

Concerns about Commercial Surrogacy

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Abstract: *Right to reproduction, being universally recognised human right, clubbed with growing cases of infertile couples round the globe, obliges state to think twice its approaches toward surrogacy which is perceived as a means of hereditary lineage continuation and thus very often preferred over adoption. And thus prospect of ART industries is evident, of which Compensatory Surrogacy, if allowed in vindication of feminist discourses, partisan of enchasing female liberty of fertility faculty; does calls for such adequate protective mechanism ensuring that gestational mothers are in no way reduced to mere wombs. The contours of women empowerment that potentially segregates the sanctity of motherhood into biological mother and gestational mother, of which the later is subservient by agreement, are of more concern from feministic perspective when such are not purely act of magnanimous but commercial. The situation is then worst when such agreements are ventured in a patriarchal society without any adequate legal framework even to resort any related flaw. There is yet no international consensus arrived confidently to set up any universal standard of normative frame work to regulate surrogacy agreement. Commercial Surrogacy has a mixed rationale for feministic concerns that calls for more complex analysis of deeper casual connections amid women, child and society.*

Key-words:- Altruistic Surrogacy, Baby Selling, Assisted Reproductive Technology, Fertility Tourism, Surrogate Mother.

Introduction

The present paper shall endeavour to evaluate the contemporary legal protective mechanisms favouring the women rights in the country. A well known proverb that law being static in nature legs behind the dynamic society, calls for the rejuvenation of new policies to redress the new dimensions factual in the society. Surrogacy has thus evolved as a new arena of concern for its contribution and consequences of virtue and vice respectively. Addressing the problem of in-fertility it somewhere breaks new ground of feminist discourses for formulation of new legal frame work to regulate the innovative gender specific labour market that is on the verge of public acceptance in India. In spite of lack of consensus in legalization of Commercial Surrogacy both in national and international scenario followed by the academic arena it is a irresistible means to family making rights for some and capitalizing means of human weakness for some.

Surrogacy, in the present days, is a well known method of reproduction based on an agreement whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child's genetic mother i.e. the more traditional form for surrogacy where the surrogate mother contributes her own egg; or she may, as a gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo. In certain cases surrogacy is the only available option of assisted reproductive technology for parents who wish to have a baby

that is biologically related to them. However the ART Draft Bill of India and the Guidelines of Indian Council for Medical Research limited the definition of Surrogacy to the latter category where the surrogate mother is to gestate only and the basis of such shall be a surrogacy agreement.

Stakeholders in a Commercial Surrogacy Agreements taking place in India are the Commissioning Parents, the Surrogate mother and her family, the new born baby, local guardians and the Commercial sperm banks and the ART clinics but what is missing here is the adequate legal framework balancing rights of the stakeholders leaving no scope for exploitation, as because in this particular venture.

Surrogacy – A new Dimension to ameliorate right to Procreation

Every member state to the International Bill of Human Right is laid upon with the obligation to ensure the right to procreation as a basic Human Right and thus to protect and promote reproductive rights without any discrimination, recognizing reproductive rights include the right to the highest attainable standard of sexual and reproductive health, the right of all to decide freely and responsibly the number, spacing and timing of their children, and on matters related to their sexuality, and to have the information and means to do so free from discrimination, violence or coercion. However, infertility is evident in all societies encapsulating good number of people facing hurdles in fullest enjoyment of their right to procreation. Infertility, though not life threatening,

can cause intense agony and trauma to the infertile couples. And adoption as a means of attainment of parenthood cannot however equate the right to reproduce in family making.

The right to procreation is an essential human right of every individual of the every society, but owing to the growing cases of infertility or incapacity to procreate in natural process the full realisation of the right to make family encounters a setback and calls for Assisted Reproductive Technologies (ART). ART treatments are always the last resort to infertility even though not an option to skip the pain and labour of conceiving and child birth which is the normal process to have a child. Thus ART clinics are for the treatment of infertile couples to help them have their own babies. With this motto the clinics are never expected to suggest a patient or couple suffering from infertility to opt for Surrogacy or ART or Adoption before exhausting all possible natural and medical treatment means available to the patients, as per the management protocols being guided by the Indian Council for Medical Research.

