



COMMERCIALISATION OF SURROGACY

*By: Ananya Kathuria & Gautam Kamra
From: JIMS Engineering Management
Technical Campus (JEMTEC) SCHOOL
OF LAW, Affiliated to G.G.S.I.P
University, New Delhi*

Surrogacy simply means an agreement whereby a woman agrees to carry a pregnancy for another person who will become newborn child's parent after birth. Since commercial surrogacy is legal in India, it means that surrogacy involves medical, nutritional and overall health care for the surrogate mother. Surrogacy is a noble act as it provides happiness to the unfortunate couples. After the legalisation of surrogacy in India, India became a favourite country for those wanting a surrogate child due to the cheap availability of resources attracting commissioning parents from various other countries as well. This led to the exploitation of poor women who were ready to become the surrogate mothers for monetary benefits. The bill aimed at putting an end to the exploitation of such women and violation of their rights. The Surrogacy Bill is fulfilling the purpose of helping the unfortunate couples as well as avoiding the exploitation of poor women.

In this abstract we have highlighted some positive impacts of the Surrogacy Bill , types of Surrogacy and the way people treat the act of Surrogacy.

COMMERCIALISATION OF SURROGACY

-----INTRODUCTION-----

Surrogacy refers to an agreement whereby a woman agrees to carry a pregnancy for another person who will become newborn child's parent after birth¹. Across the globe surrogacy is on the rise, surrogacy is a noble act as it provides happiness to the unfortunate couples. Intended parents may seek a surrogacy agreement in case of medical impossibility of pregnancy or complications leading to danger to mother or child's health. And as the gay couples look to start a family, the need of surrogates increases. A surrogate mother is a woman who bears a child on behalf of another woman, either from her own egg fertilized by the other woman's partner or from the implantation in her uterus of a fertilized egg from the other woman. If the surrogate mother receives monetary benefits for surrogacy then it is termed as commercial surrogacy. The legality and costs of surrogacy vary widely between jurisdictions, sometimes resulting in interstate or international surrogacy arrangements. In case the surrogate mother is not receiving any extra compensation except for the reasonable medical and other expenses, it is referred to as altruistic surrogacy. After the legalisation of surrogacy in India, India became a favourite country for those wanting a surrogate child due to the cheap availability of resources attracting commissioning parents from various other countries as well.

-----TYPES OF SURROGACY-----

There are broadly two kinds of surrogacy: Traditional Surrogacy and Gestational

¹Reference from <https://en.wikipedia.org/wiki/Surrogacy>



Surrogacy.² Traditional Surrogacy (also known as straight, genetic or partial surrogacy) involves natural or artificial insemination of a surrogate. The resulting child is genetically related to the intended father and the surrogate mother if the sperm of the intended father is used for the insemination. But if the sperm of a donor is used for this purpose, then the resulting child is genetically related to only the surrogate mother and not to the intended father. On the other hand, Gestational Surrogacy (also known as host or full surrogacy) when an embryo created by In Vitro Fertilisation (IVF) technology is implanted in a surrogate mother. This can be done through various combinations like, the egg and sperm of the intended parents by which the resulting child is genetically related to the intended parents, the egg of the intended mother and the donor's sperm by which the resulting child is genetically related to the intended mother only, etc.

-----ISSUES WITH SURROGACY-----

Since surrogacy is a complex process of giving birth to a child, it involves various legal, social and medical issues as well. Some of them are: Legal issues & Citizenship, Religious & Ethical issues, Psychological concerns & Health issues. Since commercial surrogacy is legal in India, it involves monetary benefits to the surrogate mother along with other benefits and compensations. The overall expenses of surrogacy, involving medical treatment, compensation to surrogate mother, doctor's fee, etc is less in India as compared to some other countries because of which foreign

couples come to India for surrogacy which leads to legal issues and citizenship. For instance: Jan Balaz v. Union of India³, a case of German twins born by surrogacy in India. The question of citizenship arises as India does not offer dual citizenship. For the purpose of surrogacy, poor women are mostly targeted as they are in need of money and so they are ready to carry the child in their womb for nine months. This leads to exploitation of women leading to violation of their rights in spite of their consent causing legal issues. Some other legal issues may include the terms of contract, gay and homosexual couples planning to have a baby through surrogacy, number of times a woman can become a surrogate mother, etc. These issues are not just legal but also related to social and religious issues. For instance: the religion of the baby whose intended parents are foreigners and the surrogate mother is Indian, the impact of surrogacy on the society and people in backward areas, husband's consent in order to become the surrogate, the impact on the family of the surrogate mother and the problems faced by them, etc. Along with these issues there comes the problem of surrogate's health and the psychological condition of the surrogate mother and the child. It has been noticed that the surrogate mothers undergo stress or depression at the time of giving away the child and also during the time period of nine months which also includes grief and refusal to release the child as well because of lack of emotional support and therapy during surrogacy process. This also leads to the psychological harm of the child and hampers its health as well. Since poor women do this for

² Reference from https://en.wikipedia.org/wiki/Surrogacy#Types_of_surrogacy

³AIR 2010 Guj 21



monetary benefits, it is possible that they do not get the emotional support, care and love and affection of the family of the surrogate depending upon the family background and the thinking of the family members. For the welfare of the surrogate and the baby she is carrying, it is necessary that proper care of the mother should be taken and she should be provided with proper diet and medical assistance during those nine months as it directly affects the child. All these issues must be considered while taking the decision of surrogacy.

