

## **Wombs on Loan :Navigating through Some Key Ethical Issues to Empirical Solution**

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### **Abstract**

Surrogacy is an alternative choice to adoption for having a baby for those who would otherwise remain childless, maybe because they are infertile couple or they choose to have same sex partners or they choose to remain single. But surrogacy brings with its own unique set of ethical conundrums and social issues which need to be addressed as adequately as possible to come to an acceptable enough solution to all parties involved. Philosophical discussions like ethics, bioethics can richly inform the discourse on the topic and this paper aims to bring together philosophy and empirical studies and legal perspective to come to a much better understanding of the topic. This paper generally discusses about the rights of parenthood like who has the right to become parents and how that is determined and with what justification and I believe this discussion is centrally related to any discussion on the topic. Bioethics have evolved with emerging new medical challenges and different declarations and codifications and though all of them are not universal, they, however, provide a firm moral foundation to approach the challenging landscape of the assisted reproductive technology areas. Lastly this paper discusses the real world scenarios of ramifications of surrogacy and the legal response of countries. Indian scenario is taken as a case study in both socio-economic and legal perspective and in conclusion this paper strongly recommends a comprehensive legal framework informed by all these ethical, bio-ethical and legal perspectives and that framework will be able to deal out just treatments to all the stakeholders and regulate the ARTs clinics for better delivery of world-class services and as the issues of surrogacy is too complex, unforeseen situations and conflicts are likely to occur in future as well and this comprehensive legal framework will be of great help to deal with such issues much more effectively and with surer footing on the solid ground.

**Keywords: surrogacy; ethics; bioethics; legal framework; discourse; assisted reproductive technologies (ARTs)**

## **Introduction**

The quest of parenthood has an eternal appeal and many, if not all, find parenthood to be an essential ingredient for healthy, fulfilling and meaningful life. Babies are generally born and raised, for the most part, within traditional family set-up but modern advancement in science and technology has pushed the boundary where in vitro fertilization (IVF) is possible and through these assisted reproductive technologies (ARTs) it is possible for even a single person, male or female, to have a baby by arranging for a surrogate mother who will loan or donate (in the sense of altruistic motive to raise the baby in her womb for the recipient person or persons) her womb. The issue of reproductive donation or surrogacy, however, has always raised ethical questions as the issue is age old though the form of the practice has evolved dramatically in modern time so much so that the fundamental ethical questions have also changed with the evolving practice. We may stress the point once more that the question of surrogacy is not an entirely new and modern problem but quite surprisingly its genesis can be traced back to biblical times. The story we find in the Old Testament tells us that Sarah, the wife of the patriarch Abraham could not conceive and she arranged Hagar, her handmaiden to conceive a baby through the primitive method of copulation. Hagar's subsequent refusal to forego her identity brought about the complexities involved in such arrangements and the problems, both ethical and pragmatic, are as relevant today as they were then. It can be seen in the pre modern time and context as the surrogacy arrangements invariably involved copulation and that raised heated ethical questions of propriety and also the attendant moral complications when the surrogate mother claims, quite rightly, her own right to be socially recognized as the mother of the surrogate baby. The modern ARTs have quite successfully delinked biology from reproduction and the many claim with a tone of righteous indignation that eggs, sperms and wombs have been increasingly commodified and hence dehumanised. Also the ARTs have made surrogacy arrangements look like any other business contracts and the possibility of single person or lesbian or a gay or a couple beyond the reproductive age to be parents invite the ethical questions of who can or can be allowed to be parents within a particular social setup.

So the overall context in which global commerce is being carried on with the practice of surrogacy raises disturbing questions the answers to which are far from definitive. The feminist engagement in the issue and bioethical principles through which the issue of

surrogacy needs to be seen have to be taken into consideration before some responses can be framed. The advent of untramodern and sophisticated medical technology has been a game changer and it should also be noted that the integrated global economy and laissez faire economic principles have give. In this paper we will try to investigate the most pertinent ethical questions and because of rampant commercialisation of surrogacy the issues of exploitation of surrogates who mostly belong to the lower strata of society from both economic and social standpoints and those children who often land in no man's land. The necessity of formulating a comprehensive and broadband legal framework may also help, though not solve all the complex problems involved, in this regard.

