
LEGAL AND ETHICAL ISSUES INHERENT IN SURROGACY: AN ANALYSIS

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Surrogacy is a practice that provides the childless with the hope of fulfilling their right to procreate with the aid of a third party referred to as the surrogate mother who is able to have a source of income in lieu of giving birth to a child. However this practice at the outset may seem very amicable as it solves the purpose of both the parties, but there are many ethical issues that the parties often overlook while entering into such arrangements and oblivious of the repercussions of the failure of these agreements they are unaware of the legal implications as well. The Warnock committee report was aimed at basically a more prohibitive approach to surrogacy though it was not aimed at the complete prohibition and it essentially discouraged this practice¹. Thirteen years later the government commissioned the Margret Brazier committee which was less hostile towards the approach to surrogacy as compared to the Warnock committee report, nevertheless it provided that the regulation should not appear to either endorse or encourage the practice of surrogacy. In *Briody vs. St Helen's and Knowsley AHA*², Justice Hale concluded that surrogacy as such is not contrary to public policy but the issue is a difficult one, upon which the opinions are divided, so that it would be wise to tread with caution. She expressed the view that if there is a trend towards the acceptance and regulation as a last resort rather than towards prohibition.

The Warnock committee report outlined the major moral obligations to the practice of surrogate motherhood³.

- 1) It is inconsistent with human dignity that a woman should use her uterus for financial profit.
- 2) To deliberately become pregnant with the intention of giving up the child distorts the relationship of giving up the child distorts the relationship between the mother and the child.
- 3) It is often argued that surrogacy and especially commercial surrogacy involves baby selling in the sense that the surrogate mother agrees to lease the womb and produce a child as a product with the raw materials provided by the genetic parents.
- (4) The counterargument though to this issue is that a child is a unique individual and the sole desire of the commissioning parents, the money paid to the surrogate mother is only for the pains she incurs and the expenses that she may have to incur while bearing the pregnancy and by this agreement in no way the dignity of the child is being demanded.

Infact the Warnock committee report recommended that "a legislation be introduced to render criminal the creation or the operation in the United Kingdom of agencies whose purposes include the recruitment of women for surrogate pregnancy or making arrangements for the individual or couples who wish to use the services of a carrying mother."(Para 8.11)

²(2001) 2 FLR 1094, at pp. 1098-1100.

³ Steinbock Bonnie, Legal and ethical issues in human reproduction, Ashgate Dartmouth, p. 266-67,

(5) Another argument against this practice is that the child born out of the surrogacy arrangement is often treated cruelly and in case the child is born handicapped or with any defect he is owned. The counterargument to the same is that the commissioning parents would never treat a child that is their own in a cruel manner and such an assumption is entirely ill founded and in no sense a parent would disown the child even if he is handicapped. However the case of putting a market value upon the child may be wrong. Human life has intrinsic value it is of utmost preciousness. Justice Sorkow⁴ in the historic **Baby M** case accepted the premise that producing a child for money denigrates human dignity but he denied that this happens in a surrogacy arrangement. Ms. Whitehead was not paid for the surrender of the child to the father she was paid for her willingness to be impregnated and carry Mr. Sterns child to term. The child once born is his biological child; he cannot purchase what is already his.

(6) Some of the experts refute the claim that surrogacy amounts to baby selling it is argued that baby selling is when the born child is sold to another person here we are talking about an agreement that is entered into before even the stage of conception⁵. Although if we look at the standard contract it is when one party pays a consideration in exchange of goods and services. The contracts provide for payment in instalments during the course of the pregnancy. Under this system, the surrogate would receive payments throughout the pregnancy, and would receive a percentage of the agreed fee if she miscarried but would be entitled to the entire amount upon carrying the foetus to term, even if the child was stillborn. If the payment were solely for the services rendered, the surrogate would have fulfilled her duty by carrying the child to term. However most surrogacy contracts are not complete until the surrogate delivers the child to the intended parents. Therefore, at least a portion of the payment must be for the baby. This would make the surrogacy agreement a contract for both a service and a product, hence raising accusations of baby-selling. The question now arises therefore whether it is morally correct to put a price on the womb of a mother. The deontological approach bemoans the idea as it provides that if the intention behind an action is wrong then no matter what be the consequences it is deemed to be wrong only. The argument that the couples who are infertile and are unable to procreate would fall incorrect when the means are objectionable. The deontological approach suggests that the end does not justify the means. To treat the human being as a means is like lacking all intrinsic value. According to Kantian philosophy treating the human being as an autonomous agent is the right approach, a person who is capable of formulating and pursuing progress of his own. All persons are to be treated as ends in themselves and never as means. The criticism of the deontological stems from the utilitarian approach which provides that every action must result in the maximum beneficial consequences, thus it allows surrogacy as it enables the infertile to lead a more fulfilling life and to participate in one of the great joys of life, one that would otherwise be denied to them and criticizes the deontology for being a value-laden philosophy. This

⁴ Surrogate motherhood as prenatal adoption, In Re Baby M, 217 N.J. Super 372, 525 A.2d 1157(1987)

⁵ Brenda M. Baker, A Case for Permitting Altruistic Surrogacy,

<http://www.hsph.harvard.edu/rt21/procreative/BAKER_Altruistic_Surrogacy.html> Surrogacy according to some jurists is not selling the baby because they believe that sale can be made only if it is the women's child however the child is not her own but the egg and sperm of the intended parents or the couple and the woman acting as a surrogate mother rents her womb for carrying the child which is not same as selling.

is also supported by *libertarian theory* of individual freedom which advocates for allowing the willing couples to enter freely negotiated contracts⁶.

