



LEGAL AND POLICY CHALLENGES TO SURROGACY (Abstract)

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INTRODUCTION

This part of the essay broadly deals with where surrogacy comes context, what is surrogacy, from where the word originated and the different types of surrogacy. Thus, surrogacy actually is a form of third party reproduction in which a woman agrees to create and maintain pregnancy for another person. The main two types of surrogacies are: Traditional and Gestational surrogacy.

SURROGACY IN INTERNATIONAL PRACTICE

This part of the essay deals with the surrogacy laws in different countries because the laws relating to surrogacy are not same in all the countries and differs according to their practice. The essay mainly deals with main surrogacy laws in Australia, Canada, USA, UK and South Africa.

SURROGACY IN INDIA AND LEGAL FRAMEWORK RELATING TO SURROGACY

This part of the essay deals with surrogacy laws in India and how it has become an emerging leader in the surrogacy field. It deals with the salient features of National Guidelines for Accreditation, Supervision and Regulation of ART clinics as well the ART (Regulation) Bill 2010.

RESPONSE OF INDIAN JUDICIARY TOWARDS SURROGACY

This part of the essay deals with how the judicial system responds to surrogacy in India and when the concept of surrogacy came before the Indian Judiciary. The first case where the concept of surrogacy came into question is the “Manji case” where the judicial system was provided with a chance to develop the surrogacy laws but failed to do so.

THE SURROGACY (REGULATION) BILL 2016

This part of the essay deals with the present surrogacy bill of 2016 and renewed guidelines for the present as well as its disadvantages and how it could affect the restricted people.

CONCLUSION

Thus, overall this essay deals with the legal and policy changes in surrogacy, its earlier status, how it has changed over time, the different surrogacy laws in other countries. The surrogacy laws in India, its present status and how adoption has taken its place. Thus, **Instead of bringing a new life into the nation why not give a new life to children who have no one.**

LEGAL AND POLICY CHALLENGES TO SURROGACY

INTRODUCTION

It is the birth right of every woman to conceive and cherish the feeling of motherhood. But infertility of a couple deprives them of this beautiful experience. But with the advancement of technology and development of new methods in the medical field now infertile couples can also procreate and surrogacy is one of them. The words



‘surrogate’ originates from the Latin word ‘surrogatus’ which means substitute.

Surrogacy is a form of third party reproduction in which a woman agrees to create and maintain pregnancy for another person. It has become a veritable and ethical conundrum. Surrogacy is either altruistic or commercial. Altruistic surrogacy is where the surrogate mother is not paid any monetary benefits and is motivated mainly by a desire to help an infertile couple to have a child of their own. This arrangement is usually seen where the surrogates are close friends or relatives to the parents. Commercial surrogacy is where, a gestational carrier is paid to carry a child to maturity in her womb. It is legal in several countries including India due to excellent medical infrastructure, high international demand and ready availability of poor surrogates. This type of surrogacy is usually referred to as ‘womb for rent’, ‘outsourced pregnancies’ etc.

Types of surrogacy

There are mainly two types of surrogacies that are recognized today, they are:

- Traditional surrogacy: This is also termed as complete surrogacy. In this type, the eggs of the surrogate mother and the sperm of the commissioning husband are used in conception of the child making her the genetic and biological mother of the child.
- Gestational surrogacy: In this type, an embryo created in vitro is transferred into the uterus of a woman who does not contribute the egg.

SURROGACY: INTERNATIONAL PRACTICE

Surrogacy laws differ from country to country. In many countries like Sweden, Spain, France and Germany, surrogacy is illegal since it is against their public policy and in few other countries only altruistic surrogacy is legal.

AUSTRALIA

- In all the states of Australia the surrogate mother is regarded by law to be the legal mother of the child and any surrogate agreement giving the custody to others is void and unenforceable. Here commercial surrogacy is illegal although the Northern Territory has no legislation governing the laws of surrogacy whereas altruistic surrogacy is legal.
- In Western Australia and South Australia, altruistic surrogacy is legal only for straight couples and it is not legal for single people or same sex couples.

