

Uterus on Rent: Exploitation of Surrogate Mother

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"Behind every great fortune there is a crime".

Honoré de Balzac

Reproduction is a natural rule and not an exception. Science and technology continues to evolve novel medical procedures and treatments that always counteracts with the legal, social and ethical issues. We are yet to achieve success in developing a baby outside the womb of a mother. Undoubtedly, besides the opposing views of some governments and conflicts at socio-cultural and religious level, surrogacy and the *in vitro* fertilization (IVF: more famous as "Test Tube Baby") technique have certainly proved to be a boon for infertile or otherwise medically unfit couples or even single individual for celebrating their parenthood. In general notion, the term surrogacy refers to the (legal) practice of hiring a fertile woman (surrogate) who gives consent for carrying pregnancy usually through donor insemination (may also involve natural sexual intercourse or IVF) and further agrees to deliver baby and transfer it to the newborn's biological father and mother, respecting the terms and conditions of a contract agreement signed between the surrogate mother and the commissioning couple or individual before the woman becomes pregnant. In short Surrogacy is "a pre-fertilization contract or agreement to carry a child for biological parent or individual" [1]. In general, there are two basic kinds of surrogacy commonly distinguished as altruistic surrogacy wherein a surrogate mother who voluntarily agrees to carry a baby for infertile relatives without monetary benefits or remuneration; while in commercial surrogacy, there exists a contractual (legal) agreement between an infertile commissioning couple and an unrelated surrogate mother to carry the couple's baby for a monetary benefits. With the advent of commercial surrogacy, the scope of altruistic surrogacy was quickly overshadowed by that of commercial surrogacy, whose expansion was facilitated by "advances in [medical] technology that allow for gestational surrogacy, and greater acceptance in public opinion" [2].

In the present state-of-the-art there exist countrywide variations in the legal guidelines and ethical frames governing the issues of surrogacy. For example in Russia, the surrogacy (including commercial) has been permitted by the Family code of the Russian Federation and the Russian Law on Population Healthcare. In the USA, for example, there are no legal federal guidelines or laws governing the process of surrogacy; however the surrogacy is enforced between private parties through contracts and agreements. In many other countries like China, France and Japan have completely prohibited all forms of surrogacy and also experienced several crisis over surrogacy issues in recent years [3,4]. Interestingly, in China over 2.7 million women are unable to conceive owing to ill uterine factors thereby there is a greater demand for surrogacy, however the contemporary laws deprives such infertile parents from parenthood [5]. In India, with enforcement of Surrogacy [Regulation] Bill 2016, there will be complete ban on commercial surrogacy (including the sale and purchase of human embryo and gametes) while the ethical guidelines permits surrogacy only for couples who cannot conceive a child and the bill proclaims the prohibition of exploitation of surrogate mother and child at risk [6].

What is more embarrassing is, commercial surrogacy has been famously branded as "reproductive tourism," and equally branded a women as 'Child Machine' of personal reproductive choice. Ironically, this reproductive tourism invites the travelling of clients from one country to another country to exercise personal reproductive choices [7]. Owing to the lack of uniform regulations for surrogacy,

International commercial surrogacy or the so called “reproductive tourism,” is booming as a business of exploiting women, raising major legal issues and creating personal risks for surrogate mother, child and the commissioning parents [8]. Perhaps, the absence of a genetic tie between surrogate mother and the child made gestational surrogacy more popular and cheaper than traditional surrogacy.

The market for international surrogacy has growing progressively and it has achieved an estimated amount of six billion dollars annually worldwide and the trend is evolving in logarithmic fashion because the surrogacy commissioning clients have more preference for commercial surrogacy over adoption [9]. Surprisingly, although the surrogacy services are available in the contemporary Western world, however, because of the cost constraints, many client couples travel from affluent Western countries to low or middle income countries like Ukraine, India etc. in quest of a surrogate mother for their baby [10]. More specifically until recent times, Thailand is coming up as a “womb-of-Asia” [11]. Altogether, commercial surrogacy has made a paradigm shifts in ethics, culture, family and remodelled the concept of “motherhood” from babies being “begotten” to being “made” [12]. Commercial surrogacy is being utilized as one of the easiest and cheapest tool for “baby outsourcing” across the world. Typically in neocolonial contemporary settings, where babies are over looked as a product of commercial surrogacy “baby factory”, relatively wealthy Westerners hire the womb of a poor woman who is adversely caught in the drudgery of bread and butter produce a child for her wealthy client [13].

Risk factors are associated with any type of pregnancy that ultimately affects the woman’s life and health. In connection to this notion, the risks to the surrogate mother could be quite substantial and significant, many times which might not be compensated by monetary gains. A poor woman who enrolls in surrogacy contract is certainly vulnerable and may leave herself open to the possibility of exploitation to a greater extent. Apart from common pregnancy related problems like high blood pressure, diabetes or complications of the pregnancy, such as bleeding or premature labour are not uncommon; the surrogate mother may also need blood transfusion. Unfortunately if the HIV infected blood has been transfused owing to some medical emergency, then what is the cost of surrogacy? Can it be compensated with money alone? It is well known fact that HIV is transmitted through blood donations, in case the donor is HIV positive [14]. Many advocates of surrogacy may use the disclaimer that the donor’s blood is seriously tested for such infectious diseases using modern tools, but the fact is that if we transfuse the blood of a donor in the “diagnostic window” or “window period” (the time interval from infection to the time point when a blood specimen from that infected person first yields a positive result in a diagnostic or screening assay) the risk of HIV transmission cannot be ruled out, although it will be less but it cannot be zero [15]. Therefore, the argument of advocates of surrogacy is not a concrete reality and certainly it is not a win-win situation under such circumstances.

