

SURROGACY: HOW FAR NEW LAWS SUCCESSFUL IN COMBATING ISSUES IN REGARDS TO SURROGATE MOTHER AND THE CHILD

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ABSTRACT

Surrogacy is an arrangement where a surrogate mother bears and delivers a child for another couple or person. Commercial surrogacy is legal in India, Ukraine, and California while it is illegal in England, many states of United States, and in Australia, which recognize only altruistic surrogacy. Many infertile couples from all over the World come to India for surrogacy since commercial surrogacy is legal in India. Although this arrangement appears to be beneficial for all parties concerned, there are certain delicate issues which need to be addressed through carefully framed laws in order to protect the rights of the surrogate mother and the intended parents.

It is currently estimated to be a \$2-billion industry². Before November 2015, when the government imposed a ban, foreigners accounted for 80 per cent of surrogacy births in the country. This is because most countries, barring a few such as Russia, Ukraine and some U.S. states, do not permit commercial surrogacy. Many countries in Europe have completely prohibited surrogacy arrangements, both to protect the reproductive health of the surrogate mother as well as the future of the newborn child.

1. INTRODUCTION

The first scientifically documented test tube baby in India was born in 1986 and India legalized surrogacy in 2002.

Supreet Sidhu quoted that the next decade saw mushrooming

1. Asst. Prof, Amity Law School, Noida

2. Editorial, "why surrogacy is necessary", The Hindu, August 20, 2016

of IVF clinics in the country and India earned the tag of the ‘surrogacy capital’ of the world. In 2012, surrogacy tourism in India was valued at approximately \$500 million annually³.

Anand in Gujarat with its countless IVF clinics and ready availability of surrogates emerged as Ground Zero for Surrogacy for childless foreign couples.

The domestic factors that attributed towards the creation of a surrogacy market in India were poverty, relatively low medical costs, skilled medical personnel and laxity in laws.

Clinics charged patients between \$10,000 and \$28,000 for the complete package, including fertilization, the surrogate’s fee, and delivery of the baby at a hospital, which is believed to be just one third of the total cost for similar procedure to be carried out in UK⁴.

The procedure required to be followed by the foreign childless couple for surrogacy is fairly simple. They need to register with the Indian embassy, get documents from their doctor saying that they are unable to have a child and carry a medical visa.

Once the sanction has been obtained from the Indian Embassy, they could go ahead with the surrogacy agreement with the surrogate (invariably through a middle-man) and commence the process.

2. LEGAL ISSUES

Commercial surrogacy has been legal in India since 2002.

India is emerging as a leader in international surrogacy and a sought after destination in surrogacy-related fertility tourism. Indian surrogates have been increasingly popular with fertile couples in industrialized nations because of the relatively low cost. Indian clinics are at the same time becoming more competitive, not just in the pricing, but in the hiring and retention of Indian females as surrogates. Clinics charge patients roughly a third of the price compared with going through the procedure in the UK⁵.

Surrogacy in India is relatively low cost and the legal environment

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3. Supreet Sidhu, Commercial surrogacy and lack of Regulations: comparative study, Lampert Publications, 1st edit 2007
 4. Editorial, Draft surrogacy bill violates fundamental right of people to choose modes of parenthood, The Indian Express, Aug 27, 2016
 5. DrMrsKaushalv.UOI SCC 2015BOM 8052

is favorable. In 2008, the Supreme Court of India in the Manji's case⁶ (Japanese Baby) has held that commercial surrogacy is permitted in India with a direction to the Legislature to pass an appropriate Law governing Surrogacy in India. At present the Surrogacy Contract between the parties and the Assisted Reproductive Technique (ART) Clinics guidelines are the guiding force. Giving due regard to the apex court directions, the Legislature has enacted ART BILL, 2008 which is still pending and is expected to come in force somewhere in the next coming year. The law commission of India has specifically reviewed the Surrogacy Law keeping in mind that in India that India is an International Surrogacy destination.

