently three types of surrogacy contracts are functioning in the society, these are traditional, gestational and donor surrogacy. Traditional Surrogacy includes artificial insemination of the surrogate mother by using the sperm of the intended father. Gestational surrogacy, on the other hand involves creation of the embryo in a Petri dish and its implantation into the womb of the surrogate who carries it to the term. Genetic Surrogacy is the process in which both the sperm and the embryo is bought from an outside donor and the child has no relation to the parents⁴.

Although these three types of surrogacies have their own implications and consequences, the most common in them is the gestational surrogacy in which one woman bears a non-genetic child for real parents for monetary benefits. The main reason for continuous growth of gestational surrogacy is due the surety that the infant will have the genetic traits of the "real" parents and not of the surrogate mother. One reason due to which commercial surrogacy is booming in India is due to the low cost

³ American Law Reports, *Validity And Construction Of Surrogate Parenting Agreement*, 77 A.L.R. 470. (1989)

⁴ Preeti Chaturvedi & Churchi Mandakini, "Horizens of Law of surrogacy" <http://ssrn.com/abstract=1962231>

of surrogacy in India. Low cost coupled with casual legal environment has made India a popular fertility destination⁵ii.

Commerce or Charity?

At present in the Indian legal system, the few judgments passed by the Supreme Court related to surrogacy are not in support of commercial surrogacy, according to the Supreme Court in the Baby Manji case⁶ surrogacy in India can only be accepted when it does not have the commercial aspect i.e; a surrogacy which doesn't provide any kind of monetary benefits to the surrogate mother, done as an act of charity. Almost all the cases of surrogacy in India are done through a contract for monetary benefit to the surrogate mother, the main reason for commercial surrogacy is the poor economic condition of the women involved in the business of surrogacy, though surrogacy is still considered as a taboo in the Indian society these women sometime with the permission or pressure from their family so as to ensure their own survival. It is argued that surrogacy is same as sperm donation by male but the difference between the two is clearly visible as the emotional and mental attachment is present in surrogacy and the surrogate mother goes through various difficulties faced during the pregnancy and if it gets her certain benefits to improve her survival then what is the problem?

If commercial surrogacy is allowed in India than chances of exploitation of women will increase as families with weak economic conditions will force their female members to go for commercial surrogacy and use their body as means of earning livelihood, this is same as forcing a woman into prostitution to earn money and violation of his right to protect his body against exploitation. The Supreme Court in the **Baby Manji** has clearly provided that commercial surrogacy, if allowed without any regulation and check can lead to disastrous effects⁷.

5 Margaret Ryznar, “International Commercial Surrogacy And Its Parties” Retrieved from [Http://Ssrn.Com/Abstract=1614462](http://ssrn.com/abstract=1614462)

6 Baby Manji Yamada V. Union Of India, (2008) 13 SCC 518

7 Y. F. Jayakumar, Socio-Legal aspects of Surrogacy in India, Vol. 1 No. 2, 96, 97, INDIAN JOURNAL OF LAW AND JUSTICE (2010).

Another grave human right violation that can happen under the protection of surrogacy is the trafficking of Humans into foreign countries, the court has looked upon this issue in the case of **Jan Balaz v Union Of India**⁸ in this case the court not believing surrogacy to be an illegal activity, still had its own reservations about the wrong us of surrogacy in human trafficking.

Going against the Supreme Court's opinion the government of India has made the "The Assisted Reproductive Technologies (Regulation) Bill, 2010" which validates commercial surrogacy and lays down rules and regulation to govern it. According to Section 34(3) of ART act the surrogate mother can receive monetary compensation for agreeing to do the surrogacy act. The ART act is yet to be presented before the parliament for approval.

Hence, it is clear that both the commercial and the altruistic form of surrogacy in India can exist within the present legal sphere but their implementation is still a major problem due to unenforceability of the laws at present times.

