

Womb For Rent: An Aid Or A Scotch?

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Introduction

The yearning and longing to have ones children is a natural one but there are some wretched and doomed couples who are not in a position or rather who cannot bear their own children due to various reasons .Throughout the globe infertility has always been seen as a problem with no succor to ask for but now this is no more considered a quandary as renting a womb or in other words surrogacy has provided hope and light in the eyes and hearts of many frustrated, depressed, dejected and down in the dumps couples who could not bear child or rather who could not have child due to some physiological conditions which leads or has lead to repeated miscarriage or due to some diseases like high blood pressure, heart, liver or kidney disease. Also when the woman has medical problems relating to her uterus, when she had hysterectomy and her uterus has been removed, when she have had unsuccessful attempts of various assisted reproduction techniques such as IVF, when they are unable to adopt a child due to factors like age, marital status, their sexual orientation etc(1). Some women who are very striving, pushy and are very well placed in their lives or who are not so settled may for career purposes (2) go for surrogacy. Additionally, there could also be phobia of pregnancy or woman may not want to undergo pain and sickness related with pregnancy and child birth. Factors such as escalation and

augmentation of infertility in modern society(3), attenuation and dwindling number of children available for adoption in some countries, opening out and expansion of surrogacy contract and commercial surrogacy agencies and the introduction of new technologies like ICSI- Intracytoplasmic sperm injection, in vitro fertilization (IVF) and Intra Uterine Insemination (IUI) have resulted in promoting publicity and public interest in the form of surrogacy arrangements between infertile couples and surrogate mothers.

Although surrogacy is considered a boon as it really helps infertile and dejected couples, yet there are so many issues related to it- whether a surrogate is giving her free consent and is not under the control and influence of some factors? Is she familiar with all the technicalities and complications involved in the process? Is money factor an influential factor for which the surrogate has agreed to enter into the contract? Will she be able to happily part with the baby after delivery whom she has kept in her womb for nine long months?(4) Additionally there can be problems when the child is diagnosed with disability or disease and the commissioning parents refuse to accept the child or it could also be vice versa. Then, there could also be problems incases of multiple births of children. The commissioning couple may desire only for one baby. Like in a case a California couple backed out of their

contract when a British Woman who was carrying twins refused to abort with one of the fetuses.(5)

These and many other issues keep on haunting and it seriously requires contemplation and ponderation.

Surrogacy is not only present in the modern times, earlier also it was very much ubiquitous. The first known infertile couple are Abraham and Sarah. Sarah who was unable to conceive asked her husband Abraham to compromise with their handmaid whose name was Hager so that they could start a family of their own through her. “ Now Sarah ,Abraham’s wife bore him no children and she had a handmaid , an Egyptian , whose name was Hagar and Sarah said unto Abraham behold now, the Lord hath restrained me from bearing: I pray thee, go in unto my maid: it may be that I may obtain children by her”. Genesis 16:1-2 (King James)(6)

As far as India is concerned we do not find any authentic documents. However, in the Mahabharata , Gandhari, ardhagini of king of Hastinapur, Dhritrashtra became pregnant and gave birth to a mass(mole). The mass consisted of so many cells. . Bhagwat Vyasa found that out of so many cells in the mass,101 were normal. These cells were then allowed to grow till its full term in vitro. Now out of these 101 cells, 100 developed into male children (Kaurvas) and 1 into female child whose name was Dusheela. Not only this, there are many other example ‘such as ‘ sage Gautam producing two children, Kripa and Kripa, birth of Drishtadumana and Draupadi. Additionally there is also a story of Devki regarding her seventh pregnancy which relates to embryo transfer.(7)

Meaning and Types

The word ‘surrogate literally means “substitute”. Thus, the word surrogate mother is a substitute mother. She is the woman who on account of

fiscal or empathetic reasons agrees to bear the child of another and delivers the child to this other person after the birth.

Surrogate arrangements may be made with (commercial) or without (altruistic) payment to the surrogate mother.

Surrogacy is of two types:

Traditional surrogacy: In traditional surrogacy the mother is related to the child genetically. Artificial insemination of her own eggs is done either by using In-Vitro fertilization (IVF) or IUI(Intra –Uterus Insemination) with the sperm of the intended father or sperm donor . As the mother is genetically related to the child later on it becomes very difficult for her to part and separate with the child. There are number of cases endorsing this.

Gestational surrogacy: In Gestational surrogacy the eggs of the woman are not used and thus she is not genetically related to the child. Here either the intended mother’s or any other egg donor eggs are taken and are invitro fertilized. The sperm could be either of the intended father or any other sperm donor and after this is done it is then transplanted into the surrogate’s uterus.In reality the surrogate mother in such cases rents her womb for a specific period and after the child is born gives away the child to the genetic mother .