In recent times Surrogacy gained a fabulous momentum of acceptance amid other ART process. Surrogacy as a means to continue the hereditary line in cases of infertility of either of the couple has been as old as mythology even if in most cases such were Clandestine. However, the Contemporary process of Surrogacy has evolved variations and contextualised itself in a whole newer platform with new dimensions. Unlike the traditional Surrogacy, today such process are attribute of legal basis like Surrogacy documents backed by economic reasons like compensations, working under the successful barren of ART industries availing technologies such as allowing artificial insemination of sperm and embryo etc.

But then Commercial surrogacy may be best understood as “a new kind of labour-gendered, exploitative and stigmatised labour, but labour nonetheless”. Research findings have highlighted the fact that ARTs were promoting and consolidating the idea of motherhood as women’s destiny, and capitalising on the stigma and trauma of childlessness within marriage. Nonetheless, many issues remain to be addressed; for instance, stem cell research that uses “spare” IVF embryos raises ethical concerns – informed consent needs to be obtained in a non-coercive manner from users, just as the question of fact who has the right to the genetic material that is a by-product of ART procedures needs to be resolved, and malpractices like the overstimulation of the ovaries to obtain more embryos for research need to be guarded against.

ART Bill – Legal Basis of Surrogacy Agreement in India

Endeavours are yet consistent over almost a decade to culminate into a comprehensive legal framework

to regulate the surrogacy arrangements or contract pregnancy ventured in the nation. In India surrogacy agreements goes by the terms of ART Bill and the National Guidelines of the National Guideline set forth by the Indian Council for Medical Research and does not have any separate identity. The present ART Bill seems to reject the recommendation of the Law Commission Report No. 228 that suggests a ban on Commercial Surrogacy in Indian context. In Addition the Bill, while leaving scope for Altruistic surrogacy, it is ambiguous or rather shy to declare the contours of commercial surrogacy, which actually leaves room for arbitrariness of the privileged components of the surrogacy contract to manipulate the fair trade service and thus curving out a fine unregulated passage for exploitation in the name of win-win situation.

As already the Bill is known as a pro-ART, it seems to reserve the interests of the flourishing Fertility industries and their active participants, declaring the ART clinics to be registered in India and the surrogate mothers to be only Indian citizen. Thus the foreigner intending parents, when trans-national surrogacy is not yet barred legally, not having any relative or known person of Indian citizenship will have to opt only for commercial surrogacy, and the fertility tourism is thus protected well. The said ART Bill, which actually is a reflection of the National Guideline set forth by the Indian Council for Medical Research itself, seems to be more cautious about the interest of the ART industry and its clients that is the rights of the intending parents rather than that of the baby and the surrogate mother.

While the sale of organs is illegal in most countries, semen, ova, blood and other body fluids and tissues fall outside the purview of existing legislations because of their regenerative nature. ARTs today have created a “fertility market” where human reproductive parts like eggs, sperms, uteri and embryos can be “bought”, “sold”, or “hired”. Further, the movement of reproductive material and processes follows “modern routes of capital” flow – from “South to North, from third world to first world, from poor to rich bodies, from black and brown to white bodies, from young to old bodies, from productive to less productive...bodies”. ARTs also have been criticised for being patriarchal and capitalist, and for accommodating rather than questioning power relations that equate motherhood with womanhood.

Again during the said situation it is always hard to rule out every possibility of pre-natal sex determination, which is a crime in the country, during the process of surrogacy. Speaking more about the surrogate child’s rights, it’s very unfortunate that the neither the Present Bill advocates about the basic rights to nutrition and care like breastfeeding or love and warmth of the birth mother nor the agreement, and to the worst in

cases like the Baby Manjhi case where although the infant had three mothers but was all left alone for days. Moreover, what shall be the contours of liabilities for the local guardian who if not bound by any legal document, is responsible to look after the child immediately after the birth, and why such child shall be parentless in presence of its local guardian losing its right to family? And of more recent the Balaz twins case, involved two male infants belonging to a German father and Indian surrogate mother who were caught in a major row when India refused to furnish the children with Indian passports for their passage to Germany. Germany deemed surrogacy as an illegal practice subject to prosecution, and had refused to accept the children. Through the period of two years the children and their father battled the Indian administration and the German consulate for recognition of the infants.