Fundamental Rights and Surrogacy

Procreation of children is always considered as an act associated with the basic requirement of every person who has a right to live, according to the Universal Declaration of Human Rights (UDHR) Article 16(1) provides that any men and women of full age without any limitation of any kind related to race or religion has a right to marry and start a family. The same right has been enshrined under the Constitution Of India under the protection of Right to life and personal liberty. The Indian Courts have many times included Right to Reproduction as a part of basic right that every person has, one of the leading case in this regard is B.K Parthasarthi v Government Of Andhra Pradesh.⁹ in which the Andhra Pradesh High Court recognized the reproductive autonomy of an individual as an aspect of his privacy. The same principle is applied for the justification of surrogacy as the means to achieve the right provided by the constitution of our country. But the most important thing to understand right now is whether it is correct to use some other person just to fully enjoy you right provided too you? The answer to this question can be understood

⁸ AIR 2010 Guj 21

⁹ 1974 SCR (1) 697

with the help of the present social structure of the woman involved in the act of surrogacy, as against the popular norm that should be followed for surrogacy i.e; altruistic surrogacy, most of the cases of surrogacy is commercial in nature which involve a woman not related to parents in any circumstances, leave alone the social background but the economic background of the surrogate mother is in no case close to the real parents, in such circumstances chances of voluntary surrogacy is very low as there is no motive behind such surrogacy except the monetary benefit which the surrogate mother gains from the whole act. One cannot expect that a woman living under such economical deterioration can opt for surrogacy except under the influence of money to be received for carrying the children, looking at these circumstances we can say that commercial surrogacy in no way be accepted as constitutionally valid due to the pressure under which it is working, Another problem with the whole process of surrogacy is the role of infertility clinics which works as a middleman between the prospective parents and the surrogate mother and take a large chunk of money which should go to the surrogate mother for carrying the child, in fact only a very small amount of money is received by the surrogate mother for carrying the baby¹⁰.

Lack of any proper laws to control the profession of surrogacy can lead to grave injustice with the women who are involved in surrogacy just for the purpose of providing a good life and financial stability for their family. This is the main snag in the whole process of legalizing commercial surrogacy and until any straight jacket formulae is developed for the regulation and protection of women involved in surrogacy. Another problem associated with Surrogacy for foreign couple is the chances of Human Trafficking through surrogacy, commercial surrogacy converts surrogacy which falls under Article 23 of The Constitution Of India involving these children in illegal activities like prostitution and human organ trafficking, presently there is no procedure established by the legislature to check the validity and verification of parents and what their background is, any two persons projecting themselves as parents can go for surrogacy and India and with very minimal procedure can take the child outside India. These loopholes in the present procedures

10 Preeti Chaturvedi & Churchi Mandakini, "Horizens of Law of surrogacy"
<http://ssrn.com/abstract=1962231>

are not sufficient to deal with the issues and hence it is not the right time to validate the commercial surrogacy at most surrogacy in the form of altruistic can be permitted so as to help the childless couples in fulfilling their dream.

Surrogacy And Rule Of Law

According to Jeremy Bentham law is an instrument for securing greatest good for the greatest number of people, at present the purpose of law should be to establish law so as to benefit the large number of couples waiting to get help of surrogate mothers to fulfill their dream of having a baby, but this benefit of the greater number of people does not mean that we can completely ignore the rights of the women involved in surrogate practices and doesn't care about their health and living conditions of these women involved in surrogacy just for arranging two meals a day for their families. It is in the interest of the state and its people that a legal framework should be prepared so as to limit the arbitrary use of weak legislation to do acts that cannot be permitted in the society. At this point it is important to understand the essentials of rule of law i.e; existence of law and clarity of law so that there is no problem in the applicability of the law on its subject. At present the surrogacy lacks both existence of law and any strong legal precedent that can govern surrogacy until the time there is law to govern it. Presently there is no rule to pre-authorize the surrogacy contract between the parties which is the main cause for all the disputes arising out of surrogate contracts. Another serious issue is related to the health of the surrogate mother which is under a very serious risk of mental and physical damage to their health. Utmost care is taken by the infertility clinics during the period of pregnancy and at the time of delivery but no such care is taken once the child is born and the surrogate mother is left without any kind of post birth counseling so as to make sure that she is not suffering from any post pregnancy problems like depression.