Effects and Impact of Surrogacy

Inspite of the fact that surrogacy has provided hope to many disconsolate and crestfallen couples, there are people who advocate that there are lot of psychological effects and it is not only the woman but also the child who is effected .Undoubtedly, during the time of pregnancy a close bond, tie and relationship is established between the mother and the foetus. The bond is so closed that when child is born, the mother can easily identify her child from its aroma and whiff. The hormone oxytocin plays a crucial and vital and important role. It is a response prompted,

elicited and activated by skin to skin contact and eye gazing, which promote further psychological, psychosomatic and physiological bonding.(8) If we talk about the woman it is but natural that she becomes attached with foetus in utero. There are catenas of cases where when the child is born, mother has either lamented or refuted the parting of child from herself and even in those cases where they have relinquished and renounced child, they had suffered from many psychological problems and could not concentrate anywhere. The effect is not visible and seen only on the mother, even the surrogate child suffers identity crises and he always have a feeling of detachment and aloofness. People also say that surrogate mother contracts may also violate public policy against exploiting financially disadvantaged women. Opponents of surrogacy also say that there is analogy and akinness between commercial surrogacy and prostitution. Andrew Dworkin, American Feminist observes: “[m]otherland is becoming a new branch of female prostitution with the help of scientists who want access to the womb for experimentation and power..... Women can sell reproductive capacities the same way old time prostitutes sold sexual ones but without the stigma of whoring because there is no penile intrusion. It is the womb not the vagina that is being bought.”(9)

Additionally, according to Prokopijevic, “In both cases one’s physical service is being offered, in both instances a deep personal or emotional relationship is not required for the transaction to be completed, in both cases material compensation is offered for the physical services provided”. However he also says that these analogies are shallow, superficial and relatively trivial and trifling compared the dissimilarities between the two cases.(10)

It is submitted that although people have their own reasons and rationales and disapprove and hold in bad books surrogate arrangements but why

it is forgotten that surrogacy gives the infertile couple a reward which no one on this earth can stand in. Although people may also proceed for adoption but it lacks the genetic and biological link which the couple has in cases of surrogacy. People spend extravagantly and are so spendthrift when it comes to surrogacy for the very reason that they would be attached and emotionally involved to the surrogate child. In spite of the fact that there is so much denigration and people and countries are vehemently and fervently opposed to surrogacy, it is such an issue which is mounting up, swelling and escalating in so many countries abroad.

Here it will not be out of place to mention surrogacy in different countries.

Surrogacy in America

In United States, surrogacy commenced more than 30 years ago and it was only after first baby in England was born through in vitro fertilization. Even in United States, surrogacy is a controversial, contentious and complicated issue.

“The legal issues in the United States are complicated, having to do with the fact that the surrogate mother still has legal rights to that child until they sign over their parental rights at the time of the delivery. Of course, and there’s the factor of costs. For some couples in the United States surrogacy can reach up to \$80000..... You have no idea if your surrogate mother is smoking, drinking alcohol, doing drugs. You don’t know what she’s doing. You have a third party agency as a mediator between the two of you, but there’s no one policing her in the sense that you don’t know what’s going on.” Julie (11)

In United States, the case of Baby M (537 A.2d 1227 (N.J. 1987) is the leading and landmark case on surrogacy.

The New Jersey Supreme Court laid down that surrogacy contract which was entered between the

parties was in conflict with the laws and the public policy of the State. However, the New Jersey Supreme Court found that child's custody to the Sterns would be for the welfare of the child and granted visitation rights to Whitehead. It remanded to the trial court for a finding as to how and when that visitation should proceed. (12)

The case of baby M was an eye opener and divergent views came in from lawmakers. Accordingly and presently, different states in United States have different and divergent laws on surrogacy and there is no oneness and unanimity over it. Some States allow it, other ban it and some other simply recognize intended parents (13)

Lets have a look at surrogacy in some of the states mentioned below in United States (14)

California: In California, the courts are applying State's Uniform Parentage Act to deal with cases on surrogacy. The leading case of Johnson v. Calvert was decided by the California Supreme Court. Thus, California is surrogacy comrade

New York: In New York, there is no penalty provided for altruistic surrogacy contracts but at the same time they are also not enforced. As far as commercial surrogacy contracts are concerned, civil penalties are provided as such types of contracts contravene public policy

Michigan: All types of surrogacy contracts are totally prohibited in Michigan. If anyone contravenes it is considered as a felony and the punishment that is provided is upto 5 years imprisonment and a fine upto \$50000.

