Commercial Surrogacy: Is it morally and ethically acceptable in India?

by Babu Sarkar

Cite as: (2011) PL December S-11

With the enormous advances in medicine and medical technologies, today 85% of the cases of infertility can be taken care of through medicines, surgery and/or the new medical technologies such as in-vitro fertilisation (IVF) and, Preamble of the Assisted Reproductive Technologies (Regulation) Bill, 2010

In general, surrogate mother is a woman who agrees, usually by contract and for a fee, to bear a child for a couple who are childless because the wife is infertile or physically incapable of carrying a developing fetus. Surrogacy is the method employed by couples when a woman becomes the carrier of their child. This mother can be the genetic mother of the child where the sperm is put in her ovary or she can be the gestational carrier where the embryo is placed in her womb in cases where the original women’s womb cannot do the same. The surrogate always carries on with the process of pregnancy with the intention of relinquishing the child after birth.

Today, there are two types of surrogacy. The first type of surrogacy arrangement is traditional surrogacy or complete surrogacy in which the eggs of the surrogate mother are used in the conception of the child. The surrogate mother is genetically related to the child and is thus more accurately considered the child’s biological mother. In this process the surrogate mother conceives the baby by means of artificial insemination (usually with the sperm of the husband). It is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb. The second type of surrogacy arrangement is gestational surrogacy, in which the wife is fertile but incapable of carrying a growing fetus; the child is conceived by IVF using the wife’s eggs and her husband’s sperm, and the resulting embryo is implanted in the surrogate mother’s uterus. There is another kind of surrogacy called altruistic surrogacy. It is a situation where the surrogate receives no financial reward for the pregnancy or the relinquishment of the child. Altruistic surrogacy can be termed as women helping women, where the surrogate agrees to undergo pregnancy for helping the couple without any consideration. Thus, surrogacy arrangements involve gamete transfer either sperm transfer, egg transfer, or both.

Legality of surrogacy around the world There is a plethora of views regarding the issue of surrogate birth in various countries. It is rather a tumultuous point of law as there are only a handful of nations recognising it and there is also a lack of uniformity in the principles being followed in these nations with respect to the phenomenon of surrogate birth. The United Kingdom was the first country ever to enact surrogacy legislation. It passed the Surrogacy Arrangements Act in 1985 whose main aim was to abolish commercial surrogacy. Under the Human Fertilisation and Embryology Act, 2000, the commissioning parents are given the status of legal parents provided he or she is genetically related to either of the commissioning parents.

In 1986 surrogacy came to national attention with Baby M, In re where the Supreme Court of New Jersey cleared the issue of custody right in the case of motherhood and held that the surrogate mother who conceived the child via artificial insemination has visitation right only and the natural father was awarded custody of Baby M but the rights of adopted mother was denied. This decision prohibited further surrogacy arrangements in that State unless the surrogate mother volunteers, without any payment, to act as a surrogate. Many State Laws of United States have given recognition to surrogacy and in some States the position is not clear. Florida law explicitly allows both gestational and traditional surrogacy agreements, but neither is available to unmarried same-sex couples. Virginia and Washington allow uncompensated surrogacy arrangements but deems illegal and unenforceable any agreement involving any payment to the surrogate mother other than medical and legal expenses. California is generally accepting of surrogacy agreements, particularly when the couple seeking surrogacy has contributed some of the genetic material. Therefore, California’s policy on surrogacy is based on genetics.

The Australian Capital Territory has the most liberal surrogacy laws among all Australian States. In Canada commercial surrogacy arrangements were prohibited in 2004 by the Assisted Human Reproduction Act. Altruistic surrogacy remains legal. In the province of Quebec, any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null. In March 2008, the Science Council of Japan proposed a ban on surrogacy and said that doctors, agents and their clients should be punished for commercial surrogacy arrangements. Commercial surrogacy is legal in Belgium, but illegal in the Netherlands. Since 2002, surrogacy is legal in Ukraine.

