



SOCIAL-LEGAL ASPECTS OF SUUROGACY: A BLESSING OR CURSE

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ABSTRACT

Surrogacy had been a blessing for every infertile couple and for all, who are unable to conceive for some or other reason and it helps them to enter into arrangement with a woman who agrees to become pregnant for them. It being legal in few and illegal in many countries, India had emerged as a biggest hub and attraction for couples who are excited for having child of their own genes. But the biggest and most concerned problem for India being a surrogacy hub is having no proper regulations and legislation for it, because of which parties to surrogacy agreement whether it be a couple wanting to have a surrogate child, or a surrogate mother or a surrogate child, are highly on risk of being exploited. This research paper has emphasized on the study of problem faced during or after this whole process and it talks also about the legislations and bills which are in a trial to be passed by the houses to make it a proper law. But as these trials are in process from more than 10 to 15 years, it seems hard for us to come up with any such law to regulate surrogacy.

This paper attempts to cover all aspects of surrogacy industry whether be it from aspect of a surrogate mother, intending couple or the child born through it. In this paper I have tried to dig deep the pros as well as the cons in the surrogacy industry and also analysed the regulation bill and its various provisions. This paper also tried to analyse the laws of

different countries and how they are different from India.

INTRODUCTION

Marriage is an institution between husband and wife and one of the main essential of this association is a procreation of child. It is said just not to be a physical union but spiritual and emotional union as well between the partners and is a lifelong commitment. There exist very important functions of marriage and one of them is procreation of children or in simple word reproduction i.e., extending their family. Without reproduction the continuation of society is at stake and our society believes in legitimate birth which takes place only within the wedlock. But not every couple is fortunate enough to have their own biological child, this happens because of infertility i.e., when couple cannot conceive after having regular unprotected sex. Infertility is the inability to become pregnant after one year of intercourse without conception involving a male or female partner. There are many causes of infertility, including some that medical interventions can treat. But in cases of untreated infertility, people prefer adoption or surrogacy in often. There can be many reason to opt for surrogacy other than infertility, it may include medical conditions, diversities regarding sexual identity and orientation or Complete Androgen Insensitivity Syndrome (CAIS) in this case uterus and ovaries are absent or women who might have undergone hysterectomy. The reason for opting surrogacy can also be matters of social nature reflect behind patient's agreement to pursue surrogacy.

WHAT IS SURROGACY?



The word 'surrogate' means 'substitute'.¹ Surrogacy is an arrangement, by which couple who due to infertility or any other reasons are unable to conceive enters a legal agreement with a woman, who agrees to become pregnant and give a birth to a child for the couple who become the parent of the child.

According to the Artificial Reproductive Technique (ART) Guidelines, surrogacy is an "arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a 'surrogate mother' is a woman who agrees to have an embryo generated."²

Surrogacy has come up as a dream come true method for people dreaming to achieve parenthood. Surrogacy may fulfil same sex couples' or even a single parent's desire for a genetically linked family.³

Surrogacy is of two types - Gestational (or host) Surrogacy and Traditional (or genetic) Surrogacy.

Gestational surrogacy is when the embryo that is fertilised by invitro method is implanted in the uterus of the surrogate mother who then carries and deliver the baby. This method is usually suggested in the cases of Turner's syndrome because these patients suffer from cardiac and medical complications in patients. On the other hand,

traditional surrogacy is when surrogate mother is impregnated with sperm of intended father artificially which makes her both genetic and gestational mother.

In the process of surrogacy, intended parents enter a legal agreement with a surrogate mother, which makes sure that after the birth of a child there can be easier transfer of rights and obligation of child to the parents. This is also called rent a womb service.

BACKGROUND

The worlds second and India's first IVF baby was born in Calcutta on 3rd October, 1978 and then created history when commercial surrogacy was legally recognised in India in 2002. It was not until 1980, the first paid traditional surrogacy was conducted. Elizabeth Kane received \$10,000 to become a surrogate for another couple. Later, it was in 2005, when Indian council of medical research issued a set of guidelines for surrogacy industry.

In many countries, payment for surrogacy is prohibited, solely allowing payment of necessary expenses. Specifically, Altruistic surrogacy is adopted in England, in many states of US, and Australia, whereas commercial surrogacy is permitted in India, Ukraine and California.