In Tasmania, the law states that the surrogate must be at least 25 years old and it should not be her first pregnancy

CANADA

- Surrogacy in Canada is legal but highly restricted. The legislation allows altruistic surrogacy and the surrogate mothers is not paid more than basic expenses, agencies that match surrogates and future parents are prohibited, and commercial services that support either the parents or the surrogates are not allowed. In the province of Quebec contracts involving surrogacy are unenforceable. Canadian law is very explicit, and is regulated by Bill C-6 (Assisted Human Reproduction Act). The



act places the following constraints on surrogacy in Canada:

- No person shall pay consideration to a female person to be a surrogate mother, offer to pay such consideration or advertise that it will be paid.
- No person shall accept consideration for arranging for the services of a surrogate mother, offer to make such an arrangement for consideration or advertise the arranging of such services.
- No person shall pay consideration to another person to arrange for the services of a surrogate mother, offer to pay such consideration or advertise the payment of it.
- The total cost of surrogacy in Canada is typically around \$80,000 for a program that includes just one initial embryo transfer. Additional embryo transfers are between \$3000 – \$5000 for each attempt. All the care of the surrogate before and after childbirth is covered by social security and parents will not pay anything. But the care of the baby after the birth is the responsibility of the parents. Rates of hospital care for a baby are about \$1000/day.

UNITED KINGDOM

- The Surrogacy Arrangements Act 1985 makes commercial surrogacy illegal. The surrogacy agreements are not valid even if it has been signed with the intended parents and they have paid the legal expenses within the framework of UK. Thus, paying more than the surrogacy expenses are not allowed but the relationship status has got recognition

under section 30 of the Human Fertilization and Embryology Act 1990.

- The surrogate has a legal right over the child, even if she is not genetically related to the child, till the time an adoption order comes.

UNITED STATES OF AMERICA

- In USA, the law of surrogacy varies from State to State. It ranges from banning surrogacy to enforcing them. The Assisted Human Reproductions Act 2004 permits altruistic surrogacy.

- Embryo research is not only included in one’s insurance cover in the US, it takes the cost of surrogacy package quite high and US citizens opt for India as their surrogacy destination.
- Here the surrogate mothers are made good only the expenses incurred as a result of pregnancy. And those who are found guilty are punished with a sentence of 10 years and a fine up to \$500,000.

SOUTH AFRICA

- In South Africa, the surrogacy agreement is governed by the South Africa Children’s Act of 2005. Under this Act, to make the agreement valid it should be confirmed by the High Court before fertilization.
- Gay couples as well as single parents can also be intended parents. Single parents and a couple can opt for this option only if they have any physical inability and the surrogate should be a woman having at least one child.



- Also, the surrogate has the right to terminate the pregnancy, but, only after consulting the intended parents and if it is due to non-medical reasons she must be ready to make medical reimbursements.

SURROGACY IN INDIA

India is emerging as a leader in international surrogacy and a sought after destination in surrogacy related fertility tourism due to its low cost and favorable legal environment. Though the concept of surrogacy is considered as a new aspect for India it is actually an old concept which has its mention in the ancient mythology. With an increase in the global market the surrogacy industry in India has grown enormously. Indian surrogates have been increasingly popular with fertile couples in industrialized nations and has been made legal by the guidelines laid out by the Indian Council of Medical Research(ICMR).

LEGAL FRAMEWORK RELATING TO SURROGACY

The legal environment had been favorable with surrogacy being made legal in 2002, by the guidelines laid out by the ICMR. In 2008, the Supreme Court of India in the Manji’s case has held that commercial surrogacy is permitted in India with a direction to pass an appropriate law governing surrogacy. At present, the surrogacy contracts between the parties and the Assisted Reproductive Technique(ART)Clinic guidelines, are major guiding force.

SALIENT FEATURES OF THE NATIONAL GUIDELINES FOR ACCREDITATION, SUPERVISION AND REGULATION OF ART CLINICS

The ICMR along with the National Academy of Medical Sciences in the year 2005 established the guidelines for the accreditation, supervision and regulation of ART clinics. This was mainly established to ensure that the ART clinics throughout the country followed a uniform code of conduct. The guidelines provide for the registration of ART clinics, covers the treatment given, provides for the screening of the patients for the choice of procedure to be followed as well as prescribes the information and counselling to be given to the patients.

Relating to surrogacy the guidelines mainly provide for the following:

Children born out of surrogacy must be adopted by the genetic parents unless they are unable to prove that they are the genetic parents.

- Surrogacy should be adopted only when the patients are unable to conceive completely either physically or medically.
- The guidelines prohibit any kind of monetary aspect or advertising for surrogacy by the ART centres and surrogates are to be paid only genuine expenses for the pregnancy.
- The choice of selecting the surrogate depends upon the couple or a semen bank. If the surrogate is a relative of intending mother then she should belong to the same generation.
- The surrogate should be less than 45 years of age. She should satisfy certain tests for HIV and must further provide a certificate that she had not taken any drug through intravenous by a shared syringe or by blood transfusion.
- A woman cannot act as a surrogate for more than three times in her lifetime.



However, these guidelines have undergone a lot of criticism as they were non-binding in nature and failed to emphasize on the protection of the surrogate and the child.