Arkansas: Arkansas is considered to be surrogacy friendly state. In the year 1989, Act 647 was passed which states that in surrogacy arrangements even though the mother is not genetically related to the child the biological father and his wife will be considered as the legal parents of the child.

Texas: In Texas, it is the Uniform parentage Act, 2002 which is applicable. It is a mandatory requirement that gestational surrogacy agreement should be validated by the court. In the case of intended mother it is necessary to show that she is unable to bear child. It is necessary for the intended parents to be married. As far as surrogate mother is concerned it is necessary that she should have had one pregnancy and delivery prior to becoming surrogate.

Alabama: The trend of the Courts is generally in favour of surrogacy

District of Columbia: Surrogacy is prohibited. Fine and imprisonment for persons contravening statute.

Georgia, Hawaii and Idaho: No law dealing with surrogacy but courts are favourable.

New Jersey: In New Jersey Traditional surrogacy is banned but favourable approach towards gestational surrogacy

New Mexico: no law governing surrogacy but courts showing favourable approach

Washington: In Washington, uncompensated surrogacy arrangements are allowed but compensated surrogacy arrangements are not allowed and are void and unenforceable.

Thus, there is no accord and unanimity about surrogacy in America. Due to lack of harmony and consensus on this issue, all the states of America have been given discretion to formulate their own policies on this contentious and somber issue. As there is no consensus, some of the jurisdictions ban and disallow surrogacy, some have still to settle on and some others permit it with certain conditions and restrictions.

Surrogacy in England

In United Kingdom, surrogacy arrangements have been legalized since the year 2009. The courts

have got the power to pass parental orders which are at par with the adoption orders under section 30 of Human Fertilization and Embryology Act, 1990. Here it will not be out of place to mention that it is illegal to pay more expenses than incurred incases on surrogacy

Surrogacy in India

The Supreme Court of India recognized commercial surrogacy in 2002. Since money is involved in commercial surrogacy , it usually resorted by affluent and well heeled people who can afford the cost that is involved. The infertile couple agree to pay the surrogate all the expenses that are incurred during pregnancy and after delivery. A contract could also be entered into between the parties and terms like surrogate to remain teetotaler, to abstain from sexual intercourse during pregnancy, to forego all the relations with the child after birth etc may be included. Thus, commercial surrogacy is valid in India (15). India is emerging as hub for surrogacy tourism. Various factors like stringent and restrictive laws in other countries and absence of specific legislation in India, ease of legal procedure, low cost involved in the process , role played by media and internet , social stigma attached to infertility , Indian women considered to be teetotaler etc have helped India to become favorite destination where people can come and get their dreams and desires fulfilled (16). Most of the cases on surrogacy are reported from Anand which is a city in Gujarat and is inhabited by 100000 people. People from all over the world prefer Anand surrogates because of the low cost involved. For example childbirth through surrogacy in Canada or United States takes around between \$ 30000 and \$ 70000, On the contrary in Anand it comes at around for less than \$20000. Apart from it, the clinic has several hostels, where surrogates are kept under complete control and check during the time of their pregnancies.

Although surrogacy is really a boon for infertile couples yet it is considered as a stigma by many people in India and as a result her near and dear ones usually keep it a secret. During the last stages of pregnancies, the women usually hide in the clinic or take accommodation in hostels. Some even tell their near and dear ones that the baby was their own but has been miscarried (17)

According to one of the surrogate(18)

“My parents stay close by, in Ahmadabad, but we didn’t tell them. When it started showing we told them it is ours. When they asked us after the delivery where the baby was we told them it had died during delivery. I am their daughter but still I think they’ll misunderstood what I am doing. They’ll think their daughter has been sleeping with an American”

Another surrogate (19)

“Who could choose to do this? I have had a lifetime worth of injections pumped into me. Some big ones in my hips hurt so much. In the beginning I had about twenty to twenty five pills almost everyday. I feel bloated all the time. But I know I have to do it for my children’s future. This is not a choice; this is majboori[a necessity]. When we heard of surrogacy, we didn’t have any clothes to wear after the rains- just one pair that used to get wet and our roof had fallen down. What were we to do? If your family is starving what will you do with respect? Prestige won’t fill an empty stomach”.

Thus, above mentioned are some of the heart rending facts narrated by the poor surrogates. The poor illiterate women who are from rustic background are persuaded by their spouses or middleman on the pretext of easy minting money. This is really heart rending that in India, we do not have mandatory counseling sessions as is there in United States. These women who do not have any say or control over body are recruited by

commercial agencies and are shifted to hostels for the whole term of their pregnancies.