Paula Gerber states that International Surrogacy involves bilateral issues, where the laws of both the nations have to be at par/uniformity else the concerns and interests of parties involved will remain unresolved and thus, giving due regard to the concerns and in order to prevent the commercialization of the Human Reproductive system, exploitation of women and the commodification⁷ of Children, the law commission has submitted its report with the relevant suggestion:

The Law Commission of India has submitted the 228th (August 2009) Report on "*NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY.*" The following observations had been made by the Law Commission: -

- (a) Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes⁸.
- (b) A surrogacy arrangement should provide for financial support

6. Baby Manji Yamada v. UNION OF INDIA & ANR. SCC 2008 SC 1656

7. Paula Gerber, Surrogacy Laws and Human Rights 194, Routledge 1st edition 2015

8. www.prsindia.com (visited on Dec 1, 2016)

for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child⁹.

- (c) A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
- (d) One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.
- (e) 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.
- (f) The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
- (g) Right to privacy of donor as well as surrogate mother should be protected.
- (h) Sex-selective surrogacy should be prohibited.
- (i) Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

The Report has come largely in support of the Surrogacy in India, highlighting a proper way of operating surrogacy in Indian conditions. Exploitation of the women through surrogacy is another worrying factor, which the law has to address. The Law Commission has strongly recommended against Commercial Surrogacy. However, this is a great step forward to the present situation. Legislation to come by early 2014¹⁰ with the passing of the Assisted Reproductive Technology Bill aiming to regulate the

9. Supra a

10. Available at <http://lawcommissionofindia.nic.in> (visited on Dec1, 2016)

surrogacy business is in the pipeline.

In *Jan Balaz v Union of India*¹¹, the Gujarat High Court conferred Indian citizenship on two twin babies fathered through compensated surrogacy by a German national in Anand district. The court observed: “We are primarily concerned with the rights of two newborn, innocent babies, much more than the rights of the biological parents, surrogate mother, or the donor of the ova. Emotional and legal relationship of the babies with the surrogate mother and the donor of the ova is also of vital importance.” The court considered the surrogacy laws of countries like Ukraine, Japan, and the United States.

Because India does not offer dual citizenship, the children will have to convert to Overseas Citizenship of India if they also hold non-Indian citizenship.

Balaz, the petitioner, submitted before the Supreme Court that he shall be submitting his passports before the Indian Consulate in Berlin. He also agreed that a NGO in Germany shall respond back to India on the status of the children and their welfare. The Union of India responded that India shall make all attempts to have the children sent to Germany. German authorities have also agreed to reconsider the case if approached by the Indian.

In May 2010, the Balaz twins were provided the exit and entry documents that allowed them to leave India for Germany. The parents agreed to adopt them in Germany according to German rules.

3. IS SURROGACY PROFITABLE FOR ALL?

At a glance Gita Aravamudan states that, surrogacy seems like an attractive alternative as a poor surrogate mother gets very much needed money, an infertile couple gets their long-desired biologically related baby and the country earns foreign currency, but the real picture reveals the bitter truth¹². Due to lack of proper legislation, both surrogate mothers and intended parents are somehow exploited and the profit is earned by middlemen and commercial agencies. There is no transparency in the whole system, and the chance of getting involved in legal problems is

11. *Jan balazvUOI,AIR,2010Guj21*

12. Gita Aravamudan, *Baby Maker-Story of Indian Surrogacy* 89, Springer 1st 2014

there due to unpredictable regulations governing surrogacy in India.

Although in 2005, ICMR issued guidelines for accreditation, supervision, and regulation of ART clinics in India, these guidelines are repeatedly violated. Frustration of cross border childless couples is easily understandable who not only have to cope up with language barrier, but sometimes have to fight a long legal battle to get their child¹³. Even if everything goes well, they have to stay in India for 2-3 months for completion of formalities after the birth of baby. The cross border surrogacy leads to problems in citizenship, nationality, motherhood, parentage, and rights of a child. There are occasions where children are denied nationality of the country of intended parents and this results in either a long legal battle like in case of the German couple with twin surrogate children or the Israeli gay couple who had to undergo DNA testing to establish parentage or have a bleak future in orphanage for the child. There are incidences where the child given to couple after surrogacy is not genetically related to them and in turn, is disowned by the intended parent and has to spend his life in an orphanage.

