

Surrogacy in India: Current Perspectives

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Abstract

Surrogacy is a method or agreement whereby a woman agrees to carry a pregnancy for another person or persons, who will become the newborn child's parent(s) after birth. It refers to a contract in which a woman carries a pregnancy "for" another couple. Number of infertile couples from all over the World approach. Although this arrangement appears to be beneficial for all parties concerned, there are certain delicate issues which need to be addressed through carefully framed laws in order to protect the rights of the surrogate mother and the intended parents. Commercial surrogacy is now illegal in India after a bill passed in August 2016. The ever-rising prevalence of infertility world over has led to advancement of assisted reproductive techniques (ART). Herein, surrogacy came as an alternative when the infertile woman or couple is not able to reproduce. Surrogacy is an arrangement where a surrogate mother bears and delivers a child for another couple or person. In gestational surrogacy, an embryo, which is fertilized by *in vitro* fertilization, is implanted into the uterus of the surrogate mother who carries and delivers the baby. In traditional surrogacy, the surrogate mother is impregnated with the sperms of the intended father artificially, thus making her both genetic and gestational mother. Surrogacy may be commercial or altruistic, depending upon whether the surrogate receives financial reward for her pregnancy.

Commercial surrogacy is illegal in India, now after Surrogacy Act 2016 it is legal in Ukraine, and California while it is illegal in England, many states of United States, and in Australia, which recognize only altruistic surrogacy. In contrast, countries like Germany, Sweden, Norway, and Italy do not recognize any surrogacy agreements. India had been a favorite destination of fertility tourism before it was made illegal. Each year, couples from abroad were attracted to India by so-called surrogacy agencies because cost of the whole procedure in India is as less as one third of what it is in United States and United Kingdom (10-20 lakhs).

Keywords: surrogacy, commercial, altruistic, assisted reproductive techniques (ART)

Introduction: Background

Surrogacy is a method or agreement whereby a woman agrees to carry a pregnancy for another person or persons, who will become the newborn child's parent(s) after birth. Intended parents may seek a surrogacy arrangement when either pregnancy is medically impossible, pregnancy risks present an unacceptable danger to the mother's health or is a same sex couple's preferred method of having children. Monetary compensation may or may not be involved in these arrangements. If the surrogate receives money for the surrogacy the arrangement is considered commercial surrogacy, if she receives no compensation beyond reimbursement of medical and other reasonable expenses it is referred to as altruistic^[1]. The legality and costs of surrogacy vary widely between jurisdictions, sometimes resulting in interstate or international surrogacy arrangements.

There are laws in some countries which restrict and regulate surrogacy and the consequences of surrogacy. Some couples or individuals wanting a child in this manner but who live in a jurisdiction which does not permit surrogacy in the circumstance in which they find themselves may travel to another jurisdiction which permits it.

Types of Surrogacy

1. On the basis of Selection of Surrogate Mother:

- **Altruistic surrogacy:** Where the surrogate mother receives no financial rewards for her pregnancy or the relinquishment of the child to the genetic parents except necessary medical expenses. This usually happens when the surrogate mother is a relative
- **Commercial surrogacy:** Where the surrogate mother is paid over and above the necessary medical expenses. This usually happens when the surrogate mother is not related to the mother.

2. On the basis of Embryos:

- **Traditional Surrogacy:** In this method, the surrogate mother carries the child for the full term and delivers it for the couple through artificial insemination. The surrogate mother is the biological mother of the child.
- **Gestational Surrogacy:** In this, the eggs of the mother are fertilized with father's/donor's sperm and then the embryo is placed into the uterus of the surrogate. In this case the biological mother will be the one whose eggs are used and surrogate mother is called the birth mother.

Surrogacy for whom?

At a glance, surrogacy seems like an attractive alternative as a poor surrogate mother gets very much needed money, an infertile couple gets their long-desired biologically related baby and the country earns foreign currency, but the real picture reveals the bitter truth. Due to lack of proper legislation, both surrogate mothers and intended parents are somehow exploited and the profit is earned by middlemen and commercial agencies. There is no transparency in the whole system, and the chance of getting involved in legal problems is there due to unpredictable regulations governing surrogacy in India.