Although surrogacy is not legal in every country, some countries like France, Germany, Italy, Sweden and Norway have prohibited all form of surrogacy.⁴ Especially commercial surrogacy in intend to protect

¹ Malini Karkal, 'Surrogacy from a feminist perspective', Indian Journal of Medical Science (IJME), Oct.- Dec. 1997 – 5(4)

² The Assisted Reproductive Technologies (Regulation) Bill-2010, Indian Council of Medical Research (ICMR), Ministry of Health & Family Welfare, Govt. of India, pg. 4 (a).

³ J. Kapfhamer and B. Van Voorhis., "Gestational surrogacy: a call for safer practice," Fertility and Sterility, vol. 106, no. 2, pp. 270-271, 2016

⁴ P. Saxenna, A. Mishra, and S. Malik, "Surrogacy: ethical and legal issues," Indian Journal of Community Medicine, vol. 37, no. 4, pp. 211-213, 2012



women and children from consequences of surrogacy. So the people of those countries whose are willing to parenthood, travel to these countries where surrogacy is not just legal but is of much lesser pay than other countries.

Now, when surrogacy got legalised in India in 2002 to promote medical tourism it soon became hub of surrogacy. Driven by facts that it offer option of surrogacy in low cost and also due to absence of legislature or legal framework regulating international surrogacy arrangements. As per the studies of confederation of Indian industry, the size of surrogate industry in India is of 2.3 billion dollars a year.⁵ Also study of unites nation in July 2012, estimated the business at more than 400 million dollars a year, with over 3000 fertility clinics across India.⁶

But unregulated business concern rampant exploitation of surrogate mothers as well as their children. From multiple surveys and report on unethical practices, exploitation of surrogate mothers and abandonment of children have been witnessed in vast number.

Law commission highlighted need to enact a legislation in its 228th report, in which it recommended prohibiting surrogacy, citing concern of prelevant use of surrogacy by foreigners and lack of proper legal framework resulting in exploitation of surrogate mothers who do so due to poverty and lack of proper education. Although the Indian Council of Medical Research (ICMR),

under the auspices of the Indian Ministry of Health, issued voluntary guidelines for ART clinics in 2002 and updated them in 2005, these guidelines are not binding.⁷ Vagueness on key issues such as surrogates' rights, surrogates' minimum age, contract specifics, informed consent, and requirements regarding adoption has made the voluntary guidelines a target of considerable criticism in India.⁸ And after this, in 2015 India put a stop to commercial surrogacy for foreigners. And this ban was only the start of legislation regulating surrogacy in India. Now after this, draft has been introduced to lower house of the parliament to ban it for Indian's as well.

PROBLEMS FACED IN SURROGACY INDUSTRY

Surrogacy came as a blessing with a big help to all those people who were unfortunate enough to have their own child. But no blessing is a help for a long time, it soon started losing its value and began being a curse for lot of people and also a hindrance in the way of country to become develop.

1. Former minister of external affair of India, Sushma Swaraj said in the parliament, "commercial surrogacy becoming a luxury only for those who can afford it, while it need to be a necessity". She pointed out the notice on one of the main issue of surrogacy which took away its fortune of being a blessing. As surrogacy after some time became a luxury for elite class and they leaving behind the fact

⁵ World report on India's unregulated surrogacy industry, priya shetty, www.lancet.com, vol- 380, 10-Nov.- 2012

⁶Bhalla, Nita; Thapliyal, Mansi. "India seeks to regulate its booming surrogacy industry". Medscape. Reuters Health Information., (30 Sep. 2013)

⁷ National Guidelines for Accreditation, Supervision, and Regulation of ART Clinics in India. 2005. Indian Council of Medical Research, New Delhi

⁸ Sarojini, N.B., and Aastha Sharma. "Guidelines not enough, enact surrogacy laws." Hindustan Times (Aug. 7, 2008)



that the purpose of surrogacy was to help couple unable to conceive, they already having their biological child and without being infertile started adopting surrogacy and which make it an act of luxury instead being a necessity. Also the process of surrogacy is not as cheap to be afforded by a middle class couple. We have many big celebrities who opted for surrogacy, for example famous film star Shahrukh Khan and Gauri Khan who already being a parent of two kids opted surrogacy for their third kid, also famous couple sunny leone and Daniel Weber has been recently in news for their successful surrogacy for their two twin baby boys after they adopted their first girl child, Lisa Roy (actor and model) who survived blood cancer few years ago became mother through surrogacy due to age and health complicity, Ekta Kapoor (Indian producer) became single mother of baby boy named Ravie Kapoor through IVF and surrogacy, similarly many other famous characters like Karan Johar, Sohail Khan, Farah Khan, Aamir Khan, etc. These people are followed and also copied for their actions and which creates fear if having a surrogate child became a standard or some sort of status symbol in some time.