There are such other questions related to surrogacy which poses deep concern of human rights such as issues of Trans-nationality, identification and recognition of right to parenthood, Child's right to nationality of its parents with that of the domestic laws not recognising surrogacy or surrogacy done outside its borders, rights of commercial surrogate mothers in case of maternity benefit laws in comparison to normal pregnant women, etc.

India – A Favourable destination for Fertility Tourism

The world's second and India's first IVF (in vitro fertilization) baby, Kanupriya alias Durga was born in Kolkata on October 3, 1978 about two months after the world's first IVF boy, Louise Joy Brown born in Great Britain on July 25, 1978. Since then the field of assisted reproductive technology (ART) has developed rapidly. The increasing demand for ART has resulted in mushrooming of infertility clinics in India. Among various forms of ART treatment available, surrogacy is one of the most flourishing mechanisms in India, which had its root set deep in history.

The total cost of a surrogacy arrangement in India is roughly in the range of Rs 4-12 lakh depending on the IVF clinic and is thus around one-third of what it costs in the US or other western countries where it is legal. ART industry is now a 25,000 corer rupee pot of gold. In India, reproductive tourism is a \$400 to \$500 million per year business. As of now India does not have any law to regulate the mechanism of surrogacy even though it has a commercial colour here and India has turned out to be the best destination of fertility tourism. The commercialization of surrogacy has raised fears of a black market and of baby selling and breeding farms; turning impoverished women into baby producers and the possibility of selective breeding at a price. Surrogacy degrades a pregnancy to a service and a baby to a product.

Feminist Perspective - Concerns Commercial Surrogacy

A deeper analysis about availing of a legal basis to contract pregnancy allured by commercial colours does calls for certain rigorous academic discourses to address certain human right issues of feminist perspective. The surrogate mother who in fact Plays the true legendary role for the successful workout of the ART process, is often found in the most vulnerable position surrendering her motherhood for the least alms at the mercy of the Billion dollar industries flourishing majestically at the flesh and blood of such mother and in return they are reduced to mere wombs for rent owing to paucity of their right to bargain and such other inherent socio-economic and politico-legal weakness.

To mention, some of the major indifferences of the national approach towards the commercial surrogacy practised, shall reflect the vulnerability of human rights of the surrogate mother and the child as well. When it is not about altruistic surrogacy where the act is of gratitude and compensation then it's about the compensation for availing of labour and in this particular form o labour marketing where the question of health of volunteer is of great concern, there is a need of proper legal framework to stand for the rights of the weaker party like all other labour perspective. Mentioning about the equality in bargaining power between the two contracting parties by a legally enforceable agreement, when it is the case of foetal reduction which is a selective abortion the consent of the commissioning parents are asked for and not that of the surrogate mother who is caring those multiple foetuses while the surrogate mother is rather duty bound to make every compromise for the betterment of the embryo she is caring, instead of any right to abort with consent of commissioning parents.

As set out in a recent report by the Permanent Bureau at the Hague Conference on Private International Law, commercial surrogacy has been banned in many nation states. Very recently Thailand has also banned the commercial surrogacy in response to Baby Gammy Case. However countries seem to appreciate altruistic surrogacy as a more safe and preferred option to harmonise both the right to procreation and the legal issues of parenthood.

Currently, India is one of the few countries that permit the trade of commercialized surrogacy in a completely unregulated manner. However it has its own vices and so does arguments exists against regulation of such services. Regulating it and permitting it, will put the authorities in the unique situation of a country proud to sell women's surplus reproductive labour, much like slave owners did. After the Baby M case commercial surrogacy was banned in many states of America. And following the case of Baby Cotton the UK

banned commercialized surrogacy. Very recently after the Baby Gammy case Thailand banned the commercialized surrogacy. In India the Baby Manjhi Case was of one to be mentioned here with only exception that our country hardly took the issue seriously, and responded with some temporal solutions at its best. The said case was not the last to get in legal battle field but till date we are out of a adequate law, but only a draft Bill of 2010 and some National Guide Lines which are again reputed as Pro-ART.