Surrogacy is significantly different now due to the ways it has crossed borders in the highly globalized and commercially integrated world order. However, it is quite important to understand the underlying reasons which are complex and multi-layered. Traditional or genetic surrogacy requires the surrogate woman to be the egg donor in addition to carrying the pregnancy but surrogacy as it is practised today is primarily gestational and it is highly dependent on assisted reproductive technologies (ARTS). In this sense, surrogacy has not only become transnational but it has quite successfully delinked biology from reproduction. The complexities involved can be gauged from the fact that technically there can be five parents to a surrogate child: the commissioning or social parent(s) (also called intended parents); genetic parent(s), if both donor sperm and donor Oocytes are used in a particular gestational surrogacy arrangement; and the surrogate woman, who is the gestational mother. This virtual separation of biology and reproduction has also resulted in the increasing commercialization of surrogacy. But this has also brought on to with it related ethical quandary.

### **Is parenthood a right**

Until recently before the advent of assisted reproductive technologies, the question about who should be parents were considered almost exclusively within those who could conceive without medical assistance. However, the questions now apply to a much larger set of people which include those who are infertile, those who do not have a partner of the opposite sex, those who are single and also those who can for other reasons conceive only with medical help. The questions of parenthood is significantly different in people who fall outside the ambit of traditional family with members of opposite sex bound in a

wedlock. Apprehension arises as to the ability of these groups to be a decent enough parent or is parenthood right at all without the biological linkage of the parents to the child so raised and also apprehensions about emergence of alternative non-normative social order and value system remain a strong talking point. J. David Velleman argues that parenthood must be considered within the context of genetic relationship of the parents with the child as the child can feel rooted to and be sure of his or her ancestry and that in part informs him almost instinctively about who he or she can grow up to be. As the parents can also identify themselves in the child they participated to create, it forms a more intimate and meaningful relationship, a relationship that helps the child get emotional nourishment and grow up as a person. So the moral argument goes that outside of this biological context parenthood must not be allowed and that informs much of the debate around the issues of surrogacy whether the egg or the sperm from an unknown or unrelated donor should at all be allowed and whether any single adult or adults in the same sex relationship or a couple beyond the reproductive age or simply a couple having the problems of infertility can be allowed surrogacy services to satisfy their (il)legitimate cravings for being parents. Let's us look into the matter from the ethical perspective and philosophy here can be of substantive and practical value for the policy makers when it is married to the empirical data collected from social sciences as well.

We can look into the issues involved in parenthood in some detail. It is true that everyone does not want children and also the state of not having children cannot be called a disease so that providing a medically assisted surrogate child can be argued as the only available therapeutic remedy to the disease. However, those who wish to raise a child consider parenthood to be an essential ingredient for personal wellbeing and happiness. Anja Karnein, while discussing about parenthood, distinguishes three different kinds of parenthood and argues that we need to understand what constitutes the parenthood in each category and he calls that essential element as "the good" of that type of parenthood. Here he refers to parenthood in biological, legal and social terms. The good involved in biological parenthood refers merely to biological reproduction without any reference to or value judgements of whether they have enough qualities to be decent enough parents. The good that legal parenthood entails is that the person is empowered to take all the decisions regarding the child and the good that parenthood in social terms indicate is that the person(s) in question has day to day contact with the child and spends lion's share of his

time with child and has taken or will take significant decisions for the child. Traditional parents usually combine all these three different aspects mentioned in isolation. So when a person wishes to be parents it starts with the first premise of biological kinship as it ensures that the parents now can regard the child as an extension of their own self and it becomes so important that a lot of people don't even want a child outside this biological kinship. Now if a child is created outside this traditional context, does the parent-child relationship become dysfunctional from the viewpoint of parenthood and also from the perspective of the child? To get these answers we need to explore what sort of relationship does parenthood actually mean for the adults and what can be detrimental about this relationship from the perspective of the child?

