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Surrogacy: Ethical and Legal Issues

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Abstract

Surrogacy refers to a contract in which a woman carries a pregnancy “for” another couple. Number of infertile couples from all over the World approach India where commercial surrogacy is legal. 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.

Keywords: Surrogacy, commercial, altruistic

The ever-rising prevalence of infertility world over has led to advancement of assisted reproductive techniques (ART). Herein, surrogacy comes 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 legal in India,⁽¹⁾ 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 has become a favorite destination of fertility tourism. Each year, couples from abroad are 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).

Is Surrogacy Profitable for All?

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.⁽²⁾ 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.⁽³⁾

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.⁽⁴⁾

Assisted reproductive technology legislation

The Indian government has drafted a legislation, earlier floated in 2008, finally framed as ART Regulation draft bill 2010. The bill is still pending with Government and has not been presented in the Parliament. The proposed law has taken consideration of various aspects including interests of intended parents and surrogate mothers. The proposed draft needs to be properly discussed, and its ethical and moral aspect should be widely debated by social, legal, medical personal, and the society before any law is framed.

The bill acknowledges surrogacy agreements and their legal enforceability.⁽⁵⁾ The surrogacy agreements are treated at par with other contracts under the Indian Contract Act 1872 and other laws applicable to these kinds of agreements. Both the couple/single parent and surrogate mother need to enter into a surrogacy agreement covering all issues, which would be legally enforceable. Some of the features of proposed bill are that an authority at national and state level should be constituted to register and regulate the I.V.F. clinics and A.R.T centers, and a forum should be created to file complaints for grievances against clinics and ART centers. The age of the surrogate mother should be 21-35 years, and she should not have delivered more than 5 times including her own children. Surrogate mother would not be allowed to

undergo embryo transfer more than 3 times for the same couple. If the surrogate is a married woman, the consent of her spouse would be required before she may act as surrogate to prevent any legal or marital dispute. A surrogate should be screened for STD, communicable diseases and should not have received blood transfusion in last 6 month as these may have an adverse bearing on the pregnancy outcome. All the expenses including insurance of surrogate medical bill and other reasonable expenses related to pregnancy and childbirth should be borne by intended parents. A surrogacy contract should include life insurance cover for surrogate mother. The surrogate mother may also receive monetary compensation from the couple or individual as the case may be for agreeing to act as such surrogate. It is felt that to save poor surrogate mothers from exploitation, banks should directly deal with surrogate mother, and minimal remuneration to be paid to the surrogate mother should be fixed by law.

The surrogacy arrangement should also provide for financial support for the surrogate child in case the commissioning couple dies before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child so as to avoid injustice to the child. A surrogate mother should not have any parental rights over the child, and the birth certificate of the baby should bear the names of intended parents as parents in order to avoid any legal complications. Guidelines dealing with legitimacy of the child born through ART state that the child shall be presumed to be the legitimate child of the married/unmarried couple/single parent with all the attendant rights of parentage, support, and inheritance.

The ART clinics should not be allowed to advertise for surrogacy for its clients, and couples should directly seek facilities of ART Bank. The intended parents should be legally bound to accept the custody of the child/children irrespective of any abnormality in the child/children. Confidentiality should always be maintained, and the right to privacy of the donor as well as surrogate mother should be protected. If a foreigner or NRI is seeking surrogacy, they should enter an agreement with written guarantee of citizenship for the child from their government, and they should also appoint a local guardian who would be legally responsible for taking care of the surrogate during and after the pregnancy till the child is delivered to the foreigner couple or reaches their country. Sex-selective surrogacy should be prohibited, and abortions should be governed by the Medical Termination of Pregnancy Act 1971.⁽⁶⁾

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.⁽⁷⁾

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.

Footnotes

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