2. According to United Nations human right report 2018, “children are at risk of being commodities, as surrogacy spread and usually amounts to the sale of the children.”⁹ People through surrogacy not only achieve their parenthood but in many cases people from other country come to India get a child through surrogacy because of low cost and no proper regulation and legal framework for protection of children and then sell that child

⁹ OHCHR, UNITED NATIONS HUMAN RIGHTS, available at <https://www.ohchr.org/EN/Issues/Children/Pages/Surrogacy.aspx#main> (last visited on 29 Jan. 2020)

for a huge amount or also more of the times surrogacy has been used for exploitation of children. More often girl children are exploited who are pushed to sexual and some other inappropriate activities.

3. Surrogacy is a legal agreement but it involves a woman who holds emotional side too. In many of the cases, surrogate mother just after the birth of the child are not allowed to even see their child once because the intended parents fear that if she her child may be it become difficult for her to give up on the child and if she refuses to do so. Perhaps, the most famous case of “Baby M.”¹⁰ is a result of the emotional attachment that exists in a heart of a surrogate mother. In the case of “Baby M.” In 1984, Couple named Bill and Betsy Stern hired a surrogate Mary Beth Whitehead and paid her \$10,000 for being a surrogate. The process used for surrogacy was of traditional surrogacy. And when baby was born, time came when whitehead was to sign over her parental rights which she refused to do so and claimed the custody. It was after long battle which ended in 1986, resulted in couple finally getting the custody of the child where whitehead got visiting rights. It was after this case people shifted to gestational surrogacy to avoid these legal entanglements. After this case US government came up with strict laws for regulation of surrogacy. Whitehead have written about her regret and experience in her book “Birth Mother”. Through this case we witness a trauma or a heart break a woman goes through while handing over a baby, who she has cherished for about 9 months and then have to hand it over to someone else. This is

¹⁰ 1988 N.J. LEXIS 1, 77 A.L.R.4TH 1(N.J. Feb. 3, 1988)



the case and the problem suffered by most of the surrogate mothers and in most cases these child's just after the birth are taken so far away that even if women get visitation rights, she can't exercise it.

4. Many a times surrogate mothers breach a contract by doing something which is not allowed in contract like drinking alcohol, smoking or taking drugs which not only harms surrogate mother but also child in her womb. According to studies, it has been found that using marijuana or any other form of harmful drugs can affect the fetus. It was indicated that prenatal exposure may cause irritability to new born, abnormal visual response to the stimulus and increased risk of bronchiolitis. In many of the cases these intended couple try to get surrogate in lowest price or many times these surrogates are too young girls or immature not enough to know the consequences of few acts which may cause damage to the baby. So, these parents while agreement try to mention it as a restriction for surrogate, but women addicted to these or due to stress or social pressure end up taking drugs which can cause severe harm to the baby.
5. Medical complication can form when eggs of one woman are transplanted into the surrogate, which can cause her an infectious disease which can hurt also her baby. There are various tests a woman has to go before being a surrogate.
6. Commercial surrogacy also prohibits single parents, homosexual couples, live-in-relationship couples who all to opt for altruistic surrogacy. It's hard for such people

to get someone who get ready for them to become a surrogate without being paid.

7. Cross border childless couples face many problems not only on language basis but legal battles as well. They have to stay in India for 2-3 months to complete the formalities after a baby is born. Cross border surrogacy leads to problems in citizenship, nationality, motherhood, parentage and rights of a child. Children are sometimes denied nationality of the country of intended parents.

MANJI'S CASE¹¹ - In 2008 a baby born through surrogacy was unable to leave India for three months after her birth because she held neither Indian nor Japanese nationality. The issue was resolved after the Japanese government issued a one-year visa to her on humanitarian grounds. The Japanese government issued the visa after the Indian government granted the baby a travel certificate in September 2008 in line with a Supreme Court direction.¹²

8. Many cases have highlighted the matter of abandoning of child. Intended parents disown the child and sent them to orphanage. Few reasons can be like dropping the idea of having a child, or many a times when they didn't like the child colour or appearance they refuses to accept the child, in many cases reason for disowning the child is gender inequality. If the born child is a girl child, intended parent refuses to accept it.
9. Surrogacy helps in expanding or promoting the patriarchal sense of the society. As instead of opting for adoption of a child who need parents, they decide to go for surrogacy

¹¹ Baby Manji Yamada vs. Union Of India & Anr on 29 Sep. 2008

¹² Yamada Manji "India-born surrogate baby arrives to unite with Japanese dad". Zee News., (3 Nov. 2008).



just for the child of their own genes. It gives option to people of rigid mind set of patriarchy and help them promote it. Hence, it restricts the growth of society.