The very fact that some adults want children does not entitle them to be one. Velleman believes consanguinity is the very basic necessity. He went on to take the examples of Moses, Oedipus etc to prove his point that biological kinship is essential. He stresses the point that those people could have avoided the difficulties they faced had they been nurtured in their own families. But he conveniently forgets the fact that those people went on to become extraordinary persons in their own right and we can even argue that if they were brought up in relative obscurity they might not have realised their potential. Velleman believes that children need to know where they came from and that knowledge makes them feel rooted to an ancestry whose successes and failures, trials and tribulations create some sort of necessary benchmark against which he or she strives to work. If the child does not get the ancestry because of unknown gametes nourished in the wombs of an unknown surrogate mother will feel adrift and a sense of loss will haunt him so much so that he may not make sense of it all and thereby may not realise the full potential. That makes parenthood non-transferable. Here I argue that there is no reason those who wish to be parents will not be as good or as bad parents as their counterparts who can procreate and have babies within the traditional social context. As for the child, who cannot decide where to be born, the conducive atmosphere which nourishes the child and the love and affection and careful guidance of the parents that help the child to form his own identity and realise his potential are essential. The importance of consanguinity cannot be downplayed but that does not mean other forms of parental relationship cannot help a child form his identity and make realistic aspirations about his future and realise his potential. That being the primary argument, we can say that denying adults the service of

surrogacy to those people for whom assisted reproductive technologies are the only means to become parents and have a fulfilling life does constitute a moral wrong which is tantamount to depriving someone of valid right to have a family he or she wishes.

Among different subsets of population like single parents, same sex couples, infertile couples among others that must take the help of ARTs and surrogacy services, to become parents, let take the example of single parents to frame some likely ethical issues that must be addressed. Here in case of the single parents, the rights of the parents can often clash with those of the yet unborn child. As the child needs to rely on a single parent, and if that parent is potentially impaired in any way like having bouts of depression, substance abuse and the like, the ethical dilemma may emerge as to whether the right to have a child conflicts with the right of the child to have a decent enough parents and some sort of home environment. And if so, who should take the responsibility to take the decision, local administration or the clinic? In case of a current psychiatric or other debilitating problems, the provider may not offer the ARTs services but the questions can be more ambiguous and subtle in cases where the would-be single parents had a past history of substance abuse or bouts of depression but currently does not have any symptoms. It is not clear whether the past history should affect the decision making of the provider and if it does, to what degree and how. If the right to parenthood is based on being loving or compassionate, questions arise whether ARTs providers or others should assess this qualities a priori. But questions arise whether that amounts to being unjust and discriminatory in that the "natural parents" do not have to go through the same screening procedures. But questions also arise as to how much professional and ethical responsibilities these ARTs clinics have to the yet unborn babies.

### **Surrogacy and Bioethics**

As the surrogacy practice in the modern form is actually an offshoot of cutting edge medical technology it is imperative that the medical fraternity and management take decisions which are soundly in line with ethical principles also known as bio-ethics.

Key sets of medical ethics have been developed over time and together they form a framework that can help approach the issues and controversies now posed by ARTs. The Hippocratic oath in the fifth century B.C formed the foundation of modern bioethics with two key principles...



i) "Never do harm to anyone".

ii) "All that may come to my knowledge in the exercise of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal" (North, 2002).

The World Medical Association in 1964 issued the Helsinki Declaration that includes among many the following principles :

i) "It is the duty of the physician to promote and safeguard the health of patients".

ii) "The health of my patients will be my first consideration".

iii) "A physician shall act in the patient's best interest when providing medical care".

Belmont Report mandated by the National Research Act continue to be cited as one of the most important documents in the field of bioethics. Four key principles are found in this report. They are autonomy, beneficence, non maleficence and justice. In bio-ethics, these four principles are readily recognised as cardinal principles. **Non-maleficence** implies that no harm should be done to others intentionally. **Autonomy** means independence to the patients who will be allowed to make their own decisions. **Beneficence** means to effect a cure for the suffering patients, and **justice** means the patients will be treated fairly and without discrimination of any kind.

Our brief historical overview of the evolution of bioethics shows that formulations of ethical principles continued to evolve as new technologies brought new realities and posed new challenges. ARTs is one such area where biomedical developments have brought and continue to bring new and unforeseen dilemmas. Rapidly evolving bio-ethical principles should be brought to bear upon this field as well for more ethical, humane and equitable practices in the field.

