

Surrogacy Ethical and Legal Implication in India

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ABSTRACT

Surrogacy is a contract in which a woman is paid to carry a child for a different pair. In India, where commercial surrogacy is legal, a substantial number of infertile couples travel there. Despite the fact that this arrangement appears to benefit all parties concerned, there are some delicate issues that must be addressed by carefully written laws in order to preserve the surrogate mothers and intended parents' rights. An agreement to carry a pregnancy for the intended parents is known as a surrogacy agreement. Traditional and gestational surrogacy is the two main types of surrogacy. In gestational surrogacy, pregnancy is achieved through the transfer of an embryo created through in vitro fertilization, resulting in a child who is genetically unrelated to the surrogate.

Keywords: ethical, legal implication, surrogacy, global scale

I. INTRODUCTION

Babylonian law and tradition followed the practice of antiquity. A couple could plan for the male part of the relationship to have another lady pregnant. The couple planned to raise the child they had given birth to. A barren woman could employ this treatment to prevent divorce. Several breakthroughs in health, social customs, and legislation have all contributed to the development of modern commercial surrogacy.

In the 1930s, the American pharmaceutical companies Schering-Kahlbaum and Parke-Davis began mass-producing oestrogen. In 1944, Harvard Medical School Professor John Rock fertilized human oocytes outside the uterus for the first time. The first successful cryopreservation of sperm was place in 1953. In 1971, the first commercial sperm bank opened in New York, and it swiftly grew into a very profitable sector all over the world. Louise Brown, the first test-tube baby and result of the IVF method, was born in England in 1978. The first surrogacy contract was written by Noel Keane, a Michigan lawyer, in 1980. In 1985, the first successful gestational surrogacy pregnancy in a woman was performed. The surrogate and biological mother, Mary Beth Whitehead, Despite the surrogacy agreement, the US government refused to hand over custody of the child (Baby M) to the couple in 1986. The biological father, not the surrogate mother, was given custody of the kid by the New Jersey courts. In California, surrogate mother Anna Johnson was unyielding in her determination to succeed custody of the baby to the intended parents in 1990. The couple's parental rights were affirmed by the court. The true mother, according to this ruling, is a woman who wishes to conceive and raise a kid. In 1994, Latin American fertility professionals convened in Chile to examine the ethics and legalities of assisted reproduction standing. Surrogacy is not a new concept; it has been throughout the world for centuries.

1.1 Definition of Surrogacy

Surrogacy is an important form of assisted human reproduction for people who are unable or unwilling to procreate naturally.

Surrogacy is an arrangement in which a woman agrees to be impregnated through assisted conception, bears the resulting fetus, and then relinquishes at the time of birth, the child has all parental rights.. It is one of the most dramatic of modern reproductive technologies. Surrogacy is defined as "the practice of one woman carrying a child for another with the aim of the child being given over after delivery," according to the Warnock Report.

Strangers may come to an agreement, usually involving the payment of expenses, or a woman may volunteer to be a surrogate for a friend or relative. According to the conditions of a contract negotiated before the lady became pregnant, the surrogate undertakes to transfer the kid to the biological father and his wife after birth. Some experts refer to this as "contractual parenting."

This ART procedure is a godsend for women who are unable to conceive for a variety of reasons. It's possible that not all women will be able to carry their own genetic offspring. For example, a woman may be unable to ovulate or carry a pregnancy if her womb and ovaries have been removed due to cancer or if she was not born with them. Due to dangerously high blood pressure or severe skin disorders, a woman may be able to ovulate but not be able to carry a pregnancy. Such women could still raise a child who is their partner's biological child by using a surrogate.

A woman who is unable to keep the created fetus due to a history of spontaneous abortion may request that her spouse participate in this arrangement in order to realize her desire to have a biological kid. Women with life-threatening conditions such as renal disease or multiple sclerosis may also benefit from this procedure.

1.2 Surrogacy of Variety Shapes

Surrogacy is practiced in many different ways around the world. Surrogacy can be divided into distinct forms based on the type of contract signed, the financial transactions and connections involved, and the usage of genetic material.

Surrogacy can be defined as formal or informal, depending on the nature of the agreement between the parties. The nature and parameters of the agreement between the surrogate and the commissioning couple are carefully established in formal surrogacy arrangements. Because there are no terms and conditions specified, informal surrogacy agreements are frequently unclear and uncertain.

Commercial or altruistic surrogacy can be characterized depending on the financial interactions between the surrogate mother and the commissioning parents. Commercial surrogacy includes paying the surrogate mother money or other perks, whereas altruistic surrogacy does not entail any financial transaction and is typically done between friends and relatives.

Surrogacy can be characterized as partial or total, depending on the usage of genetic material. The surrogate mother provides genetic material to the eventual kid in a partial surrogacy. The insertion of alien genetic material into a woman who then carries the child for another couple who are the biological parents is known as total surrogacy.