If we look upon the problem of surrogate mothers, things are even worse and unethical. The poor, illiterate women of rural background are often persuaded in such deals by their spouse or middlemen for earning easy money. These women have no right on decision regarding their own body and life. In India, there is no provision of psychological screening or legal counseling, which is mandatory in USA. After recruitment by commercial agencies, these women are shifted into hostels for the whole duration of pregnancy on the pretext of taking antenatal care¹⁴. The real motive is to guard them and to avoid any social stigma of being outcast by their community. These women spend the whole tenure of pregnancy worrying about their household and children. They are allowed to go out only for antenatal visits and are allowed to meet their family only on Sundays. The worst part is that in case of unfavorable outcome of pregnancy, they are unlikely to be paid, and there is no provision of insurance or post-pregnancy medical and psychiatric support for them. Rich career

13. Id 121

14. Doreswamy Raju v State of Gujrat, Sc 2004,SC 995

15. Pinki Virmani, The perils of IVF, Surrogacy and modified babies 188, Springer 2nd edit 2016

women who do not want to take the trouble of carrying their own pregnancy are resorting to hiring surrogate mothers¹⁵. There are a number of moral and ethical issues regarding surrogacy, which has become more of a commercial racket, and there is an urgent need for framing and implementation of laws for the parents and the surrogate mother.

4. SOCIAL IMPACT OF SURROGACY IN INDIA

The laissez-faire approach to surrogacy laws in India raised questions about its impact in particulars in surrogacy and the wider community. Surrogacy in India has been the subject of increasing attention by experts from a variety of disciplines, including health policy¹⁶, social work¹⁷, feminist ethnography¹⁸, and bioethics¹⁹.

The labor of bearing a child is more intimately bound up with a women's identity than other types of labor. The work of pregnancy is long term, complex and involves an emotional and physical bonding between mother and fetus.²⁰

Commercialization of surrogacy is a contemporary legal issue, as there is a recent development in the ART technology, and thus, the proper laws regarding this issue has to framed as it is a very sensitive issue bearing with many social, legal, moral and political implications. The 2015 bill claims for insuring the medical, social and legal rights of the surrogate mother and the genetic parents . In the projected bill various guidelines are laid down related to the procedures that the ART clinics have to follow. It includes the rights, duties, offences and the penalties the ART clinics, genetic parents, donor and the surrogate mother hold and has to follow. Also, in the last nearly 20 years have seen an exponential growth of infertility clinics that use techniques requiring handling of spermatozoa or the oocyte outside the body, or the use of a surrogate mother. As of today, anyone can open infertility or assisted reproductive technology (ART) clinic; no permission is required to do so. Therefore, it becomes essential to regulate

16. Andrea Whittaker, 'Challenges of Medical Travel to Global Regulation: A case study of Reproductive travel in Asia' 10 Global Social Policy 2010

17.

18. AdityBharadwaj, 'The other Mother: Supplementary Wombs, Surrogate State and ARTs in India' ,Indian Journal of Public Health ,June 2015

19. Ethical concerns of Maternal Surrogacy and Reproductive Tourism,38 Journal of Medical Ethics 2012.

20. Margaret Jane Radin and Carole, Patemanstres,s2012

and keep the check on the clinics, so that the services they are providing are ethical.

In the proposed bill, due moral, social and legal concern has been taken by the drafters, but the bill lacks on certain aspects like due compensation to the woman. In the west up to 50 per cent of the total cost goes to the surrogate mother while in India most of the money is appropriated by sperm banks, ART clinics and lawyers. The Reproductive Technology (Regulation) Bill 2008 and the amended Bill of 2014 has not touched many of the ethical and social issues related to surrogacy and the rights of a woman and a child. It particularly provides for an agreement, legally enforceable where the surrogate mother can receive monetary compensation.