### **Surrogacy and its real world implications**

Surrogacy is portrayed by the industry and its vocal supporters as an equitable arrangement where all concerned parties benefit. But concerns remain on multiple grounds. It is a well-known fact that the women who choose to be surrogates do so because of financial constraints they face and they belong to the lower rung of socioeconomic ladder. They mostly use the money for their daughter's marriage or the education of their children or to build a house or start a business or because their husbands cannot earn money anymore. In respect of the surrogacy clinics and rich intending parents these would be surrogate

mothers are not in a position to negotiate successfully for higher monetary compensation. Moreover as the surrogacy arrangements involve a substantial amount of money, it is not extraordinary that the husband may force his wife to be repeat surrogate even at the cost of her health and well-being. As the surrogate uses her body to carry the actual pregnancy, the caring attitude of the husband in the initial phase may not last once the baby is delivered or physical complications start. The attitude of the surrogacy clinics are also ambivalent at best. As the whole industry revolves around the delivery of a healthy baby, the health of the surrogate mother is mostly overlooked. Heavy doses of hormones and drugs as are necessary because of the unnatural medical interference in inducing the pregnancy, the later physiological and even psychological complications are inevitable but they are hardly addressed by the industry. These leave deep scars quite literally both on her physique and mind. Apart from these there are social stigmas associated with induced pregnancy for an outside couple. It directly runs counter to the long held traditional moral standard adhered to by larger outside world. Marriage is regarded as hallowed institution within which sex and pregnancy are allowed and the birth of a child is celebrated but the pregnancy and the birth of a child outside the wedlock is regarded as sinful and repugnant. However beautifully they are promoted by the industry as something ultimately altruistic even in the commercial setup as it brings joy to a childless couple who will not otherwise ever get their own much coveted baby, the fact cannot escape notice that the entire process is done with absolute secrecy and in most cases, even the in-laws of the surrogates are also kept in the dark, let alone friends and other relatives. That the society still see surrogacy as a type of prostitution and the act of delivering the baby to an outside couple for a specified sum of money as an act of baby selling for monetary gain cannot be dismissed easily from the ongoing debates on the issue. Apart from these, the surrogate mother herself feels the invisible bond with the child during the pregnancy and she most often feels an acute sense of loss. This coupled with secrecy and isolated existence where she is invisibilised from the society for around 10 months or so often affects her mental health profoundly.

### **ARTS and emergence of India as an attractive hub**

Surrogacy practice has become quite prominent within the fertility industry which is quite flourishing at present due various factors like increasing rate of infertility among



couples. Assisted reproductive technologies are prohibitively expensive for the common people and India has emerged as an attractive destination due to cost effective and world class medical services. Surrogacy arrangements have been an essential component within this fertility industry. Though authentic statistics regarding the number of babies born through surrogacy is not available, anecdotal evidences and media reports pointed to a steadily flourishing and already big commercial surrogacy market in India prior to the ban imposed on commercial surrogacy through an act of the parliament of India. Let's dig into some of the numbers to gauge the extent of the market and its growth, both real and potential. **The surrogacy market in India was roughly valued at USD 2.3 billion in 2015, with around 3000 surrogate births taking place each year.** The reasons for the stupendous growth of surrogacy industry in India are not far to seek. Commercial surrogacy was made legal in India and medical tourism was being aggressively promoted to attract foreign money. In addition to that, the cost differential between the western countries and India for the same arrangement is quite big. Moreover, as the whole surrogacy industry in India was quite unregulated and a comprehensive law to tackle most issues regarding surrogacy was conspicuous by absence, the paperwork and legal formalities were quite minimal, it attracted foreign childless couples to rush to "the wonder that is India". If we look at the places where surrogacy is practised, it will be instantly evident how broad-based it has already become. Not only metro cities but smaller cities like Kochi in Kerala, Madurai in Tamil Nadu, Indore and Bhopal in Maharashtra, Jalandhar in Punjab, Ahmedabad in Gujarat etc have become increasingly quite important. Anand, small town in the western Gujarat, has become the global capital of surrogacy market and ready availability of gamete donors and surrogates is both advertised and ensured.

### **Surrogacy in the legal landscape of India**

Before we can propose anything on the legal front, let's look at the case study of how the then existing reality on the ground in this regard in India pushed the lawmakers to effectively abolish commercial surrogacy which had been flourishing in the country due to the confluence of various factors already mentioned. The Indian Council for Medical Research (ICMR) provided guidelines for regulating Assisted Reproductive Technology procedures in 2002 and it was adopted by the government of India in 2005. As surrogacy was made legal in India, it quickly became one of the most sought-after places in the globe. There were some landmark cases regarding surrogacy in India and those cases