As a result, the entire surrogacy process is extremely difficult, costly, and has significant psychological implications. Surrogacy is usually the last option for most couples. Many people have tried artificial insemination, in vitro fertilization, or a combination of the two, as well as a variety of other assisted reproductive technologies. Surrogacy's legality is also disputed, as some countries regard surrogacy contracts as unlawful, and the rights and obligations of the contract's parties are unknown. Long before the intended kid is born, hopeful parents encounter numerous major challenges in their quest to become parents. Despite all of the legal, ethical, moral, and religious obstacles, many women and men still want to have children.

II. THE GLOBAL FREQUENCY OF INFERTILITY

Infertility is becoming more common around the world; the state of assisted reproduction is progressing (ART). When a woman or couple is unable to conceive, it is called infertility. Surrogacy becomes a viable option. Surrogacy is a practice in which a woman carries and delivers a child for the benefit of another spouse or individual. In gestational surrogacy, an in vitro fertilized embryo is inserted into the surrogate mother's uterus, who then bears and delivers the baby. Traditional Surrogacy entails the surrogate mother being artificially impregnated with the intended father's sperm, effectively making her a genetic and gestational mother. Surrogacy can be either commercial or altruistic, depending on whether the surrogate is paid for the pregnancy.

Commercial surrogacy is permitted in India, California, and Ukraine although it is prohibited in Australia, and many US states, England which only recognize altruistic surrogacy. Surrogacy agreements are not recognized in Sweden, Germany, Italy, Norway, or for example. India has been a popular location for fertility tourism. Every year, couples from all over the world flock to India for surrogacy services since the cost of the entire procedure is less than a third of what it is in the United Kingdom and the United States ten-twenty lakhs).

III. SURROGACY ARRANGEMENTS GLOBAL SCALE

Surrogacy traditionally entails the fusion of a surrogate mother's egg with the commissioning father's sperm. In both parents' home countries, the commissioning father would be the child's the surrogate mother would be the child's legal mother, while the legal father would be the surrogate father. At the moment, however, granting parentage to couples who employ artificial fertilization procedures is difficult. Because the sperm donor is usually considered the legal father of the child, legislation had to be enacted to make the husband of the woman who is artificially inseminated-donor the legal father of the child. Surrogacy arrangements are not encouraged under this law.

Gestational surrogacy, for example, is a medical advancement that allows a surrogate mother will be used to carry an embryo produced from a donor egg and sperm. In this case, the term "mother" must be defined legally. The surrogate's and

commissioning parents' home countries may have different legal requirements. There could be a severe legal controversy that affects issues like nationality and immigration. In nations that allow commercial surrogacy, rules may allow commissioning parents, not the surrogate mother, to obtain parental rights over the kid. Other countries, who may have their own rules, may not recognize this.

IV. SURROGACY FINANCIALLY VIABLE OPTION

Surrogacy looks to be an enticing alternative at first glance, because it provides a poor surrogate mother with much-needed income, in the ideal world, an infertile couple obtains their long-awaited biologically connected baby, and the country gains foreign revenue, but the reality is rather different. Surrogate mothers and intended parents are both exploited due to a lack of effective legislation, and the profit is made thru commercial agencies and middlemen. The entire business is opaque, and there is a possibility of becoming mired in legal troubles as a result of India's unpredictably strict surrogacy laws.

Despite the fact that the ICMR set standards for certification, supervision, and control of ART clinics in India in 2005, these guidelines are routinely broken.

It's easy to understand the anguish of childless couples who live on both sides of the divide who not only have to deal with a language barrier, but also have to fight a protracted legal struggle to acquire their child. Even if everything goes well, they will after that, you'll have to stay in India for another two-three months. The kid is born to complete the necessary papers. Citizenship, nationality, motherhood, parentage, and a child's rights are all affected by cross-border surrogacy. When children are denied nationality in the country of their intended parents, it can result in a long legal battle (as in the case of the German couple with twin surrogate children or the Israeli gay couple who had to undergo DNA testing to establish parentage) or a bleak future in an orphanage (as in the case of the German couple with twin surrogate children or the Israeli gay couple who had to undergo DNA testing to establish parentage). There have been cases where the child born to a couple through surrogacy is not genetically linked to them, and as a result, the intended parent disowns the child, forcing him to spend his life in an orphanage.

Surrogate mothers face a far more difficult and unethical scenario. Poor, illiterate women from rural areas are frequently enticed to participate in such transactions by their husbands or middlemen in order to make quick money. These women have no authority over their own bodies or lives. In India, psychiatric evaluation and legal advice are not required, as they are in the United States. Following commercial agency recruiting, these women are placed in hostels for the duration of their pregnancy under the guise of receiving antenatal care. The underlying goal is to keep them safe and avoid the social shame that comes with being an outcast in their community. These women worry about their homes and children for the duration of their pregnancy. They are only permitted to leave the house for antenatal visits, and they are only permitted to see their families on Sundays. The worst thing is that they are unlikely to get compensated if the pregnancy does not go well, and there is no insurance or post-pregnancy medical or mental assistance available to them. Surrogate mothers are hired by wealthy career women who do not want to go through the hassle of carrying their own pregnancy. Surrogacy has turned into a business, and there is a pressing need to address it for rules to be framed and implemented for both the parents and the surrogate mother.