Another problem related to surrogacy is the strict laws in many developed countries from where many couples come for surrogacy. In many countries like U.S.A Britain and France commercial surrogacy is completely prohibited and children born in India are not recognized as real parents, in some cases the child is not considered as valid citizen of the country and at most considered as adopted children of these parents¹¹.

¹¹ Raghav Sharma, "An International, Moral & Legal Perspective: The Call For Legalization Of Surrogacy In India" <http://ssrn.com/abstract=997923>

Parents opting for surrogacy in India should take prior consent from their respective embassy to permit them to take part in surrogacy.

Summary of the Various Regulations With Respect To Legalization of Surrogacy in India:

ICMR national guidelines on Regulation of ART, 2005 National Guidelines on ART^{viii} is an opportunity for parties in the wake of absence of any specific law governing and regulating surrogacy. These are in the nature of norms and are mere guidelines to be followed by parties to surrogacy transaction and by ART Clinics providing these services. These guidelines are issued to regulate and supervise ART Clinics in India. These guidelines were made by Indian Council of Medical Research in association or with the assistance of National Academy of Medical Sciences under the head of National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India 2005. Some of these guideline are:

- 1) ART Clinics should be registered, supervised and regulated by the States Accreditation Authority. Any information about clients, Donors must be kept confidential.
- 2) No treatment should be given without the written consent of the couple.
- 3) The ART clinic must not be a party to any commercial element in donor programmes or in gestational surrogacy.
- 4) A surrogate mother carrying a child biologically unrelated to her must register as a patient in her own name.
- 5) While registering, surrogate mother must mention that she is a surrogate mother and provide all the necessary information about the genetic parents such as names, addresses, etc.
- 6) Surrogate mother must not use/register in the name of the person for whom she is carrying the child, as this would pose legal issues, particularly in the untoward event of maternal death.

7) The birth certificate shall be in the name of the genetic parents. The clinic, however, must also provide a certificate to the genetic parents giving the name and address of the surrogate mother.

8) All the expenses of the surrogate mother during the period of pregnancy and post-natal care relating to pregnancy should be borne by the couple seeking surrogacy.

9) The surrogate mother would also be entitled to a monetary compensation from the couple for agreeing to act as a surrogate; the exact value of this compensation should be decided by discussion between the couple and the proposed surrogate mother.

15) Advertisements regarding surrogacy should not be made by ART clinic. The responsibility of finding a surrogate mother, through advertisement or otherwise, should rest with the couple, or a semen bank.

16) A surrogate mother should not be over 45 years of age. Before accepting a woman as a possible surrogate for a particular couple's child, the ART clinic must ensure that the woman satisfies all the testable criteria to go through a successful full-term pregnancy.

Law Commission of India in its 228th Report, 2009 made certain recommendations to legalize surrogacy by effective legislation which can cover all the aspects of Surrogacy and relationships arising out of surrogacy. The Union Health Ministry has finalized the Assisted Reproductive Technologies (ART) Regulation Bill, 2010 which has been sent for Law Ministry's approval¹². Despite recommendation by Law Commission of India, to recognize only altruistic surrogacy arrangements and not commercial ones, the draft Bill legalizes commercial surrogacy as well. National Guidelines on Surrogacy" regulating surrogacy but these are simply guidelines and are not binding or enforceable, neither there is sanction attached to it. Considering such scenario, Law Commission of India, as discussed above, in its 228th Report, so as to formalize the law on surrogacy, recommended an exhaustive legislation by making some vital recommendations.

The Moral Dilemma of Surrogacy

¹² 228th Law Commission Report, "Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy", August 2009.

The legal perspective of surrogacy has been colored by the moral and ethical overtones abased on which various public policies are framed. Both the supporters and critics of surrogacy stand by their views based on various moral and ethical conducts that they follow, to completely understand the final result of it is important to first look at the various moral arguments arising out of surrogacy.