Although in 2005, ICMR issued guidelines for accreditation, supervision, and regulation of ART clinics in India, these guidelines are repeatedly violated. Frustration of cross border childless couples is easily understandable who not only have to cope up with language barrier, but sometimes have to fight a long legal battle to get their child. Even if everything goes well, they have to stay in India for 2-3 months for completion of formalities after the birth of baby. The cross border surrogacy leads to problems in citizenship, nationality, motherhood, parentage, and rights of a child. There are occasions where children are denied nationality of the country of intended parents and this results in either a long legal battle like in case of the German couple with twin surrogate children or the Israeli gay couple who had to undergo DNA testing to establish parentage or have a bleak future in orphanage for the child. There are incidences where the child given to couple after surrogacy is not genetically related to them and in turn, is disowned by the intended parent and has to spend his life in an orphanage.

If we look upon the problem of surrogate mothers, things are even worse and unethical. The poor, illiterate women of rural background are often persuaded in such deals by their spouse or middlemen for earning easy money. These women have no right on decision regarding their own body and life. In India, there is no provision of psychological screening or legal counseling, which is mandatory in USA. After recruitment by commercial agencies, these women are shifted into hostels for the whole duration of pregnancy on the pretext of taking antenatal care. The real motive is to guard them and to avoid any social stigma of being outcast by their community. These women spend the whole tenure of pregnancy worrying about their household and children. They are allowed to go out only for antenatal visits and are allowed to meet their family only on Sundays. The worst part is that in case of unfavorable outcome of pregnancy, they are unlikely to be paid, and there is no provision of insurance or post-pregnancy medical and psychiatric support for them. Rich career women who do not want to take the trouble of carrying their own pregnancy are resorting to hiring surrogate mothers. There are a number of moral and ethical issues regarding surrogacy, which has become more of a commercial racket, and there is an urgent need for framing and implementation of laws for the parents and the surrogate mother.

Surrogacy (Regulation) bill, 2016

It bans all forms of commercial surrogacy in India.]

Altruistic surrogacy is permitted on the fulfillment of certain conditions.]

Only childless couples who have been married for at least five

years, provided that at least one of them is proven to have fertility related issues.→

Married couples who have biological or adopted children, single people, live-in partners, homosexual persons would not be eligible to opt for surrogacy.→

Foreign nationals, NRIs, OCIs etc won't be allowed to commission surrogacy in India.→

Childless or unmarried women would not be allowed to be surrogate mothers.}]

Surrogate mothers may only be close relatives, and they would be permitted only once to be a surrogate.}]

The rights of both the surrogate mother and children are protected as per the Bill.}]

The Bill will regulate surrogacy in India by establishing National Surrogacy Board at the central level and State Surrogacy Boards and Appropriate Authorities in the State and Union Territories.

Positive points

It aims to ensure better health and life of the surrogate mother by;

- banning commercial surrogacy
- bringing in altruistic surrogacy model
- Allowing a woman to be a surrogate only once in her lifetime.

The exploitation of women would be prevented especially of those who have no awareness about their rights.

It would curb child trafficking and illegal surrogacy racket by; Prescribing the punishment and fine (10 years and upto 10 lakhs) for the undertaking of commercial surrogacy, abandonment of child, sell or import of a human embryo.

Banning the egg donation

It is the first comprehensive legislation on surrogacy which has created an institutional mechanism for the regulation of surrogacy at both central and state level. With the strict provisions in the bill for surrogacy, Adoption can be another alternative to realize the parenthood with which the happiness of an orphan child and that of the couple can be ensured at the same time.

Limitations

The bill proposes to ban all forms of commercial surrogacy. It shows a paternalistic attitude in which the government decides the good and bad for the citizens by depriving their freedom.

It makes surrogacy an issue of moral and ethics, when it is not. The bill doesn't recognize the natural right of a woman to bear children and her Constitutional right to work and earn wages.

The proposed provisions in the Bill might force the industry to go underground. Chances of unethical practices and corruption would be high in such a strict regulation.