SALIENT FEATURES OF THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) BILL 2010

Considering the radical growth in the ART centres approached by infertile couples, the ICMR came up with a Bill called the Assisted Reproductive Technology Bill in the year 2010. The Bill provides for the constitution of National and State Advisory Board for Assisted Reproductive Technology to permit the permissible practices to be followed in these centres as well as provides for training in the clinics. It also promotes dissemination of information to the public regarding this. The 2010 Bill defines the duties of the ART centres so that the parties to the contracts are provided with proper information to give their true consent. It states that the surrogate mother should abandon all her parental rights on the child and the birth certificate is registered in the name of the intended parents. It also states that if the intended parents are from another country they should submit documents necessary to take the child born in India to their country.

Though this Bill proved to be effective than the guidelines, it also failed to answer certain ethical questions. Unlike abortion the consent of husband is necessary if a married woman wants to become a surrogate.

RESPONSE OF INDIAN JUDICIARY TOWARDS SURROGACY

The question of legal void on surrogacy first came up for consideration before the Indian Judiciary in the case of “**Baby Manji Yamada Vs Union of India**”¹. In this case it was alleged that in the name of surrogacy a lot of irregularities was committed and a money market was being perpetuated. Here the petitioner was born to biological parents, Dr Yuki Yamada and Dr. Ikufumi Yamada through surrogate mother in the year 2008. But the biological parents later faced certain marital problems and were divorced by the time she was born. Later on, she was under the care of her paternal grandmother and was issued a birth certificate in the name of her genetic father. Manji was also breastfed by her Indian surrogate mother; and she was issued a certificate of Identification instead of a passport to make her transit out of India possible. Subsequently a writ petition was filed in the Rajasthan High Court challenging the legality of the surrogacy. Consequently, the HC ordered for the production of the child before it, but it was challenged by the grandmother on the ground that the writ petition was baseless as it was not proved in whose illegal custody the child was in the SC. But the SC set aside the order of the HC and asked the parents to seek redressal before the National Commission for Protection of Child Rights setup under the Commissions for Protection of Child Rights Act 2005. The SC, thus, in this case failed to discuss on the rights of the child born out of surrogacy as well the citizenship issues that could occur if surrogacy is not recognised in the country where the child is planned to be brought up.

¹ (2008)13 SCC 518; AIR 2009 SC 84



THE SURROGACY (REGULATION) BILL 2016

The present Bill was proposed by the Central Government in view of actor, Tusshar Kapoor opting to become a single parent through surrogacy. As per the guidelines of the new proposed Bill actor Karan Johar could be the last single men or women to opt for surrogacy. According to the new Bill single men, women and gay couples are banned from opting for surrogacy. The features of the new Bill are as follow:

- As per the draft Bill, commercial surrogacy is prohibited. Any payment to a woman opting to become a surrogate mother is illegal.
- Surrogacy for singles, foreigners and persons of Indian origin is also banned.
- Only a blood relative of 25-35 years of age can become a surrogate
- The woman opting to become a surrogate mother should be married and should have a child of their own
- The Bill also prohibits egg donation
- The Bill also has guidelines for regulating clinics and hospitals that allow surrogacy
- It has provisions for providing legal aid to surrogate mothers

Thus, altogether, surrogacy is allowed only in an altruistic form and no monetary benefits are allowed according to the new draft Bill.

PITFALLS OF THE NEW BILL

The new Bill will actually make surrogacy disappear from India. The guidelines in the Bill will not only make it impossible for singles and homosexuals to become parents but also difficult for heterosexual couples with infertility issues to have children

through surrogacy. The clause on only blood relative aged between 25-35 years to become a surrogate mother will make it difficult for heterosexual couples to use this procedure. Since 2002 until today, India has been the surrogacy capital for foreigners from other countries, but, now with the new bill singles and homosexual couples are forced to venture out of the country especially US where surrogacy is legal. The new Bill will also have other negative effects such as blackmailing within the families, as well as unregulated black market in the field of surrogacy.

CONCLUSION

India, with its growth in medical tourism has been tagged to be the next leader in the 'baby market'. Considering the economic backwardness in India, surrogacy has literally come as a rescue to many poor families. Though, surrogacy is considered as a blessing, the legal complications and lifelong injuries can never be negated. After the establishment of the new Bill, a lot of changes has been brought about in surrogacy, majority being a lot pf problems. Thus, it is necessary that India adopts a framework where affordable surrogacy is provided along with the protection of the surrogate mothers.

Thus, at present till 2016 there are about 50,000 adoptable orphans in India. With the new Bill, it has encouraged the intending parents whoever they may be to opt for adoption of orphans.

Instead of bringing a new life into the nation why not give a new life to children who have no one.