The first issue raised against surrogacy is that the whole act of surrogacy leads commercialization of motherhood which is completely unacceptable in our society. A child born through surrogacy may not be acceptable to the parents if he is born with any kind of deformity. Along with commercialization of the baby surrogacy, the critics of surrogacy that it is on same level as prostitution as both include a woman's body for the purpose of another person. The whole act of surrogacy demeans the mother child relationship and the surrogacy is nothing more than a breeding machine.

The greatest attack against surrogacy is that it fundamentally changes the complete relationship between the mother and the child as both of them don't have any kind of connection until the child is born, it creates a relationship of utility and consumer and not of love and affection.

But the supporters of surrogacy are not accepting any of these views, according to them surrogacy is not the commercialization of motherhood as the child born out of it has more similarity to the genetic mother than the surrogate mother due to the infant having the same genes as the real parents. Also, the surrogate mother works just as a vessel and has no biological connection to the baby as such.

The law has to strike a balance between the practices of surrogacy and the purpose that it fulfils without going against the moral issues that can come in surrogacy and the benefits that infertile couples can get through surrogacy.

Recommendations

The proposed law/legislation dealing with surrogacy must be certain, effective, clear and must define rights & obligations of the necessary parties. Legislature cannot turn its blind eye, thereby leaving it for judiciary to deal with such unforeseen situations of

surrogacy. There should be a Strong regulatory framework, a “Surrogacy Bill” which shall regulate as well as facilitate surrogacy transaction: in following ways¹³:

1. Recognizing or validating Surrogacy contract as a special contract
2. Prescribing qualifications for parties involved (Commissioning parents and Surrogate Mother) and mode of selection of Surrogate mother.
3. Regulating & prescribing medical operations involved in surrogacy
4. Recognition of ART Clinics (Prescribed & Appropriate Surrogacy Centers) including
5. Government recognized Surrogacy Counseling Services (Medical & Legal counseling)
6. Definition of relations of parties involved: Surrogate Mother, Surrogate Child and Commissioning Parents.
7. The legitimacy of the surrogate child and its citizenship.

Conclusion

The present form of surrogacy prevalent in India is suffering from many anomalies and is not sufficient to deal with various problems coming from surrogacy. It is correct that every person has a right to start a family and surrogacy is one such way through which infertile couples can fulfill their dreams but it is not accepted that just to fulfill their dream life and health of another person has to suffer so much. One of the anomalies suffered by the surrogacy practices in India is the lack of any post and pre pregnancy counseling of the surrogate so as to make sure that the surrogate mother is fit, both mentally and physically to carry a child for another person, this counseling is also necessary to make sure that the consent is free from any kind of influence and the act is a voluntary act of the surrogate mother. This counseling will help her in measuring the pros and cons of the action so as to avoid any future tribulations.

13. 228th Law Commission Report, “Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy”, August 2009.

Laws should be made so as to regulate the pre authorization of surrogacy agreements in order to reduce chances of exploitation through unfair means. A reasonable time should be provided for the surrogate mother in case she changes her mind before surrogacy so that she can revoke her consent before surrogacy.

A procedure should be established by law so as to make sure that no legal question arises related to the custody of the Infant in cases of death or the divorce of the parents, a clear rule should be present so as to determine the parentage of the new born baby. In many scenarios the infant born from surrogacy is considered as adopted child and not as the real child, rules should be made for deciding the parentage of the new born child.

The government should ensure that the future law made in this regard should be based on the grounds of providing complete security of life to the surrogate mother without violation of any of her rights, one of the most important step in this direction would be to make strict laws to regulate the functioning of infertility clinics in India. Large number of clinics is unregulated and works without any kind of regulation to check whether they are taking reasonable care and precaution before going for artificial insemination for surrogacy.

The process of surrogacy can never be considered an evil as it provides a ray of hope for the childless parents, but in the present scenario it is very important that a strict check is present so as to avoid any kind of conflict between surrogacy and human rights, a consistent check is also necessary so to make sure that any illegal trafficking is not going on under the garb of surrogacy. After making sure that right legislature is available for surrogacy, only then we can hope that surrogacy will work for the right purpose.
