



Commercial surrogacy: A challenge to motherhood

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Abstract

The modern development of medical science and technology poses a great threat to the dignity of a mother and her mother hood. The irony is that now medical science enables women to provide wombs for rent as 'surrogate mother' or "commercial surrogation". Days are not so far when the so called elite class couples would find it rather economic and time saving to hire a surrogated mother to deliver a child for them than to spend their valuable time in procuring a child of their own. Water has started flowing in that direction as India is emerging as a hot destination for surrogacy-related fertility tourism, the assisted reproductive technology (ART) industry in India is worth more than Rs 25,000 crore. According to infertility expert India offers the best cheap expertise 'surrogate mother' which is driving in more people from abroad for surrogacy. There is no law to deal with the issue of surrogacy precisely in India at present. The proposed Surrogacy (Regulation) Bill, 2016 intends to regulate surrogacy in India. The bill prohibits commercial surrogacy and allows ethical surrogacy to the needy infertile Indian couples. In aforesaid back drop to address the issues of commercial surrogacy in India. This paper first examines the various moral and ethical issues relating to commercial surrogacy in India. It then discusses the legislative history of surrogacy in India and is to make a nuanced examination regarding effectiveness of the provisions of the proposed Surrogacy (Regulation) Bill, 2016 to stop commercial surrogacy in India, it goes on to discuss how this unethical practices place both surrogate mothers and their babies at extreme perils and concludes with some remarks.

Keywords: Assisted Reproductive Technologies, Surrogacy, Surrogate Mother, Draft Surrogacy (Regulation) Bill 2016

Introduction

The word mother brings lots of virtuous feelings of emotion and spirituality in our mind. It is said that human being is the most superior creature of this world and mother hood is the most magnificent gift of the God to any woman. Only a mother can have this heavenly feeling because she is the one who literally gives life to the fertilized embryo in her womb for nine months through her blood, the air she breathes, the food she eats. This tedious journey of a mother comes to an end when she first takes the child in her lap and put a tender kiss on the fore head ^[1].

But the modern development of medical science and technology poses a great threat to the dignity of a mother and her mother hood. The irony is that now medical science enables women to provide wombs for rent as 'surrogate mother' or "commercial surrogation" ^[2]. She can use her motherhood for financial profit and to deliver someone else's child. The term 'surrogate mother' or "commercial surrogation" reduces women's status to that of an inanimate object, an incubator, a container, rented property, 'a kind of hatchery' or 'alternative reproduction vehicle' who performs nothing more than 'a basically gestational role' by providing an 'endocrinological environment' in which to 'gestate an embryo'. Language which describes the mother in these derogatory terms reduces and denigrates the miracle of life which she carries within her body.

Surrogacy as Business in India

It's an irony to imagine motherhood as profession. Babies,

after all are the precious gift of God and not a commodity which could be procure by money. Unfortunately surrogacy which is a bonafide act of a mother to help a woman to become a mother who cannot bear a child due to some medical complications, has become a commercial business. In the field of surrogacy India emerge as an important destination due to its cheap rates and legal relaxation as well ^[3]. In India it has become a concern which has given rise to an ethical question leading to political debate. Human right activities have argued over the health of woman and their rights, legal scholars have probed the contractual and jurisdictional issues. With a move to promote medical tourism commercial surrogacy was legalized in India in 2002. The open market economy adopted by India in 1991 paved way to flow of private money in health sector resulting in constructions of global class hospitals and medical infrastructure which helped to flourish surrogacy tourism in India ^[4]. Surrogacy industry has grown steadily in India as word gets around that babies can be incubated at a low price and without government red tape. There are thousands of potential parents across the globe come to India to hire another woman to bear their children. Commercial surrogacy, or "wombs for rent," is a growing business in India. Critics have portrayed the notoriety of surrogacy in India as 'child booming business', 'womb on rent', 'infant firm', 'parenthood as a substitute'. Surrogacy has turned a typical biological capacity of a woman's body into a business contract Commercial surrogacy now has taken a form of corporate business where Surrogate services are advertised, surrogates are recruited. The commercialization of surrogacy

raises apprehension of a black market and baby-selling, breeding farms, turning poor women into baby producers. Due lack of regulations and easy availability of surrogated mother surrogacy is becoming a booming industry in India. The total expenditure for surrogacy in India is around \$25,000 to \$30,000 which is around 1/3rd of that in developed countries like the USA. This pulls in foreign couples to India who search for a financially savvy treatment for infertility and an entire business of medicinal tourism has developed on surrogacy. ART industry is now a 25,000 crore rupee booming industry. Anand, a small town in Gujarat, has become the heaven of commercial surrogacy. It seems Indian motherhood is on rent which dispatch babies for foreigners and earns foreign currency for Indian economy.

Commercial Surrogation Degrades Motherhood

Human being is the best creation of God and for creating His best creation God chose Mothers who bring this gift of God to world. Motherhood is regarded as the most noble and holiest service assumed by mankind. It is said one cannot appease God if one cannot make mother happy because both God and Mother is the symbol of creation, love and sacrifice^[5].