Commercial surrogacy in India India, surreptitiously, has become a booming centre of a fertility market with its reproductive tourism industry reportedly estimated at Rs 25,000 crores today. On 29-9-2008 in Baby Manji Yamada case it was observed by the Supreme Court that reaching industry proportions is sometimes referred to by the emotionally charged and potentially offensive terms like wombs for rent, outsourced pregnancies or baby farms. In India surrogacy is presumably considered legitimate because no Indian law prohibits surrogacy. But then, as a retort, no law permits surrogacy either. However, the changing face of law is now going to usher in a new rent-a-womb law as commercial surrogacy was legalised in India in 2002. In 2005, the Indian Council of Medical Research (ICMR) issued guidelines to check the use of Assisted Reproductive Technology (ART). But these guidelines are silent...
on many major issues and therefore, exploitation, extortion and ethical abuses in surrogacy trafficking are rampant, go undeterred and surrogate mothers are misused with impunity.\footnote{18}

Recently, the Assisted Reproductive Technologies (Regulation) Bill, 2010 and the Assisted Reproductive Technologies (Regulation) Rules, 2010, for the first time attempt to plug the loopholes which prevail in the field of surrogacy. The 2010 Bill and the Rules legalise commercial surrogacy. Here are some important provisions of the Bill:

1. The surrogate mother may receive monetary compensation for carrying the child in addition to healthcare and treatment expenses during pregnancy. [Section 34(3)]
2. The surrogate mother will relinquish all parental rights over the child once the amount is transferred. [Section 34(4)]
3. The prescribed age-limit for a surrogate mother in between 21-35 years and no woman shall act as a surrogate mother for more than five successful live births in her life, including her own children. [Section 34(5)]
4. Both the couple or individual seeking surrogacy and the surrogate mother shall enter into a surrogacy agreement which shall be legally enforceable. [Section 34(1)]

Legal and ethical issues relating to surrogate birth in India Surrogate birth is a very controversial issue both ethically and legally. The practice of renting a womb and getting a child is like outsourcing pregnancy. This trade’s business volume is estimated to be around $500 million and the numbers of cases of surrogacy are believed to be increasing at galloping rate in India.\footnote{19} But surrogate motherhood as an arrangement, in which a woman carries and bears a child for another person(s), but takes no ownership of the child born has also raised moral, ethical and legal questions about both the woman and the commissioned baby. In this regard few questions are frequently asked that, is it legal in India to become surrogate mother through a surrogate contract?; and is the contract itself valid?; or is surrogacy considered as baby selling?; and so on. On the basis of these questions, this article has tried to address the issue that whether commercial surrogacy is morally and ethically acceptable in India?

Surrogate contract and moral/ethical proposition In 1976 the lawyer Noel Keane arranged the first formal agreement between a couple and a surrogate mother in the United States. Attorney Noel Keane is generally recognised as the creator of the legal idea of surrogate motherhood. Commercial surrogacy involves reimbursement of a surrogate for carrying the contracting couple’s child in her womb and to some extent it is universally condemned. Such surrogacy can be termed as reproductive trafficking also, as it creates a national and international traffic in which women have become movable property, and object of reproductive exchange, brokered by intermediaries with profit motives. In Baby Manji Yamada case the Supreme Court observed that commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms, such as womb for rent, outsourced pregnancies or baby firms.\footnote{20}

In India, the ART Bill of 2010 includes surrogacy contracts within the ambit of the Contract Act, 1872 to make it enforceable. The Act on the other hand, prohibits contracts against public policy which includes public morality and conscience. Section 23 of the Contract Act states:

23. What considerations and objects are lawful, and what not.\footnote{“The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the court regards it as immoral, or opposed to public policy.}

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void.

In the light of Section 23 of the Contract Act, many people argue that commercial surrogacy arrangements are considered immoral as they involve giving up the material rights and the selling of babies for money, therefore, surrogacy must be banned.

Actually it is still very much a grey area in ethical and moral terms and that is why different societies and countries have responded to this possibility in different ways. In developing countries that do allow it, such as Argentina and South Africa, there are stringent norms mandated for the process, including case-by-case reviews and monitoring by independent Ethics Committees. Severing a woman’s tie with a child by contract as in case of surrogate agreements dismisses bonds between the surrogate and child that can be created by pregnancy. Exercising the physical act of pregnancy and child-bearing from the notion of motherhood necessarily leads to commoditisation. It also occurs when the surrogate mother does not desire the child for its own sake but for money. This results in treating human life like any other commodity and surrogacy contracts as contracts for the sale of goods, which is not desirable and morally as well as ethically not acceptable.