In some of the cases it is also seen that it is not only that women undergo surrogacy because of her vulnerability, in some cases on their own account also in order to lead a regal and decorous life they opt for surrogacy.

In one of the cases, surrogate said (20)

“You know I had always dreamt of being an airhostess. But when I saw the situation at home-with my father earning only 1500(rupees) I knew I couldn't study anymore. I just wanted to see America once, so badly. Once I got married I thought it would never happen. But now that I am planning to do this for the second time, I feel “why not”? If I can do this here, may be I can get some job there as well, no? Will you take me with you to America?”

Thus, it is seen that there are various factors responsible for forcing a woman to undergo surrogacy. In some cases they are forced to undergo and there are also cases where women out of their own choices have chosen this path and there is no force and compulsion.

Presently, the Surrogacy (Regulation) Bill, 2016 has been drafted by the government. The present bill makes children born through surrogacy legal and transparent. It bans, forbids and proscribes foreigners from hiring surrogates in India. The provision has been made for the welfare of children born through surrogacy(21). There has been catena of cases where foreigners have refuted and rebuffed to accept children born through surrogacy may be on account of disability or birth of twins etc. The new bill only allows Indian couples to go for surrogacy and under it, they are not allowed to back out from their commitments. Under the bill, the surrogate woman can only be from 21 to 35 years and can have only five successful births. This is inclusive

of surrogacy (22). Prior to this, the Surrogacy (Regulation) Bill 2014 had been introduced in Lok Sabha. The bill talked about the procedure for the persons seeking use of Assisted Reproductive Technology . It said that people who are interested in surrogacy through Assisted Reproductive Technology are required to inform National Board in the district about the clinic where they want to seek surrogacy, the woman who had consented to act as a surrogate mother, the agreement with such woman who is eligible to enter into an agreement. It was a requirement that all expenses be it on medical tests and treatments, food, health insurance, compensation, other requirements during the whole term i.e. from the date of the agreement, during pregnancy and post delivery are to be borne by intended parents. The woman may also take compensation for agreeing to become a surrogate mother. The surrogate mother shall also be tested for all communicable diseases and shall be declared medically fit from the clinic where she intends to take treatment. It is necessary that the surrogate mother should not be less than 21 years and should not be above 35 years. She should have delivered not less than two children from her marriage and consent of her spouse should be taken to act as a surrogate mother. The bill also said that no woman shall act as a surrogate for more than four live births in her life and this is inclusive of her own children. Under the bill, it was necessary that surrogate mother must register herself at the hospital and declare herself to be surrogate mother and should also provide names and addresses of the persons for whom she has agreed and is acting as a surrogate. It was a requirement that she shall relinquish all parental rights over the child. The bill also talked about foreign couple, not resident in India and are interested in seeking surrogacy in India. It was necessary for them to appoint a local guardian who will take care of surrogate during and after pregnancy. They would also pay premium insurance cover to the surrogate mother and the

child till the child is given to the commissioning parents. They were also required to produce a letter from the embassy stating that their country permits surrogacy and also the child born will be allowed entry in their country as their biological child.

Conclusion

Renting a womb or Surrogacy is one of the products of advanced science and technology. In many countries as has been seen renting a womb is considered illegal may be on moral grounds or ethically it is not considered justified. No problem arises in cases on altruistic surrogacy, the problem is in the area of commercial surrogacy where money is taken for keeping a child in the womb of surrogate mother. The question which needs to be pondered over is- are all commercial surrogacy immoral and unethical? The answer is probably 'NO'. Why don't people understand that in cases on commercial surrogacy, both the parties derive and draw benefit from each other as surrogacy is actually considered and seen as a boon for infertile couples which has really brought happiness on their grim and gloomy faces and at the same time many downtrodden, economically weaker and helpless women are being helped and are being taken out of their poverty. Why do we take a negative side of everything. Why do we see that woman in every case is being exploited? She might on her own will be ready to help the couple who cannot bear their own child. When both the parties are deriving benefit and it is mutual, what is the harm? Of course in those cases where people indulge in commercial surrogacy and where woman is exploited and it is at the cost of a woman who because of her poverty and scarcity has unwillingly been compelled to enter into a contract should be punished. There is no iota of doubt that many downtrodden, browbeaten and subjugated women are abused in the name of surrogacy but it is not the universal rule and it is not applicable everywhere .In those cases where

women are willingly entering into such a contract, they should be allowed to enter into such commercial surrogacy contracts and people should not make hue and cry on this area for nothing can supersede and supplant the smile, beam and spark that surrogacy has brought on the faces of infertile couple who had lost every hope of their happiness and blissfulness. Moreover when surrogate also doesn't have problem, it is submitted that people and countries should not hype on this issue.

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