V. LEGAL IMPLICATION OF SURROGACY IN INDIA

The Indian government has drafted a bill, which was first proposed introduced in 2008 and is currently known as the ART Regulation Draft Bill 2010. The government is still working on the bill, which has yet to be submitted in Parliament. Before any law is framed, the proposed draught should be thoroughly discussed, and its ethical and moral aspects should be discussed frequently among social, legal, and medical professionals, as well as the general population.

The legal enforceability of surrogacy contracts are recognized in the bill. The Indian Contract Act of 1872, and other legislation, were enacted to protect Native Americans, that apply to these types of agreements treat surrogacy agreements the same as other contracts. Together the single /couple parent and the surrogate mother must sign a legally binding surrogacy agreement that covers all issues. A national and state-level authority should be established to register and regulate IVF clinics and ART centres, and a forum should be established to file objections for grievances against clinics and ART centres, among other features of the proposed bill. The surrogate mother should be between the ages of 21 and 35, and she should not have delivered more than five children, including her own. Surrogate mothers would not be allowed to transfer embryos for the same couple more than three times. To avoid any legal or marital issues, if the surrogate is a married woman, her spouse's consent is required before she can act as surrogate. A surrogate should be tested for STDs and communicable diseases, and she should not have had a blood transfusion in the previous six months, as these factors can affect the pregnancy's outcome. Intended parents should cover all costs, including surrogate medical insurance and other reasonable costs associated with pregnancy and childbirth. A life insurance policy for the surrogate mother should be included in the surrogacy contract. For agreeing to act as

a surrogate, the surrogate mother may receive monetary compensation from the couple or individual in question. To protect poor surrogate mothers from exploitation, it is proposed that banks deal directly with surrogate mothers, and that the surrogate mother's minimum remuneration be set by law.

To avoid injustice to the child the surrogacy contract should include the following provisions: monetary assistance for the surrogate child in the event that the commissioning couple dies before the child is delivered, or if the intended parents' divorce and no one wants to take delivery of the child. In order to avoid legal complications, a surrogate mother should not have any parental rights over the child; the intended parents should be listed as parents on the baby's birth certificate. The newborn's name through ART is presumed to be the legitimate child of the unmarried/married single/couple parent, with all the attendant rights of parentage, inheritance, and support according to the guidelines.

Surrogacy should not be advertised by ART clinics to their clientele, and couples should seek ART Bank services directly. Regardless of any anomaly in the child/children, the intended parents should be legally compelled to accept custody of the child/children. Confidentiality should always be preserved, and the donor's and surrogate mother's right to privacy should be protected. If a foreigner or NRI wants to use a surrogate, they should sign a contract with their government that includes a written guarantee of citizenship for the child, and appoint a native guardian who will be legally responsible for the surrogate during and after the pregnancy, until the child is delivered to the foreign couple or arrives in their country. Surrogacy based on a woman's gender should be illegal, and abortions should be governed by the Medical Termination of Pregnancy Act of 1971.

Intended parents typically seek a surrogacy arrangement when pregnancy is either medically impossible or regarded to be extremely dangerous to the mother's health. There may or may not be monetary remuneration included in these contracts. When the surrogate is paid more than medical reimbursement and other reasonable expenditures, the arrangement is known as commercial surrogacy; otherwise, it is known Surrogacy that isn't for profit is known as altruistic or non-commercial surrogacy. Surrogacy regulations and expenses vary widely between countries.

VI. CONCLUSION

Surrogacy appears to be an ironic practice given the fact that nearly 12 million Indian children are orphans. Adopting a child in India is a complicated and time-consuming process for childless couples who want to give these children a home. India still lacks basic infrastructure 60 years after independence a comprehensive adoption law that applies to all citizens, regardless of religion or country of residence, whether they are Non-Resident Indians (NRIs), Persons of Indian Origin (PIOs), or Overseas Citizens of India (OCIs). As a result, they turn to IVF or surrogacy as options. Guardianship, not adoption, is permitted under the Guardian and Wards Act of 1890. Non-Hindus are not permitted to adopt a Hindu child under the Hindu Adoption and Maintenance Act of 1956, and immigration requirements after adoption present additional challenges.

Surrogacy is used in India when there are several orphaned children. Couples without children who want to adopt these children must go through a lengthy process. There is no universal adoption law that covers all citizens of all faiths or Indians residing abroad. As a result, they are forced to choose between IVF and surrogacy. The Guardian and Wards Act, 1890, Adoption is permitted, but guardianship is not. Non-Hindus are unable to adopt, a Hindu child under the Hindu Adoption and Maintenance Act of 1956, and immigration procedures after adoption are complicated. Surrogacy rates will be reduced by using simple adoption processes. Commercial surrogacy, on the other hand, should be encouraged. Women's and children's rights should be safeguarded by enacting legislation that closes all existing gaps.

There is a strong need everyone's adoption process should be changed and simplified. Surrogacy rates are expected to rise decrease as a result of this. Surrogacy should be promoted for altruistic reasons rather than for profit. To cover the grey areas and protect the rights of women and children, laws should be drafted and implemented.

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