(7) Another argument that is levelled often against surrogacy is that it breaks the bond between the mother and the child as the child might be hurt when it comes to know that somebody was paid money for its birth. In short, most policymakers want a surrogate to be motivated by altruism – a service out of love and a sense of social Responsibility - rather than a profit motive (Brazier report). Elizabeth Anderson argues that it is not in the best interests of the child to discover that the gestational mother gave her away in return for money shortly after the birth. The surrogate mothers own child's sense of security might be undermined by witnessing that their mother giving away a child to whom she has just given birth, even though this claim backed by any evidence because of the limited number of surrogate births the long term impact of surrogacy arrangements upon children is yet to be ascertained. She further suggests that commercial surrogacy substitutes market norms for some of the norms of the parental love. For in this practice the natural mother deliberately conceives a child with the intention of giving it up for material advantage. Her renunciation of parental responsibilities is not done for the child's sake nor for the sake of fulfilling an interest she shares with the child but typically for her own sake or in case it is motivated by altruism then for the sake of the intended parents. The rights are thus treated as a kind of property right they treat the child itself as a commodity which may be bought as well as sold. Further she claims that the application of commercial norms to women's labour reduces the surrogate mothers from the person worthy of respect and consideration to objects of mere use⁷.

(8) It is also argued though that money is not the deciding factor for women's participation in surrogacy. Studies have proven that this is not the only factor determinative; it is often that the surrogates are moved by the plight of the infertile family members and friends. Some enjoy the aspect of parenting and want to help the infertile couples become parents. Women also describe the experience as the one incurring psychic benefits that they received from the feelings that they were helping someone meet a joyous life goal. The brazier report also acknowledges the experience as shared by many women as an emotionally rewarding experience with no obvious ill effects on them or their families.

It is often witnessed that commercial surrogacy mostly attracts poor women, when women are presented with measure for fighting poverty then women prefer paid surrogacy. It is because of this that India is a viable destination of surrogacy for foreigners. Though there is another school of thought that believes that the right to liberty is curtailed. The woman or the surrogate mother has the right to use her body to give birth to the baby of another. To deny her such a right would be violating her right to liberty⁸.

(9) The other ethical argument against surrogacy is that it encourages the exploitation of women; one of the primary concerns about commercial surrogacy is the very real potential for exploitation

⁶ Deontology is premised on the principle that when we follow our duty we behave morally, when we fail to follow our duty we behave immorally. In the deontological sense duties, rules and obligations are determined by god and being moral is a matter of obeying god. It dwells into the aspect of goodness or badness of the intention or motive behind the actions it is not concerned with the consequences. If you have a moral duty of not lying then lying is always wrong, even if it results in harm done.

⁷Is Women's Labor Commodity?' (1990) 19 Philosophy and Public Affairs.

⁸Lal Neeta 'Regulating the surrogacy boom', <<http://newsblaze.com/story/20081223152045tsop.nb/topstory.html>>January 20, 2012.

and coercion. Surrogacy does not, however, have to be commercial to be coercive. In situations where a couple is infertile, there may be intense family pressure upon a female sibling to become a surrogate to provide a child for the couple. Moreover, this pressure may not be overt, but might manifest itself through feelings of guilt or through strong family opinion, so that the potential surrogate sees no other means of remedying the situation for the infertile couple. Whether or not surrogacy is commercialized, when set within the context of women's inequality, it inevitably supports and reinforces the view that bearing and raising children is what being a woman is all about. The aspect of commercialization often involves the surrogate being exploited by the rich and secondly due to lack of informed consent the woman is forced to part from the child before even the bond with the child grows thus making the woman more susceptible to anger, depression and withdrawal.

(10) Many argue that instead of commercial surrogacy, altruistic surrogacy is allowed however it must be kept in mind that often surrogacy without payment may lead to exploitation as is the case of hiring surrogates within the families as compared to surrogacy with payment. It is opined that if surrogacy becomes an avenue by which women in richer countries choose poorer women in our country to bear their babies, then it is economic exploitation, a kind of biological colonization⁹. The trauma that a woman undergoes while parting with the child also needs to be talked about. It is true that the child is not her own biological child however the women who undergoes so much suffering and pains in carrying the child for 9 months it is very difficult for her to part away with the same. Unlike adoption and guardianship the concept of surrogacy is bereft of the interests of the child in the sense that the arrangement is primarily based on contractual obligations having little regard for the welfare of the child.