In Indian values mother holds an esteemed status she is even worshipped as Goddess in the popular mythology. But Commercial surrogacy puts a question on these values because relationship between the surrogate child and mother has become commercial rather than emotional one. Motherhood is not about having the child for nine months in the womb and then selling it for some bucks to the rich. People who condemn commercial surrogacy believe that Surrogacy has tainted motherhood as it involves sale of motherhood which encourages woman to sell her child in exchange of money. It is nothing but commercialization of emotions which derogates the dignity of a mother in a society. The concept itself is materialistic which promotes selfishness of people. It is also contrary to the Indian value that upholds mother above everything. Thus, surrogacy is putting motherhood to insolence. Motherhood which is regarded as a divinely act is converted into a flourishing baby Selling business and this is the one of the biggest ethical question of Surrogacy.

Commercial Surrogation Commodify Child

The important criticism of commercial surrogacy is that it treat child as a product or rather a commodity. It involves the sale of children. Though proponents of Surrogacy says that Surrogate mother just receives a monetary compensation for carrying another person's baby and allows childless couples to experience parenthood and the baby is genetically a product of the parents. Certainly, the most serious objection to Commercial Surrogacy is that it fix the price of human or better to say a child is given birth for consideration of money so it is nothing but trading of human being. It reduces children to objects of barter by putting a price on them. This is inconsistent with the Constitutional principle as provided in the Article Twenty-Third of Indian Constitution, which prohibits the sale of human beings. It is also contrary to the commonly and widely held moral principles that safeguard Human Rights and the dignity of human, namely that human beings are unique creation of God. Persons are not

fundamentally things that can be purchased and sold for a price. The fact is that supporter of commercial surrogacy do not find a good explanation to get around the allegation of baby selling shows their acceptance of these moral objection as well^[6].

Comparing Commercial Surrogacy to Prostitution

Commercial Surrogacy, like prostitution, involves payment of money for the use of the body. Sociologist are of opinion that commercial surrogacy is similar to prostitution, and thus should be prohibited. It has been argued that in both commercial surrogacy and prostitution there is commodification of the female's uterus and/or eggs. Commercial Surrogacy raises questions regarding the legality of prostitution, commercial surrogacy, like prostitution, allows society to equate women with sex and nothing more. Commercial Surrogacy also operates like prostitution such the broker in the surrogacy context, who brings the contracting parties together for a fee, has also been analogized to a pimp and the clinics are like brothels where this type of immoral agreements are executed. It remains a fact that no woman with her free will and consent would sale her motherhood or body as in case of prostitution and surrogate motherhood. It really a matter of regret the state has neglected and failed to provide basic facilities to these women who belong to the marginalized section of the society to maintain their livelihood for which they are induced to sale their motherhood to earn their livelihood.

Legislative History of Surrogacy in India

The flourishing business of Surrogacy is not regulated in India by any legislation till date. As it is not directly declared as unenforceable by law, it is deemed to be enforceable and fully valid. As there is no codified law the ordinary civil law of the land is applicable in respect of surrogacy.

In 2005 first attempt of regulate surrogacy was made by Ministry of Health and Family Welfare. After several years of discussion with all stake holders i.e. the ICMR, the National Academy of Medical Sciences, and practitioners of ART, the Ministry of Health and Family Welfare published the National Guidelines for Accreditation, Supervision & Regulation of ART Clinics.

In 2008 thereafter The Indian Council of Medical Research has drafted the Assisted Reproductive Technology Bill, 2008 to regularize and legitimate different forms of reproductive technologies, including commercial surrogacy.

In 2009 The Law Commission of India submitted the 228th Report on "NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY."

The following observations had been made by the Law Commission: -

- Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying

child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes.

- A surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.
- A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
- One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended
- Parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.
- Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.
- The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
- Right to privacy of donor as well as surrogate mother should be protected.
- Sex-selective surrogacy should be prohibited.
- Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

The report has come largely in support of the surrogacy in India, highlighting a proper way of operating surrogacy in Indian conditions. Exploitation of the women through surrogacy is another worrying factor, which the law has to address. The Law Commission has strongly recommended against commercial Surrogacy.

In 2010 a draft Assisted Reproductive Technologies (Regulations) Bill was prepared. This bill is the draft of following the incorporation of additions and modifications to the Draft of 2008. While the previous draft was an effort to include issues concerning Assisted Reproductive Technologies (ARTs), it had several limitations, and it was expected that the new draft would address these gaps. The 2010 Draft with additions and modifications has tried to take into consideration some of the concerns with the previous document.

In 2012, the Ministry of Home Affairs issued new visa regulations that stipulated various conditions, including a bar on single individuals, unmarried couples, or gay couples from getting a medicinal visa for appointing surrogacy in India.