10. There are also some ethnical issues with surrogacy poor or illiterate women of rural background persuaded in such deals for money by husbands and such deals steals women right on their body and life. India has no provision of psychological screening or legal counselling i.e., mandatory in USA. In many of the cases these womens just for money agrees to become the surrogate but don't really know how it works and they sometimes don't know that after baby is born she has to give it to them. Many cases they don't know how will her body acts to it and she may not be prepared for it.

11. There are many surrogate industries which are working unchecked as the watchdog drafted regulation by India medical research is still awaited in parliament which has made these industries kept working.

establishment of national surrogacy board, state surrogacy board and for appointment of authorities for regulation of practice and process of surrogacy.

- Speaking on the Bill, Dr. Vardhan said: “ the bill is aimed at ending the exploitation of women who are lending their womb for surrogacy, and protecting the rights of children born through this. The bill will also look after the interest of the couple that opt for surrogacy, ensuring that there are laws protecting them against exploitation by clinics that are carrying this out as a business.”

“There are very few countries in the world which allow commercial surrogacy, with experts arguing that this is exploitation and abuse of human dignity. We cannot allow women in our country to be exploited without them actually understanding what is happening with them. The government has a duty to protect the interests of these women,” added the Minister.¹³

SURROGACY (REGULATION) BILL 2019

- This bill was introduced by minister of health and family welfare, Dr. Harsh Vandhan in Lok Sabha on July 15, 2019.
- The Bill defines surrogacy as a practice where a woman gives birth to a child for an intending couple with the intention to hand over the child after the birth to the intending couple.
- This bill was passed by lok sabha on Monday, 5 Aug 2019. It aims at banning commercial surrogacy in India and also for the

PROVISIONS OF REGULATION BILL 2019:

The Regulation bill 2019 consists of various provisions to regulate and maintain the surrogate industry. It provides for constitution of surrogacy boards at national and state levels to regulate it at central and state level, respectively. These boards will also look after every aspects of surrogacy happening at their boundaries. Bill also set a guidelines providing restrictions and eligibility for the couple who can opt for surrogacy.

¹³ The Hindu, LOK SAVHA PASSES SURROGACY REGULATION BILL, 2019 , 05 Aug. 2019, available at

<https://www.thehindu.com/news/national/lok-sabha-passes-surrogacy-bill/article28824277.ece> (last visited on 31st Jan. 2020)



According to it, intending couples should not abandon a child under any condition and if they do so they will be punished. This provision was required to be essential as there are number of cases coming were child either being a girl child, or born disabled or due to any other reason are abandoned by the couples. Hence, this bill prohibited the abandoning of child. This bill also mentions that only Indian couples who are legally married for atleast 5 years are allowed to opt for surrogacy. It prohibited commercial surrogacy and allowed only ethical surrogacy that to only to intent infertile Indian marriage couples between age of 23 to 50 year and 26 to 55 years for female and male respectively.

This bill also Seeks to allow ethical/altruistic surrogacy to intending infertile Indian married couples. Here, altruistic means there can be no agreement between surrogate and intending couple and also there shall be no paying to a surrogate mother but it allow them to pay necessary expenses and if they want, as a gift or a thanking expression. Couple must also obtain certificate of essentiality, certificate of eligibility before going for surrogacy. These certificates are essential to obtain before any surrogacy takes place.

There are also essential for a woman to fulfil before becoming a surrogate . According to bill Surrogate mother must be a close relative of intending couple (eligibility criteria). This is to ensure that no one do commercial surrogacy by making it compulsory that the couple can have surrogate within their very close relation. This is also to ensure that no children or women is exploited. Also, Surrogate must be a married woman having a child of her own and should be between the ages of 25-35 years. Also, She should not

have been a surrogate earlier that means a woman can act as a surrogate mother only once in her whole lifetime and also she must be certifiably mentally and physically fit.