Besides having a history of normal birth of babies in their families, over dozens of celebrity in India have adopted commercial surrogacy in recent times and of note, few are single parent [16]. What is the societal ‘take to home message’ from a single parent? Everything is possible for them because they are ‘rich and famous’ and after all public icons. Who were those surrogate mothers? What is the economic, social and cultural background of those women? What was their real motive of being surrogate mother? What is their status after post surrogacy? No information is available. In case of single parent, as the surrogate baby grows up, naturally the child might experience anxiety about the identity of the surrogate mother. To know the name of father and mother is a birth right of a child. What is the answer? The child has neither experienced the mother’s love and affectionate care nor tasted the first breast feed which is a kind of vaccine in its initial days of development. Under such circumstances the surrogate child might develop a psychological stigma about its identity. The Article 7 of the ‘UN Convention on the Rights of the Child’ states ‘that all children have the right to be nurtured by their parents, and Article 8 directs member states to “respect the rights of the child to preserve his other identity, including nationality, name and family relations”. Is it not an infringement of the child’s human rights? Moreover usually during the pregnancy period the surrogate women are literally being kept in custody and constant vigilance. Such practices not only violates the basic human rights of women but also creates a mental stress since the commissioning parent and doctor ensures that surrogate mother do not bond with their babies.

There are several questions waiting to be legally answered by the policy makers while drafting the Surrogacy Laws. Some of the issues raised below are still not resolved fully. For example:

1. Who should be the legal beneficiaries of surrogacy arrangements? Whether infertile couples, or single men or women? Or can it be practiced for the sake simply convenience,
2. If the surrogate fetus succumbs to a particular congenital disease and a medical termination of pregnancy (TOP) is required but the surrogate mother is not willing for TOP because of her caste, culture, religious beliefs or emotional attachment, in such a case does the commissioning parents refuse to accept the baby, if yes then what is the future of surrogate baby? Similar imbroglio happened in the case of Baby Gammy [17].
3. If the surrogate baby borne handicapped and neither commissioning parent nor surrogate mother accepts the baby; what is the future of baby?
4. During the period of pregnancy the surrogate mother may undergo change her psychological and thereby may refuses to give up the child, as it happened in the case of Johnson v. Calvert (5 Cal. 4th 84, 851 P.2d 776, 1993). How to provide legal solution for such complexities?
5. When the commissioning parents from countries that prohibit surrogacy travel abroad to obtain surrogacy in another country, however, parental rights are denied by their home country. Similar situation was prevailing in the case of Aki Mukai in Japan [18]. What is the legal solution for such problems as there are no international guidelines available to be followed by member countries?
6. If the surrogacy agreement or contract involves donor insemination by natural sexual intercourse (until the baby conceives), what is the identity of a woman in agreement? Whether a surrogate mother? or a kind of prostitute? And how different is this situation from the prostitution?
7. What is the legal limit that a woman can exercise her right to make agreement or contracts regarding the use of her body for surrogacy arrangements?
8. Is the contract or agreement of surrogacy is something like contracting with prostitution, live in relationship or something like contracting for slavery? Which, if any, of these kinds of contracts should be enforceable?
9. What if, the surrogate mother does not want to carry the full term of the pregnancy owing to some unavoidable circumstances, can the State compel the surrogate mother to carry out "specific performance" of her agreement?
10. Should a child born under surrogacy contract has the legal right to know the identity of any or all of the people or records associated with child's conception and delivery?
11. Owing to increasing demand of surrogacy across the world, can it be casted as business involving brokers or third parties allowed to make profit from surrogacy business?
12. What is the legal action and quantum of punishment that needs to be taken against those social elements that does not accept surrogate mother socially or marginalize, abuse or torture, owing to surrogacy?

Apart from diverse interpretations against surrogacy adversely affecting families, motherhood, paternity and after all the health of society, it has proved to be an easiest way of achieving the parenthood. On clear grounds, there is a need to legitimize the surrogacy arrangements exclusively for those people who cannot conceive, or have a defective reproductive system or other 'proof-of-concept' circumstances which are justified on human grounds. Country-wide regulations may not circumvent the problems of international surrogacy, therefore the concrete international guidelines enforceable in any part of the world needs to be drafted by nodal agencies. While doing so, the dignity and rights of women should be on priority because the womb of a mother is a natural incubator for reproduction

and not for exploitation. Undoubtedly, the current country wide surrogacy regulations do not guarantee the prohibition of exploitation of surrogate mother by various agencies. The current state of the art, situation warrants the government and social organisations to pay special attention towards the problems of the surrogacy as it comprises the complex and complicated ethical, social and moral issues. The overall achievement lies in making the system socially, ethically and morally acceptable in concert with the dynamicity of society and full proof on legal grounds. Above all the social identity, dignity and health of a surrogate mother is of paramount importance. In future, society might develop different approaches, attitudes and mentalities towards childbearing but certainly there is no need to hasten it by enforcing surrogacy agreements in the current state of the art. Taking into consideration the present situation, surrogacy has remained a family-building option but in search of concrete legitimacy.

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