In 2013 to oblige recommendations made by various Ministries and divisions, the administration made further changes to the draft Assisted Reproductive Technology (Regulation) Bill According to the Assisted Reproductive Technology (Regulation) Bill, 2013, no lady under 21 years old and more than 35 years can go about as a surrogate

mother. The bill out of the blue, states conditions for outside couples looking to hire surrogates in India. The remuneration for surrogacy according to the 2013 draft will be private transaction between the surrogate mother and appointing guardians. IVF centers or ART banks have no part to play in it.

Surrogacy (Regulation) Bill-2016: A Positive Step to Regulate Surrogacy in India

Surrogacy (Regulation) Bill 2016 proposed to be passed by the present government has made surrogacy business unlawful in India. The draft bill is the outcome of discourse with 18 ministries, 26 states, 40 stakeholders and different specialists' doctors wanting to communicate to the nation that surrogacy business surrogacy is one of the unlawful forms of business [7]. The absence of directions has raised various moral concerns, especially with respect to the misuse and mishandle of surrogate moms. Thus, complete enactment directing surrogacy and ART centers is really the need of great importance.

The major provisions of the Surrogacy (Regulation) Bill-2016 are as follows:

- Ban on commercial surrogacy.
- Non Resident Indians(NRI's) and Persons of Indian Origins(PIO's) holding Overseas Citizens of India (OCI) cards have been barred from opting for surrogacy.
- Surrogacy is allowed for only heterosexual couples with proven infertility. Single people or homosexual partners cannot have a baby through surrogacy.
- Married couples who have a child naturally or through surrogacy cannot opt for surrogacy to have another baby.
- Married couples can go for surrogacy only after 5 years of their marriage. Also, the married woman should be between 23 and 50 years and for the man 26 and 55 and are required to produce their medical certificate regarding their infertility.
- Children born through surrogacy would be granted the same rights as any other biological or adopted child of the woman who carries the pregnancy.
- The Bill allows a couple with a mentally or physically challenged child to go for surrogacy.
- Couples cannot compensate the surrogate mother with financial benefits. Only the medical bills of the surrogate mother can be paid by the couple.
- Heterosexual couples with proven infertility can approach surrogacy only if the surrogate mother is in close relation to the couple and shall not be paid for becoming a surrogate mother.
- Surrogacy clinics under the Bill will have to maintain their record for 25 years to ensure that documents are made available in case of a legal dispute.
- Establishment of a National Surrogacy Board which will be run by the Health Ministry, Surrogacy Boards of States and Union Territories to keep a strict check on all the surrogacy cases done in fertility hospitals and clinics.
- Commercial surrogacy, abandoning the surrogate child, exploitation of surrogate mother, selling/ import of human embryo have all been deemed as violations that are punishable by a jail term of at least 10 years and a fine of

up to Rs 10 lakh.

- It also makes it illegal for doctors to do procedures that hurt the surrogate mother and the baby's physical and mental health.

This bill is definitely a step in the right direction as it is a crime to do business with a woman's womb by taking opportunity of her helplessness. We feel elated to say that we live in a democratic country where rule of law prevails. We are proud of our Constitution which guarantees us right to life and personal liberty. We have elected governments and an active judiciary to provide justice. In spite of having everything we are unable and have failed to protect the poor women who are the victims of this industry and the draft Surrogacy Bill 2016 seeks to protect them. Since the initiation of commercial surrogacy, a number unpleasant cases has come up involving foreigners which compel legislature to rethink about commercial surrogacy. In 2012, for example, an Australian couple who abandoned a baby boy born via a surrogacy arrangement in India and return to Australia with a baby girl while leaving her healthy twin brother behind. Such issues justify the complete prohibition commercial surrogacy in India. A wide range of side effect, entanglements and genuine dangers a surrogate mothers confront^[8]. Also many reports have come up from different agencies which documented how Indian women were exploited in the name of commercial surrogacy. Meanwhile, the banning of commercial surrogacy can perhaps open up doors for adoption as well. In a country like India, where one encounters frequent stories of children being abandoned by their parents out of poverty or social stigma, especially girls, banning commercial surrogacy could encourage parents to look toward adoption as a methods for satisfying their fantasies of parenthood.

Conclusion

From the above discussion it may be concluded that process of becoming parent through surrogacy was in practice since time immemorial. But the modern development of medical science and technology has introduced the most unethical practice of surrogacy what is called as commercial surrogacy. In his speech during a seminar Dr. Gautam Khastagir a renowned Gynecologist clearly stated that there is no need of commercial surrogacy in India as in majority case complications can be removed by medications.

But to earn profit it has been recommended and practice by some unscrupulous infertility clinics and in absence of any law it was very easy for them to exploit the poor mothers of India. We Indian worship our country as mother we must not tolerate the insult and degradation of the motherhood of our mother. Surrogacy (Regulation) Bill-2016 is a silver lining in this regard. Once the bill is passed by the parliament commercial surrogacy would be illegal and would definitely put clutch on unscrupulous business of putting motherhood on sale.

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