For legal status of child, bill clearly states that child born out of surrogacy to be the biological child of intending couple. New born child shall be entitled to all the rights and privileges available to a natural child. Bill also seeks to regulate functioning of surrogacy clinics and also all surrogacy clinics in country need to be registered by appropriate authority in order to regulate surrogacy and its procedure. This is to be ensured by the boards established in central and state level including UTs.

PROBLEMS FACED AFTER REMOVAL OF COMMERCIAL SURROGACY

It's not just that commercial surrogacy was only toxic for our society. It was also medium of livelihood to a class of people. As, these section of society are where woman are not educated and are also poor and jobless. Their husband left them because of some reasons and they are left lonely and struggling for livelihood. So these women choose to become a surrogate mother as the intended parents give all facilities to them i.e., food and medicines.

Also one issue which is been raised as an emotional problem for the surrogate mother as she is not been allowed to see the child so she don't changes her decision.

Hence, commercial surrogacy does have major issues but it can't be just removed without seeing back problems of it.



While discussion on surrogacy regulation bill 2019, Shashi Tharoor (MP congress) puts certain objections on provision of bill:

- i- It prevent same sex couple having children
- ii- Also it violates Putuswami judgement of SC, as it violates Article 14 (as its treats equally unequally) and Article 21 (right to privacy).

By providing married couples to wait for 5 years to become eligible for surrogacy is an unreasonable restriction on their reproductive rights.

ANALYSIS OF LEGISLATIONS FROM DIFFERENT COUNTRIES

Aforementioned, jurisdiction in various countries have different ideas regarding the concept of surrogacy and status of its legislation on surrogacy. Countries like Spain, France, Germany, Bulgaria, Italy and Portugal prohibits all forms of surrogacy. Whereas Commercial surrogacy is banned in Canada, Denmark, UK, New Zealand and Australia, except the Northern Territory which has no law on surrogacy but all these countries allow altruistic surrogacy.

GREECE- Surrogacy is legal in Greece since last few years and this is available only to Greeks and not just Greeks but according to Greek law, right to surrogacy is granted only to women and hence, no single man have right to get a child through surrogacy except heterosexual couples and single mothers. Now Greece has also allowed this process for foreigners as well. Greece is the country where parentage is decided by judiciary and hence it becomes easy determine the parentage of the child born through surrogacy.

USA- Surrogacy is not legal in whole USA but is allowed in parts of it. In most states of USA there is no law for surrogacy; because of which the parentage of the child is decided by judiciary when the surrogate is pregnant and is in her sixth month of pregnancy. USA is the country who recognised the concept of surrogacy and introduced parentage through surrogacy for the first time. In USA any one can carry out surrogacy it be heterosexual or homosexual couples, single men or women and unmarried couples. Judicial decision for parentage and application of ius soli i.e., minors right to an American passport, is guaranteed so that the issue which is caused to the child in most of the case for returning to his home town is solved.

Ukraine is a country where surrogacy has a proper legislation which is been regulated by the national law. Also, Georgia is the country where surrogacy is legal and has same legal status as in Ukraine

As like in Ukraine, surrogacy is also legal in Russia and have lots of experience in the matter. Russia is known for its stronger economy and hence it also have strong terms in customer care and clinic. Kazakhstan has also similar conditions for surrogacy as of in Russia, but because of its high price like that of US it is an unattractive country for surrogacy.

India at current only provides service of surrogacy to heterosexual couples whose country allow them to opt for surrogacy and that's why its attraction for foreign tourist for surrogacy had to the extend came to the end.

CONCLUSION

India is a vast country which brings great responsibility to the government as well as the citizens. There is a responsibility of the



government to regulate the laws for everything, at the same time it is also the responsibility of the citizens to not misuse these laws or regulations made by government for the benefit of the citizens only. India is still trying to come with proper laws for regulation of surrogacy which has not yet been properly formed and is still in line for being passed by the Raja Sabah. Surrogacy is a blessing only when applied in a regulated manner and get stopped being misused. Government need to come up with strict rules and better application of it. There should be a data of each and every surrogacy to make sure that no one is being exploited. Just banning commercial surrogacy doesn't mean that there will be no sale of children or no exploitation of surrogate women. Surrogacy is a very old issue which yet hasn't been considered as a very serious matter in need of quick and effective laws as soon as possible. Its better late than never. And a country like India badly needs serious implementations of law and for implementation we need law on it, a proper effective law.

