
COMMERCIALISATION OF SURROGACY AND WOMEN'S RIGHT TO HEALTH

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Surrogacy is the ray of hope in most of the infertile couples as it is a “Non-zero-sum-game”.

ABSTRACT

Artificial Human Reproductive Technologies facilitated the infertile couple's dream of parenthood. Surrogacy is one such ART where a woman bears a child for the couple to produce children for the couples. Some consider surrogacy as the ray of hope, some recognize it as dehumanising women.. Over time, surrogacy is considered as business, this article discusses how surrogacy has been commercialised over the recent times, exploitation of women, ethical issues concerning surrogacy, Right to health of a surrogate mother and the need to regularise the legislation on surrogacy, thereby protecting most importantly the interest of the children.

Keywords: surrogacy, commercialisation, exploitation, surrogate mother, commissioning parents, interest of the child.

INTRODUCTION

Family is considered to be the fundamental unit of the society, usually devolved from a common ancestor, through bonds and ties of marriage and blood relations, consisting of 3 generations: grand parents ; parents , aunts - uncles; their children. It is essential to procreate and reproduce younger generations to expand the family and to prevent the human race from extinction. It is natural for any married couple, dreaming to embrace ‘parenthood’ and the pain of not being able to not being able to embrace one is tormenting. Studies also found it may lead to breakdown of marriage and other difficulties. Fortunately, with the advancement of science in the field of infertility, Artificial Human Reproductive Technologies (hereinafter referred as “ART”) were introduced through which the couples with fertility issues have embraced their dream of ‘parenthood’ by reproducing a ‘genetically related child’. In-vitro fertilisation, embryo-transfer, surrogacy are few methods of Artificial Human Reproductive Technologies, among which ‘surrogacy’ is the most disputed.

MEANING AND DEFINITION OF SURROGACY

The word ‘surrogacy’ finds its origin from the Latin word ‘*surrogatus*’ which means a substitute i.e., a person appointed to act in place of another. In the process of surrogacy there are usually 2 parties, the commissioning parents (biological or the genetic parents) and the other party would be a woman, whose womb is contracted for the purpose of reproduction. Hiring a womb or renting a womb means to nurture and fertilise the embryo of an unknown couple in your womb, mostly money as the objective. The surrogate mother thus, waives her right to motherhood and parental rights in the child born through this process.

Black’s Law Dictionary defines surrogacy as, “an agreement wherein a woman agrees to be artificially inseminated with the semen of another woman's husband”.

According to **The New Encyclopaedia Britannica**, “surrogate motherhood is a practice in which a woman bears a child for the couple to produce children in the usual way”.

As per the proposed draft of the **Surrogacy Regulation Bill, 2019**, “surrogacy” means “a practice, whereby one woman bears and gives birth to a child for an intending couple with an

intention of handing over such child to the intending couple after the birth. ¹

THE ADVENT OF COMMERCIAL SURROGACY IN INDIA

Commercial Surrogacy refers to the arrangement between the surrogate mother and the commissioning couple, where the surrogate mother is compensated for her services beyond the medical expenses. Commercial Surrogacy is the most controversial type of surrogacy as it exposes the cynicism of commercialisation, commodification, trafficking and exploitation of women and children, their financial and social discrepancies with the biological parents. ²

Women and Children have been given paramount importance in Indian society as well as the legal system. It is hard to recognize them as material goods for commerce. As, re-producing babies is an act of love, but not an arrangement with a third party which includes a monetary element.³ India has become a harbour for surrogates from the view of International couples. The market for surrogacy in developing countries like India is a booming business, which has been criticised by many as “baby booming business”, ‘baby firm’ ‘womb for rent’, ‘womb on hire’⁴. As per the estimate given by the National Commission for Women, more than 3000 clinics have been established for providing surrogate services across the globe.⁵ Availability of well-qualified medical practitioners, surrogates at comparatively lesser cost than other countries and no existing legislative frame-work on the surrogates contracts and other regulations, are among few factors that attributed for the growth of surrogate industry in the country, thereby India becoming an International harbour for couples from different countries.

In order to regularise the child abandonment cases and economic- exploitation of rural and weaker sections of women by the surrogacy clinics the Indian Government has taken the initiative to incorporate certain guidelines for the conduct of surrogacy arrangement. Restrictions were imposed on the foreign nationals from hiring ‘Indian surrogates’ and later abandoning the child (as there is no assurance to the health condition of the child in the

¹ Surrogacy regulation bill, 2019,

(https://prsindia.org/files/bills_acts/bills_parliament/Bill%20text%20as%20passed%20by%20LS-%20Surrogacy%20bill.%202019.pdf)

² Aditya Kumar, Types of Surrogacy, Problems of Commercial Surrogacy,(July. 28, 2021, 5.08PM), <https://ssrn.com/abstract=3625804>

³ Dr.S.S.Das & Priyanka Maut, Commercialization of Surrogacy In India: A Critical Analysis,(July. 31st, 2021. 4.58PM) <https://www.researchgate.net/publication/281710247>

⁴ Yashomati Ghosh, “Surrogacy and Law: An Affirmative Approach to Deal with the Ethical and Legal Dilemma”, Journal of Law Teachers of India, Vol. II.Issue 1, (83 to 92) at 84.(2011)

⁵ SARAVANAN S., “Transnational surrogacy and objectification of gestational mothers”, Economic and political weekly, vol. 45, no 16, p. 26-29 (2010)

surrogacy arrangement. Both the surrogate mother and the child born out of it are subject to medical risks, due to the weak biological condition of the woman or not receiving enough nutrients during the pregnancy phase). Under the Surrogacy Regulation Bill, 2016 only the Indian married heterosexual infertile couples can opt for surrogacy. This bill bans commercial surrogacy and recognises surrogacy through a close relative. The bill further recommends the establishment of National as well as State boards for implementation and undertaking arrangements of surrogacy. The bill further punishes the acts of exploitation of surrogate mothers, commercial surrogacy, abandonment of the child. It is mandatory to register a clinic under this bill.