nudged the government to adopt some guidelines and pushed it progressively towards the comprehensive law that is now in operation. One such case is *Baby Manji Yamada v. Union of India (2008)* which centered around a Japanese couple who divorced even before the surrogate baby was born. Another one was *Jan Balaz v. Union of India (2014)*, which was about the rights of the foreign nationals seeking surrogacy services in India. This case led to the prohibition of commercial surrogacy for foreign nationals in India. The reports of the 228<sup>th</sup> and 243<sup>rd</sup> Law Commission were instrumental for framing the rules and regulations to surrogacy; in 2009 the Law Commission of India submitted a report to the Indian government on the legal and ethical issues related to surrogacy. The report recommended that the only form of surrogacy that can be permitted is altruistic surrogacy where the surrogate mother agrees to be as such without any commercial motives of financial benefit. India did not implement those recommendations at that time. The Law Commissions in their various reports and recommendations highlighted the issues of vulnerabilities and exploitation and possible coercion that the surrogate women may be subjected to in the unequal power equation among multiple parties like the rich commissioning parent(s), ARTS clinics, middlemen and the surrogate women. It sought to prohibit commercial surrogacy in any form and allowed only altruistic surrogacy where exchange of money is not involved.

### **Conclusion:**

The discussion on the ethical questions involving the practice of surrogacy shows that the ever evolving nature of biomedical innovations presents newer opportunities and hence novel challenges and the ethical responses to those challenges must keep pace with new developments. Though generally formulated ethical codes contained in different declarations and reports as discussed above can be taken as a good framework for guidelines but differences occur as to their adoption and implementation across countries and cultures. The empirical evidence and data from the ground about all the parties involved in the surrogacy arrangements and long term consequences of those arrangements of all the parties involved can provide a good enough look at how these things really worked and what needs to be done to solve issues that might have crept in. Our case study of India showed specific challenges and opportunities for the arrangements. In conclusion it is emphatically suggested that a comprehensive legal framework that takes into account the different strands of ethical principles and empirical data is required to regulate the ARTs

clinics and provide justice to all the parties involved in surrogacy arrangements. We can safely say that though India became the hub of global surrogacy industry due to multiple favourable factors as have been discussed before, the eventual ban on commercial surrogacy and setting ever harder terms and conditions associated with who can and cannot avail themselves of this service in the country will not ultimately solve the problems for all the parties. Here we can make a few observations. First of all, altruistic surrogacy is not the ultimate solution to the ethical and other practical problems that rear their heads up in the industry. Exploitation and coercion can be done even through altruistic surrogacy and in cases where commercial surrogacy is completely banned, we can expect the emergence of creative violations of the law where the surrogate women will be more disadvantaged to get decent compensation, let alone bargaining for attractive ones. This paper proposes that a complete ban on commercial surrogacy is not the way out of maze of surrogacy related problems, rather it is the better regulation and more comprehensive legal protection to the surrogate women and the children born out of such arrangements that can serve the purpose way better. Commercial surrogacy may provide avenues to the needy to lift themselves out of poverty while it also provides a way for the growing population of infertile couples to have genetically linked babies with whom they can associate themselves in a more meaningful way while a comprehensive legal framework will take care of most complexities that may arise out of these arrangements, if at all.

## **Reference:**

- Cook, Rachel (Ed.). *Surrogate Motherhood: International Perspective*. Hart Publishing, New York, 2003.
- Kuhse, Helga & Singer, Peter (Ed.). *Bioethics: An Anthology*, Second Edition, Blackwell Publishing Ltd: USA, 2006.
- Kuhse, Helga & Singer, Peter (Ed.). *A Companion To Bioethics*, Black Well Publishing Ltd., Oxford: UK, 2001.
- Moitra, Shefali. *Feminist Thought*, New Delhi & Kolkata : Munshiram Manoharlal Publishers Pvt. Ltd. in association with Centre of Advanced Study in Philosophy, Jadavpur University, 2002.
- New Babies*, Harper and Row: New York, 1989.
- Reproductive Technologies*, Birmingham, 1986.
- Robertson, A. John. *Children of Choice: Freedom and the New Reproductive Technologies*, Princeton University Press: USA, 1994.
- Singer, P. and Wells, D. *The Reproduction Revolution: New Ways of Making Babies*; Oxford University Press: Oxford, 1984

Singer, P.& Wells, D.*The Reproduction Revolution: New Ways of Making Babies*,

The Assisted Reproductive Technologies (Regulations) Bill-2010 (Draft) Ministry of Health & Family Welfare Govt of India.

Indian Council of Medical Research, Ethical Guidelines for Biomedical Research on Human Participants, New Delhi, 2006.

The Surrogacy(Regulation) Bill,2016