It ignores the changing realities of modern society, where single parents is a reality.

It lacks vision and smacks of gender discrimination by taking away this right from same sex couples. Further, as per Article 14 of the Indian Constitution all citizens are equal before the law. By placing restrictions on the right to have a surrogate child such that it is accorded to heterosexual couples alone, the government has negated the equality that the Constitution guarantees to single parents and homosexuals.

As per Supreme Court ruling, live-in relationships are on a par with marriage and children born out of long-standing live-in

relationships are legitimate. By limiting the option of surrogacy to legally married couples, the government is countering the acceptability of live-in relationships and setting a wrong precedent.

A close relative might be forced by the family members to become a surrogate mother for an infertile couple in the family. In metro cities where nuclear family is a norm, it would be very difficult to find a relative who accept to be commissioned as a surrogate mother.

The stigma attached to surrogacy would also prevent anyone (among the relatives) to come forward to be commissioned as surrogate mothers. This would reduce choices before a couple for finding commissioning Mothers.

The “adoption” could not be the remedy as the process is long and tedious. Also, the bloodline factor stops people to move from surrogacy to adoption

Discussion

Surrogacy Bill and Transparency in Assisted Reproductive Technology in India

ART (Assisted Reproduction today is a 30 billion industry in India with over 3000 clinics across the country. Over the years, Assisted Reproductive Technology (ART) has turned out to be the boon for those deprived of progeny. ART has grown exponentially in the last few years and is now more and more available to infertile couples in both developed and developing countries. India is poised to be the leader in the world of ART with rapid growths in the number of ART centers and the ART cycles performed annually. The In Vitro Fertilization (IVF) is the most common form of ART (Assisted Reproductive Technology). IVF is the artificial technique of bestowing parenthood that has brought smile to millions of those failing to conceive naturally. IVF process involves fertilization by combining an egg and sperm in a laboratory dish manually and then transferring the embryo to the uterus. The ART has resulted in a tectonic shift in the way physicians and the general population perceives infertility and ethics.

While a successful pregnancy and a healthy baby born are, of course, the biggest advantages of undertaking an IVF procedure. But several legal and ethical aspects more often than not pose deterrents to its smooth execution. With infertility on the rise due to erratic life style and late marriages, more and more couples are opting for ART or adopted babies. The safe success rate of ART is 40%. ART today is a 30 billion industry in India with over 3000 clinics across the country. Infertility is the commonest Medical problem in 30-40 years of age group of couples in India. The expansion and proliferation of assisted reproductive technologies (ART) has been facilitated by economic globalization wherein reproductive tissues like sperm, ova, and uteri are traded like any other commodity to make profit, says a new study, adding that India has emerged as the surrogacy outsourcing capital of the world. In 2008, the Indian Council of Medical Research (ICMR) developed a draft for Assisted Reproductive Technology (Regulation) Bill and sent to the Ministry of Health & Family Welfare, which was then been revised by the Ministry of Law & Justice as Assisted Reproductive Technology (Regulation) Bill-2013. Last year, the Assisted Reproductive Technology (Regulation) Bill-2016 came before the Cabinet for consideration. The ART (Regulation) Bill proposed to establish National Board, State Boards and National Registry

of (ART) in India for accreditation and supervision of ART clinics and ART Banks, ensuring that services provided by these are ethical and that the medical, social and legal rights of all the concerned are protected with maximum benefit to all the stakeholders within a recognized framework of ethics and good medical practices. This resulted into the Surrogacy (Regulation) Bill 2016 by the Health Ministry that proposed to legalize altruistic, domestic surrogacy. The bill although seeks to control exploitation of surrogate child and mother for unethical purposes. Despite this the bill in opinion of many ART experts fails to address various issues including transparency and fair practices.