In one hand state is favouring the ART and Surrogacy industries with all avenues conducive to flourish viz the mandate of keeping the whole process confidential and on other hand; it's very reluctant to stand against the stigma associated with surrogacy. Consequently volunteers basically from impoverished socio-economic strata of society would never dare challenge any unjust if confronted in surrogacy transaction with anticipation that exposure of involvement with such act shall call upon the wrath of her community and society. Bound to compromise with exploitation, they may leave their rights, lie about the parentage and claim the death of the baby after it has been handed over.

Even though traditional surrogacy are more cheaper with more percentage of success and less hazardous for the surrogate mother than that of the gestational surrogacy, the later is preferred by the draft Bill banning use of the gametes of the gestational mother and calling for oocyte donor in case where the commissioning mother is unable advancing that such shall make things legally simpler in claiming the surrogate baby. But the whole process adds cost burden of the commissioning parents, sufferings of the surrogate mother and life risk of the surrogate child.

And this calls rigorous academic discourses and adequate response from the feministic fractions, which are unbiased of the male vested interest, which can culminate with solutions, legal frame works sufficient to redress the ever expanding horizons and new peripheries of surrogacy and harmonise such with the basic human rights of the Surrogate mother individually as well as collectively. In this context to mention some grey areas of the drafted Bill that seeks attention for needs of guarantying the basic human rights and Concerns of the health hazards of the surrogate mother that are not well protected as the Bill itself allows three surrogate pregnancies for a woman, and it does not mention specifically to add those cases also where the child birth was not successful. Moreover it actually permits up to three cycles for attempting a pregnancy per couple, which would add as many as nine pregnancies, not counting surrogate mothers own child. And this does have potential of adverse effect on the women volunteer, whether its altruistic or commercial.

Conclusion

Surrogacy like all other achievements of science and technology has both vice and virtue attached to it. What matters is how the mechanism is utilised by the society and what are its apparent and subsequent consequences as well as who are the beneficiaries of such process. Surrogacy even though is an attribute of modern science and technology had its existence in society but in some other form and had served the society to certain extent. In spite of all such it had never gained reputation in the society, neither today. But owing to the growing cases of infertility denying surrogacy will not be a appreciated approach. It shall be better to allow the progress but in a regulated manner so that the benefits can be maximised and the detriments minimized.

Surrogacy when ensued by commercial purpose of compensation rather than driven out of compassion it needs more strict regulation. The reason is obvious and identical to the rationales behind enactment of all other labour laws. More over there are than such other relative areas of feminist concerns that call for adequate legal redress mechanism. Commercial surrogacy adds components of vested interest such as the sperm banks and ART clinics and such other organisers and promoters leading to competition in market and exploitation of the fullest potential of such market. To be frank such competition are even essential for development of all markets. But the question is whether a nation is socio-economically educationally and culturally suited to behold such market, and if not than going for things out of affordability will bring down exploitation, and sufferings for the vulnerable parties in the venture.

In pertinent to the above to explain the legalising of commercial surrogacy brings in limelight such crucial facts viz, when other developed countries are banning commercialization of surrogacy what makes India so ambitious to grow its fertility tourism, whether India being a patriarchal society can provide a ideal socio-cultural situation where commercial surrogate mother shall be respected for act, and whether India had its laws adopted to accustom with the new concept of commercial surrogacy viz. maternity benefit relief laws, and whether women folks of the nation who are basically recruited for participating commercial surrogacy are sufficiently educated to give their informed consent to such a legal venture which has risk of maternity mortality even and right to abortion of surrogate mother is yet vogue.

There are such other more complex areas of feministic perspective that are to be addressed like whether a gestational mother who beholds the child for more than nine months but not genetically related it, if grows a mental attachment with the child in spite of earlier consent given to relinquish all her rights what shall be her fait when confronted with genetic parents. In a commercial surrogacy agreement if the baby if born live the full amount is

paid and if the baby fails to have a live birth the surrogate mother forfeit half of the amount but this in no way reduces her sufferings during the gestation. And after all this the quantum of compensation for gestation is not yet settled uniformly but liable to the bargaining potentials of the surrogate mother. Finally legalising of commercial surrogacy in a patriarchal society will

always open up a scope for the decision makers to indulge women in such venture and make out money of such just by patronising surrogacy as magnanimous and justifying the health hazards of women linking women hood with mother hood and glorifying mother hood as the most cherished destiny of every women.

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