At the same time it is also universally accepted that morality changes from time to time and from place to place. It is not rational but it does reflect the will of society and therefore, it can be changed only by the will of the society. Arguments for
or against the moral codes of existing societies are futile. Thus, President Surkozi of France considers the â€œburqaâ€• immoral because it imposes burden on women, on the other hand, a Muslim critic considers Sarkoziâ€™s wife immoral for flaunting her nudity for the world to see. Who is to decide, which moral code is right and which not? Society is quite arbitrary in deciding its moral codes. Change should be attempted only through delicate moves and by consent.21

Although morality is often taken to prohibit unnatural activities but it must be concerned with promoting people living together in peace and harmony, not causing harm to others, and helping them. However, unlike most kinds of actions, a justification is needed for violating these prohibitions in order to avoid acting immorally. It is justified to violate moral rules only when the overall direct and indirect consequences would be better. Therefore, public morality must give recognition to surrogacy because it creates opportunity for endless barren mothers to get the joy of motherhood.

Lord Patrick Devlin in his article â€œMorals and the Criminal Lawâ€• wrote that:

No act of immorality should be made a criminal offence unless it is accompanied by some other feature such as indecency, corruption or exploitation â€¦ It is not the duty of law to concern itself with immorality as such â€¦ it should confine itself to those activities which offend against public order and decency or expose the ordinary citizen to what is offensive and injurious.22

In this respect the step towards legalising commercial surrogacy should be congratulated because this decision finally catches up with out time and in no way it is offensive and injurious. Public morality must not be accepted as a shield against any act of human upliftment and social change. Moral indignation, however strong, is not a valid basis for overriding individualsâ€™ fundamental rights of dignity and privacy. In our society, constitutional morality must outweigh the argument of public morality, even if it be the view of majority.

Thoroughly and morally anyone can say that surrogacy must be banned but if we go through the reality it will reveal that in a country crippled by abject poverty, how will the government body guarantee that women will not agree to surrogacy just to be able to eat two square meals a day? Again, legal recognition to surrogacy may be considered emancipatory in the sense that it recognises a womanâ€™s right to make choices regarding her body and also the right of procreation under the right to life guaranteed by Article 21 of the Constitution of India. So, it is better to give legality to this concept of surrogate contract because â€œprohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrationalâ€• 23 and ultimately such legality will create opportunity for poor women to earn their livelihood in a better way.

Conclusion and suggestions Unfortunately, there is currently no law regulating the fertility industry in our country. The draft Bill prepared by ICMR is full of lacuna, nay, it is incomplete. Therefore, to give protection of the interests of the surrogate and the commissioning parents as well as the surrogate child, there must be a law. The title of the 228th Report (2009) of the Law Commission of India is also reflecting the same view and the title is â€œNeed for Legislation to Regulate ART Clinics as well as Rights and Obligations of Parties to a Surrogacyâ€•.

Following recommendations must be taken into consideration at the time of making legislation:

- Surrogacy arrangements should provide for financial support for the surrogate child in the event of death, divorce or unwillingness of the commissioning couple/individual.
- Cases of abortions should be governed by the Medical Termination of Pregnancy Act, 1971.
- To prevent misuse and exploitation of the surrogate mother, direction of appointment of legal guardian is not enough. Qualifications to be appointed as a legal guardian as well as duties and responsibilities of such legal guardians must be well defined.
- One Special Court or Legal Authority, for adjudication and determination of legal issues and disputes arising out of surrogacy, is required. Such power of determination cannot be left to Advisory Boards who neither have the legal acumen nor the expertise to decide such specialist problems of surrogacy.
- Surrogate mothers can develop emotions that make the eventual giving away of the child extremely difficult. To give emotional support in such situations there must be an adequate mechanism in India. Å Å Å Å Å Å Å Å Å Å Å Å Å Lecturer in Law, S.J. Acharya Institute of Law, Kalyani University Campus, Kalyani, Nadia.
- â€œIt is estimated that 15% of couples around the world are infertileâ€•. Dr. Justice Ar. Lakshmanan, â€œSurrogacy, Lawyers Updateâ€•, Vol. 17, Part 1, January 2011, 8.
- Artificial insemination is a technique involving the artificial injection of sperm containing semen from a male into a female to cause pregnancy.
- In-vitro fertilisation is a technique for conception of a human embryo outside the motherâ€™s body.
- Although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing and other related expenses.
- Reetu and Basabdutta, â€œSurrogate Birthâ€•, AIR 2009 Jour 108.
- Uniform Parentage Act, 2000, Section 803.
- Civil Code of Quebec, 1991, C.64, Article 541.
- Baby Manji Yamada v. Union of India, (2008) 13 SCC 518, 523, para 13,
- National Guidelines for Accrediation, Supervision and Regulation of ART Clinics in India.
- The Sunday Statesman, Kolkata, 5-7-2009, 6.
- The Hindu, Kolkata, Monday, 10-8-2009, 13.