Commercial surrogacy in India, dubbed as the “surrogacy capital of the world”, is projected to become a whopping US\$2.3 billion industry by 2012²¹. In India poverty rate is 32.7%, i.e. this no. of people lives below the International poverty line thus, and such high level of poverty level makes Indian citizens prone to exploitation from the western countries.

The question here arises is that if the Indian government is legalizing renting the women’s womb that why we can’t we legitimize the renting of women’s body i.e. prostitution. Or selling and buying of organs. Transplantation of Human Organ Act, 1994 has banned the sale of human organs, organ loaning, but the legalization of commercial surrogacy as per Assisted Reproductive technology Bill, 2014 is rendering the above act void.

Giving birth to a baby is not a manufacturing process rather it is the amalgamation of a very special bond which starts to develop when the fetus is in the mother’s womb.

“Surrogacy”²², means 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 to carry it and hand over the child to the person or persons for whom she is acting as a surrogate.

According to the ART bill 2015, estimated data of the infertility rate is 15% of the world. Total fertility rate of India is 3 per

21. Sonia Malik, Surrogacy ethical and legal issues, Indian Journal of Community Medicine, Aug 2015

22. Black’s dictionary

woman, whereas, the fertility rate per woman is 2 in United State. Moreover it is to be noted that the rate of infertility in India is due to the lack of proper health care facilities and not because of biological reasons. A country that has fertility rate of 3 per woman and the population of 1,241,491,960 is not in any need of promoting surrogacy.

5. THE SURROGACY (REGULATION) BILL, 2016

The Surrogacy (Regulation) Bill, 2016 was introduced by Minister of Health and Family Welfare, Mr. J. P. Nadda in Lok Sabha on November 21, 2016. The Bill defines surrogacy as a practice where a woman gives birth to a child for an intending couple and agrees to hand over the child after the birth to the intending couple.

The Surrogacy (Regulation) Bill, 2016 proposes to regulate surrogacy in India by permitting it as an option for couples who cannot naturally have children, have a lack of other assisted reproductive technology options, are keen to have a biological child, and can find a surrogate mother among their relatives. Altruistic surrogacy, which means an arrangement without transfer of funds as inducement, is currently practised in some centres in India, though the majority of surrogacy centres use women who are paid for their services²³. The child born through surrogacy will have all the rights of a biological child. Indian infertile couples between the ages of 23-50 years (woman) and 26-55 (man) who have been married for five years and who do not have a surviving child will be eligible for surrogacy. The surrogate mother should be a close relative of the intending couple and between the ages of 25-35 years and shall act as a surrogate mother only once in her lifetime. Implementation will be through the national and State surrogacy boards. Any establishment found undertaking commercial surrogacy, abandoning the child, exploiting the surrogate mother, selling or importing a human embryo shall be punishable with imprisonment for a term not be less than 10 years and with a fine up to Rs.10 lakh. Registered surrogacy clinics will have to maintain all records for a minimum period of 25 years.

The bill manages to answer various questions like

Will surrogate arrangements be used only for infertile couples

23. www.prsindia.com (visited on Dec 1, 2016)

or even for same sex couple or just for the sake convenience of the couple who want the child but are not ready to bear pains for that?

What happens when the child is born handicapped and no one wants it? Should the surrogate and the couple be unknown to each other? Should the child be told or there should be total confidentiality? What if wife's sister donates the eggs and the husband's brother donates the sperms and the fertilization in vitro is carried out and subsequently it is implanted into the wife's uterus? When after the multiple implantation the time comes to selective abortion, what criteria should be applied and which fetus is to be aborted? Will there be sex selective abortion?²⁴

6. ADOPTION V. SURROGACY²⁵

It is estimated that there are 160 to 200 million orphans worldwide. To have an idea of the enormity of the numbers compare it with the population of Unites states which is just 300 millions. Also, it is believed that most of the orphans, due to lack of care and affection, divert into criminal activities, which is again the problem that any society or state has to face. There are over 25 million orphans in India. 5,000 children under the age of 5 die every day in India due to preventable causes. More than 60% of women in India are chronically poor. India has the highest child malnutrition rate of the world's regions.