One of the major issues is of that of lack of screening guidelines of couples based their social economic background, criminal records in past, their health, age, and family information check before they are permitted to commission surrogacy. In the absence of such screening guidelines the surrogate child’s interests suffers considerable risk from being put under the guardianship of those who lack credibility or even be detrimental to the child’s security. Although the Bill prohibits and penalizes abandonment rejection of the surrogate by couple post-birth. The bill defines “abandoned child” by defining grounds of abandonment as “physical mental defect or infirmity, or being more than one in number” excluding “sex of the child” among the same. In this aspect the Bill does not address the plight of such surrogate child found non-genetically connected with either of the parents post birth due to mishaps arising out of switching or swapping of donated frozen gametes of couples in clinics or labs, sperm banks. The bill is unclear if such a surrogate child is allowed to be abandoned or rejected or left in adoption home or orphanage.

Among the biggest misses of the bill is based on sex selective surrogacy or family balancing surrogacy to have child of a pre-determined sex, in which the earlier ART Bill prohibited penalized the same by adding relevant provisions of Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 in ART, Surrogacy. Among other offences and punishments, the Bill does not talk about are “trafficking or sale, abduction of surrogate child” in guise of either altruistic or commercial surrogacy arrangement in any form under the same.

Apart from the above mentioned aspects there are various other aspects in relation to the rights of the surrogate mother and the child the Bill lacks in clarity and transparency required to protect these rights sufficiently in case of legal issues arise. This it is imperative that before the bill is enacted these aspects are ironed out for it to be effectively regulate the ART process in the country.

Conclusion

It seems ironical that people are engaging in the practice of surrogacy when nearly 12 million Indian children are orphans. Adoption of a child in India is a complicated and a lengthy procedure for those childless couples who want to give a home to these children. Even 60 years of Independence have not given a comprehensive adoption law applicable to all its citizens, irrespective of the religion or the country they live in as Non-Resident Indians (NRIs), Persons of Indian Origin (PIOs) or Overseas Citizens of India (OCIs). As a result, they resort to the options of IVF or surrogacy. The Guardian and Wards Act, 1890 permits Guardianship and not adoption. The

Hindu Adoption and Maintenance Act, 1956 does not permit non-Hindus to adopt a Hindu child, and requirements of immigration after adoption have further hurdles

The Surrogacy (Regulation) bill, 2016 tries to address the concerns of two important stakeholders in the surrogacy industry- surrogate mother and surrogate child- to prevent their exploitation and to ensure their rights. The focus of the bill should have been twin – a) protecting the rights of the child and b) honoring the contract between the mother and commissioning parents. But by completely banning commercial surrogacy, the bill has given lopsided focus on the surrogate mother. Surrogacy industry in India is fully grown today.

Banning it at this stage may create implementation challenges, extortion by state authorities and push the business underground. A proper law with strict regulations and enforcement which would address the concerns of all stakeholders in the industry is required at this stage.

There is a strong need to modify and make the adoption procedure simple for all. This will bring down the rates of surrogacy. Altruistic and not commercial surrogacy should be promoted. Laws should be framed and implemented to cover the grey areas and to protect the rights of women and children.

References

1. Why surrogacy bill is necessary?, Soumya Swaminathan, The Hindu, 2016.
2. Surrogacy bill is long overdue. The Hindu Editorial, 2016.
3. Unequal by law, Indian Express, column by Kapil Sibal, 2016.
4. What's wrong with the Surrogacy Bill, Nidhi Gupta, and The Hindu Reads?
5. http://surrogacylawsindia.com/legality.php?id=%207&menu_id=71.
6. National guidelines for the accreditation supervision and regulation of ART clinics in India http://www.icmr.nic.in/art/art_clinics.htm.
7. <http://www.timesonline.co.uk/tol/news/world/asia/article/7113463.ecc>.
8. The Associated Press () India's surrogate mother business raises questions of global ethics 2007. <http://www.nydailynews.com/news/world/india-surrogate-motherbusiness-raises-questions-global-ethics-article-1.276982>.
9. ART Regulation draft bill 2010.: <http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf>.
10. <http://www.mp.gov.in/health/acts/mtp%20Act.pdf>.
11. Central adoption resource authority Available from: <http://www.adoptionindia.nic.in>.
12. Imrie, Susan; Jadva, Vasanti the long-term experiences of surrogates: relationships and contact with surrogacy families in genetic and gestational surrogacy arrangements. Reproductive Bio Medicine Online. 2014; 29(4):424-435.