-----INDIA AS FERTILITY TOURISM-----

India has become the main destination for surrogacy due to cheap availability of resources. Indian clinics at the same time have grown and become more competitive not just in pricing but in hiring and retention of Indian female surrogates. According to studies, Indian clinics charge \$10,000 to \$28,000 for the entire process of surrogacy, including surrogates compensation, fertilization, medical expenses, doctor's fee, delivery of baby at the hospital, etc. Also, laws in India are flexible. After the Manji's case⁴ (Japanese baby case), commercialisation of surrogacy became legal in India. In 2014, surrogacy was banned for homosexual couples and single parents in India. Commercial surrogacy became illegal in India after the surrogacy bill passed in August 2016.

-----GOVERNMENT'S ROLE IN SURROGACY-----

With an aim of putting an end to the exploitation of women in India the government took a few steps for the welfare

of the society and surrogate mothers. After legalisation of commercial surrogacy in India in 2002, India became an International Surrogacy destination and a leader in International surrogacy. Clinics charged patients roughly a third of the price compared with going through the procedure of UK. The Law Commission of India submitted its 228th report⁵. Some of its observations are listed below:

- Surrogacy agreement will continue to be governed by contract amongst parties containing the terms and conditions like providing health and other expenses to the surrogate, etc for the benefit of the parties involved in it and ensuring that there is consent of the surrogate, the intended father and the family members.
- Sex-selective surrogacy should be prohibited.
- Surrogacy contract should necessarily take care of life insurance for surrogate mother.
- Birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
 - Right of privacy of the donor as well as the surrogate mother should be protected.
 - Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian, etc.

The Union Cabinet recently approved the Surrogacy (Regulation) Bill 2016, banning commercial surrogacy in India. This bill aims at trying to prohibit the exploitation of women and children born through

⁴AIR 2009 SC 84; (2008) 13 SCC 518

⁵Reference from <http://surrogacylawsindia.com>



surrogacy. According to the Surrogacy Bill:⁶

- Only Indian couples, who have been married for at least 5 years can opt for surrogacy, provided at least one of them have been proven to have fertility-related issues.
- Only close relatives, not necessarily related by blood, will be able to offer altruistic surrogacy to the eligible couples.
- The new Bill has put a complete ban on commercial surrogacy.
- It also bans unmarried people, live-in couples and homosexuals from opting for altruistic surrogacy. Now, foreigners, even Overseas Indians, cannot commission surrogacy.
- A woman can become a surrogate mother only for altruistic purpose and under no circumstances she will be paid for it, although payment can be made towards medical expenses.
- Surrogacy regulation board will be set-up at both Central and State-level.
- The law will be applicable to the whole of India, except for the state of Jammu and Kashmir.
- Surrogacy clinics will be allowed to charge for the services rendered in the course of surrogacy, but the surrogate mother cannot be paid.
- Under the new bill, the clinics will have to maintain records of surrogacy for 25 years.
- The surrogate child will have the same rights of as that of a biological child.

-----CONCLUSION-----

Surrogacy is a way of providing happiness to the couples and their families who are not fortunate enough to get the happiness of a child. This act should be done out of kindness and not for the purpose of earning money. It is said that a woman can only understand the situation or problems of another woman, which applies here as well. A woman who has got the blessings of god in the form of a child can understand the importance of having a child and should help another woman who has been deprived of this happiness without thinking of the monetary benefits she can get out of it. The time when a woman is carrying the baby in her womb is said to be the most beautiful time in her life. The feeling should remain pure and should not be ruined by adding feeling of greediness. Surrogacy should not become a mere hardship or source of income for women or the families of the women who are ready to become the surrogate women. The surrogacy bill is very beneficial for the society as it leads to less legal complications. Also, less people's value will be harmed if this is done in a right way. Having a child through surrogacy is a big step and it should be taken wisely, keeping in mind all the pros and cons and thinking about the benefit of everyone. The intended parents should take the full responsibility of the surrogate's health before and after the delivery of the child. Even the surrogate should take all the reasonable care that she would have taken if the child was her own. All the legal work should be done before starting the process of surrogacy and due care should be taken. Also the help of a legal consultant and a medical consultant should be taking for the betterment of all the parties.

⁶Reference from
<http://indiatoday.intoday.in/education/story/surrogacy-bill/1/749353.html>