COMMERCIAL SURROGACY :: RTH of A SURROGATE

With the increase in the demand for surrogates, the biological function of a woman has been encashed by the medical agencies into a commercial profitable-business. Even the Surrogacy Regulation bill, 2019 prohibits Commercial Surrogacy and allows altruistic surrogacy. The feminist literature, has given diversified views on commercial surrogacy mainly focusing on the issues how commodification of woman's body has resulted in the choice of a woman and motherhood. According to some feminists, it is an economic necessity, which is hindered by poverty, while others consider it as a '*possibly reproductive-choice*'. It has also been criticised for turning women into a machine of reproducing babies and disposable living beings. The 9-10 months of pregnancy journey creates a special bond between the mother as well as the foetus, Surrogacy in any form repudiates from creation and experience such magical journeys.⁶

A woman has an autonomous right over her body, however it should be at her own discretion, if she chooses to be a surrogate, but not coerced either by her in-laws or husband for fulfilling their financial and materialistic needs, which has adverse effects on the health of the surrogate. The future perspective of the surrogacy paradigm is shifting from opportunity to exploitation of women from rural backgrounds as well as women from BPL.⁷ More often than not, commercial surrogacy is equated with prostitution and by virtue of the opinion of particular section of people, surrogacy is to be restricted on the grounds of morality. A surrogate arrangement not only dehumanises the woman's body but also exploits her reproductive organs

⁶ Virginie Rozee, Sayeed Unisa and Elise de La Rochebrochard, The social paradoxes of commercial surrogacy in developing countries: India before the law of 2018, BMC Women's Health, (2020), <https://doi.org/10.1186/s12905-020-01087-2>.

⁷ Anu, Pawan Kumar, Deep Inder and Nandini Sharma, Surrogacy and women's right to health in India, July. 28, 2021, 5.30PM), <http://www.ijph.in>

for the personal gain of the rich and wealthy⁸. According to few legal experts, they have coined commercial surrogacy as '*biological colonisation*'.

Regardless of the magical journey a pregnant woman experiences, many are unaware of the medical despair one might have to suffer such as- weight gain, back pain, nausea, constipation or bloating, swelling and other intolerable side effects. Additionally, a surrogate pregnancy may also lead to gestational diabetes, hypertension or life threatening haemorrhage and pulmonary embolism. The booming industry of surrogate clinics has no regard for the medical, health and hygiene conditions of the surrogate mother, which impacts the birth of a healthy baby. In the process of surrogacy, a surrogate is implanted with multiple embryos to increase the chances of conceiving, this in turn increases the health risk for both the mother and the baby. During implantation, a surrogate may also have to undergo infertility treatments, fertility drugs are inseminated which can be painful as well as have mild side effects like increased premenstrual syndrome effects. It might happen that a blood clot appears at the injection site, or there might be some adverse reaction in her body. Many women may also have to experience mild cramping or slight bleeding while undergoing embryo transfer procedure.⁹ Not to mention a woman's body transforms biologically, hormonally and emotionally during the phase of pregnancy.

CONCLUSION

Surrogacy, in any form be it commercial or altruistic dehumanises a woman and is disrespectful to the mother-child bond, as the main objective of this entire arrangement is monetary. In a surrogacy arrangement, the children who are considered the future of any nation are treated as a profit earning commodity and the surrogate mother is treated as a reproductive machine rather than a human being. Even in altruistic form of surrogacy, where a close blood relative is opted as surrogate though there is no financial aspect, the woman has to undergo a number of changes in her body, and neither her reproductive organs nor her body is the same after the delivery of the baby. This affirms that a woman is a reproductive machine for infertile couples to obtain their desired outcome, by giving birth to a healthy child which is the only optimistic angle of this arrangement. But, the end doesn't justify the means. The dream of the most infertile parents can still be achieved if they choose to adopt a child who is in need of love and affection. This

⁸ id.

⁹ Venkatesh Reddy, Arti Gupta and Viviktha Ramesh, Surrogacy: Blessing or curse to poor society in India, Healthcare in Low-income settings 2015, Vol 3 pg no. 45-47

child might not be biologically connected to the parents, but at least it's far better than surrogacy where the advantage of the economical condition of the woman is exploited and used against them. The government of India should take appropriate measures in promoting the idea of adoption of a child to childless or in-fertile parents. The vulnerability of a surrogate doesn't limit to the medical procedure, even throughout the contractual agreement with the commissioning parents, the position of the surrogate is unprotected. The surrogates being legally ill-literate are not aware of the legal implications in the surrogate agreement, to which they are party to. Therefore, it is imperative to regularise and bring in a more stringent legislative framework on surrogacy, which aims at protecting not only the interest of the abandoned children born out of surrogacy arrangement but also the surrogate mother. In the absence of consolidated legal guidelines, the victims might be deluded and exploited.