Indian government, instead of promoting commercialization of surrogacy, should divert its concentration towards the improved health facilities of the millions of women and children. In India, the infertility rate is estimated to be 10% in Indian women 98% have secondary sterility they have been pregnant at least once before but are unable to conceive again. Their problems are due to untreated disease, poor health care practices or malnutrition. Most of these can be avoided through effective antenatal and postnatal care and through good primary health care with basic facilities to diagnose and treat infertility.

Millions of children are living without love, affection and proper care all over the world, thus any government or authority instead of

24. Amita Panda, *Wombs in Labor-Transnational Commercial Surrogacy in India*, Springer 2nd edit 2015

25. Editorial, Priyagupta, *The times of India*, July 2013

encouraging the complex process of surrogating, which can render the health of the surrogate mother, the child in risk, as bearing the child is a very complex and a risky procedure. Also the Mother Mortality rate in India is 253.8, which is very high as compared to the first world nations. In Italy it is only 3.9, whereas in US 16.6. Thus, as per the Indian medical conditions, there is a high threat implicated to the woman's health, who is bearing a child.

Indian government, instead of catering the needs of the western society for the need of the child, concentrates its attention towards requirements of its citizens.

Surrogacy can be opposed on various grounds one such reason is that surrogacy is exploitative. Outsourcing surrogacy to India further degrades the women and takes advantage of their poverty and lack of opportunities. The status of women in India is already brow beaten and critics of commercial surrogacy put forward a common objection that gestational labor is different from other types of labor. A divide of the feminists believes that surrogacy brings with it a freedom of the woman to choose and thus promotes gender equality.

Treating children as commodities degrades them by using them as instruments of profit rather than cherishing them as persons worthy of love and care. Contract pregnancy also degrades women by treating their bodies as factories and by paying them not to bond with the children they bear.

Commercial surrogacy challenges the conventional assumptions of maternal bonding which is based on the concept of natural and instinctive link between the mother and her fetus/child. The Surrogacy (Regulation) Bill, 2016²⁶ The Bill prohibits commercial surrogacy, but allows altruistic surrogacy. Altruistic surrogacy involves no monetary compensation to the surrogate mother other than the medical expenses and insurance coverage during the pregnancy. Commercial surrogacy includes surrogacy or its related procedures undertaken for a monetary benefit or reward (in cash or kind) exceeding the basic medical expenses and insurance coverage.

The ends do not justify means. In the market of reproduction it is seen that the sperms and the eggs are sold and wombs are rented.

26. www.prsindia.com (visited on Dec 1 2016)

The use of technology to bear a child by such means is contrary to the unity of marriage and the dignity of procreation of human being.

7. CONCLUSION

Recently researchers have contested this assumption and argued that most surrogate mothers do not bond with the babies they relinquish to the social parents. The detachment has been measured by the success rate of relinquishment, percentage of surrogates reporting satisfaction with the process and evidence of no psychological problems as a result of relinquishment. Attention can be drawn on findings of gestational surrogacy in India to contend that maternal bonding is effectively an emotion integral to the physiological process of child birth and is deeply rooted in the cultural context of motherhood. Some questions will always remain unanswered like What is the degree of stress on the couple and on the surrogate mother? Can anyone predict the intensity of emotions attached to that baby? What are the adverse psychological effects on the child when it is separated in his early infancy from the mother giving birth? What identity crisis might ensue a? Will there be desire on the part of the child to know his gestational father or mother?

In the final conclusion we can say that, it is very well understood that formalizing and legislating clearly defined regulations to prevent unethical practices in the domain of surrogacy are an immediate need. Concurrently, while drafting these legislations, there is also a need to be perhaps more flexible and identify various categories that can be accommodate for accord of permission to undergo Assisted Reproductive Technology. The rules and regulations must be stringent, but discretionary in nature. However, to impose an outright ban on surrogacy may be a very harsh step, especially when we look at millions of couples who are unable to have the joy of becoming parents.