Justice Tirath Singh Thakur, Chief Justice of the Punjab and Haryana High Court, highlighted the various conflicting views on the issue, which he termed as highly provocative and debatable. "Whenever any new issue comes up, views are polarised between two groups, who take very strong positions. The same is true for surrogate motherhood. I think the need of the hour is to provide a practical and reasonable middle path through comprehensive legislation. We have to make sure that our people are not exploited, and thus, sufficient checks have to be provided"¹⁰.

Feminist writers try to identify the ethical and legal issues in surrogacy; the issues that may accrue depend on the surrogacy in question the relationship of the parties involved. Concerns about surrogacy according to the writer cluster around commerce, commodity, consumerism and community. In the early 21st century the belief is rife, if not reasonable that anything can be bought.¹¹

The legal issues involved in surrogate motherhood:

As the cost of the medical treatment in India is very low the place acts as a very popular reproductive hub. However, the increase in the surrogate motherhood cases in India one cannot for long remain oblivious of the many legal issues surrounding the practice of surrogate motherhood, some of which have been identified for the purpose of the present study;

⁹ Lal Neeta regulating the surrogacy boom',

<<http://newsblaze.com/story/20081223152045tsop.nb/topstory.html>>January 20, 2012.

¹⁰<http://www.indianexpress.com/news/india-perceived-as-lowcost-destination-for-surrogate-motherhood/431135/> accessed on 26th March, 2012.

¹¹ Morgan Derek, *Feminists Account of Reproductive Technology*, p. 63, Issues in Medical Law and Ethics; Cavendish Publication, 200 .

(1) Commercialization involves a transaction between two parties where one of them agrees to fulfill a promise made to the other party in lieu of some consideration. However the point necessary to be considered herein is that whether such an agreement between the parties can be considered to be a contract or not. An agreement *per se* is a contract only when it is enforceable by law. Secondly all agreements are contracts if they are made by the parties competent to the contract, for a lawful consideration and with the lawful object. The present situation falls under the test of section 23 of the Indian contract Act, 1872, Section 23 makes agreements contrary to public policy unenforceable embracing within its fold such contracts which are likely to deprave, corrupt or injure the public morality. Although if the agreement is a non-commercial surrogacy agreement then that fulfils the criteria of public policy under section 23.¹²

(2) The general public policy considerations are reflected in Section 9(5) and Section 17 of Hindu Adoptions and Maintenance Act, 1956 (HAMA) which prohibits give and take of money in consideration for adoption of a child. In non-commercial surrogacy, the focus is on providing the infertile couple with custody of the child.

In legal terms surrogacy arrangements are akin to contract for services where the individual agrees to surrender some portion of his liberty in return of something such as income that shall be more valuable to him.

(3) Even though the contracts for surrogacy as of now are non-enforceable, the laws failure to enforce the contract contributes to insecurity. Giving complete freedom to the surrogate from withdrawing from the contract and keep all the money that has been paid to her opens a window for extortion in the sense that in the absence of any regulations for breach the surrogate may continue to threaten the couple to refuse to deliver the child unless she receives more money. In Israel which is the only country where surrogacy arrangements are approved the mother is permitted to retract from her agreement only if there has been a change of circumstances and the welfare of the child would not be damaged. In the United Kingdom the surrogacy contracts are essentially unenforceable in nature.

(4) In case the baby born out of the surrogate arrangement is not fit or unhealthy then what are the consequences of the same.

(5) The right to be the legal mother in case of surrogate arrangements is also a contentious issue.

(6) What status is conferred upon the child after the birth out of surrogate arrangements? (7) The birth certificates of the child must contain the name of the genetic parents¹³.

(8) In the west even though the agreements to enter into surrogate arrangements are not void however the contract is unenforceable in the court of law. The question that needs to be answered herein is that if any of the parties revokes their part of performance then will the party be liable for specific performance.

(9) Another important factor to be considered is that in case the child born out of the surrogate arrangement is disabled and is abandoned by the commissioning parents, then what are the remedies available with the child and whether the surrogate mother can assert the rights of the child in the court of law on his behalf.

¹²Supra. n 15 at p.12.

¹³Qadeer Imrana, John Mary E., "The Business and Ethics of Surrogacy" Economic & Political Weekly, commentary, p. 10, January 10, 2012; <www.surrogacy.com/legals/article/calaw.html> (accessed on 13th April, 2012)

(10) It has been established by international conventions and even under article 21 of the Indian constitution and various case laws in the west that the right to procreate is an essential right of an individual¹⁴. In the light of this settled principle can the prohibition of surrogate motherhood be termed as violation of the constitutional principles, viz. right to privacy and the right to procreate?

Hence, there are many legal and ethical issues involved in legislation of surrogacy which needs to be clarified in the proposed legislation/bill by the law makers.

¹⁴ Skinner v. Oklahoma, 316 U.S 535, and the case related to the compulsory sterilization.