

A Socio Legal Study on the Concept of Surrogacy with Special Reference to Indian Society

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Abstract:

Motherhood is more than bearing children through it is surely and definitely is the essence of who we are as women. Nature has bestowed the beautiful capacity to procreate a life within women and to treasure the experience of motherhood. Motherhood defines our very identity, our divine stature and nature and the exceptional traits, talents and tendencies our father gave us. Parenting is the most satisfying job we will never ever have, but it is not without challenges. 'Kids the greatest gift of God ever. It has been a dream of every married couple. But there are some couples who are unable to conceive a child, they are the infertile couple, Incapability may arise with one of the partners. Right to reproduction is an innate right of human being. The desire for children among couples is a universal phenomenon. The pain and agony of not fulfilling the dream of parenthood is inestimable. The science of infertility treatment has moved forward by leaps and bounds. Every society has across the world given primary importance to the institution of family. When two individuals come together and enter into a matrimonial bond, a new family comes into existence and such family becomes complete with the birth of the children. From the ancient times, children are considered as essential for the continuation of the family lineage and a source of happiness for the parents. Psychologists point out that birth of a baby creates a bond between the spouses which can help hectic marriages to sustain in the long run. However, due to various reasons, larger sections of the society are unable to have their child. Research has stated that one in six couples have such problems. The inability to have a child which is known as infertility in medical terms is a worldwide problem.

Keywords: Surrogacy, assisted reproductive technology, child, motherhood, infertile couple etc.

I. Introduction

Surrogacy is a lawful agreement, by understanding where a lady agrees to bear a child for a person who will become the child's parent after birth of the child. A surrogate does not have any parental right over the child and also the birth certificate of the baby should exist in the names of the intended parent as it is done to avoid any legal problems.

Surrogate mother is also known as mothering by proxy, in which one woman bears and gives birth to a child for a person or a couple who then adopts or takes lawful custody of the children. The surrogate is impregnated using a process called intrauterine insemination (IUI) where a doctor takes sperm from the intended father and transfers it into the uterus of the surrogate. Then natural fertilization of the egg takes

place it has been seen that there are lots of infertile couples from every parts of the world and they approach India because commercial surrogacy is bend in India although this kind arrangement seen to be helpful for the all the parties concerned. There are certain issues which need to be solved through framing of laws so that we can protect the right of surrogate mother and the parent of the child. Commercial surrogacy is legal in Ukraine and California while it is illegal in England different state of United States and in Australia. These countries recognize altruistic surrogacy. Countries like Germany, Sudan, Norway & Italia does not recognize any surrogacy agreement. Each and every year couples attracted to India by the surrogacy agencies.

Surrogate motherhood is a affiliation in which one women bears and gives birth to a child for a person or a couple who then adopts or takes lawful custody of the children; also called mothering by proxy. The surrogate mother is impregnated through non-natural insemination with the sperm of the husband. In gestational surrogacy, the wife's ova and the ensuing embryo is fixed in the surrogate mother. Normally, in either process, the surrogate give up all parental rights, but this has been subject to officially lawful permitted.

Surrogacy refers to an arrangement, in which women carries a baby for another couple there are lots of infertile couples from every part of the world. They approach India because commercial surrogacy is legal in India. Although this kind of arrangement seems to be helpful for all the parties concerned. There are certain slight issues which need to be solved through frame of laws, so that we can defend the rights of surrogate mother and the parents of the child.¹

This process of surrogacy is helpful for homosexual people. The ever-rising prevalence of infertility has led to development of assisted reproductive technology. Therefore, surrogacy comes as an arrangement where a surrogate mother bears and delivers a child for another couple or person. Surrogacy mainly divided into two categories one is gestational surrogacy and another is altruistic surrogacy. Where generally embryo, which is fertilized by in vitro fertilization is implanted into the uterus of the surrogate mother who carries and delivers the baby.

In traditional surrogacy, the surrogate mother is impregnate with the sperms of the intended father through artificial method. Thus it makes the mother gestational and genetic mother. Surrogacy is commercial and altruistic it depends upon thus the mother receive financial reward or not.

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II. Commercial surrogacy in India

In 2002, commercial surrogacy was legalised in India which led to an increased demand from the complex who were infertile and could not produce their child biologically. India came to be known as for surrogacy capital all over the world after then but as the year progressed the government of India notice some flows and misused of commercial surrogacy observing this ICMR introduce some regulation to prevent the exploitation. According to a survey from the UN in the year 2012 India was declared as the "world capital of surrogacy"

In the year 2015 the government of India banned the practice of commercial surrogacy and also barred foreign nationals, NRIs from participating. The surrogacy regulation bill 2016 was introduced in Lok Sabha on 21st November 2016 and on 12th January, 2017 it was referred to a standing committee thereafter on 10th August 2017 the committee gave its report on the same into Lok Sabha and on the basis of that report Lok Sabha passed the Bill on 19th December 2018.

The surrogacy bill, 2016 focuses on prevention of commercial surrogacy and promotion of altruistic surrogacy. The bill also safeguards the surrogate mothers and child from exploitation. Finally on 25.12.2021 surrogacy regulation act was enacted which is still on debates.

III. 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 truth in some times lack of proper legislation, both surrogate mothers and intended parents are somehow exploited and the profit is earned by middlemen and commercial agencies. And here is no one transparency in the all system and the chance of getting involved in legal problems is there due to unpredictable regulations governing surrogacy in India. In 2005, ICMR issued some guidelines for accreditation and supervision, and regulation of ART clinics in India, these guidelines are repeatedly violated in human beings are frustration of cross border childless couples is easily understandable it is not only have to cope up with language barrier, but sometimes have to fight a long legal battle to get their child. Everything goes well, they have to stay in India for 2-3 months for completion of formalities after the birth of baby. Surrogacy has some cross leads to problems in citizenship, nationality, motherhood, parentage, and rights of a child. There are occasions where children are denied population 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 some 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. Sometimes, If we look upon the problem of surrogate mothers, and also things are even worse and not ethical but the poor, illiterate women of rural background are often persuaded in such deals by their spouse or middlemen for earning easy money surrogate women have no right on decision regarding their own body and life, In our India there is no provision of psychological screening of lawful counseling, which is mandatory in USA. After recruitment by commercial agencies, these women are shifted to hostels for the whole duration of pregnancy on the pretext of taking antenatal care. Generally, the real motive is to guard them and to avoid any social stigma of being outcast by their community. The surrogate women spend the whole tenure of pregnancy worrying about the household and children. Some times they are allowed to go out only for antenatal visits and are allowed to meet their family only on Sundays. In surrogacy process 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 postpregnancy medical and psychiatric support for them. The Rich career women who do not want to take the trouble of carrying her own pregnancy are resorting to hiring surrogate mothers. There are a minimum number of moral and ethical issues regarding surrogacy, it has become more a

commercial racket, and there is an urgent need for framing and implementation of laws for the parents and the surrogate mother.

IV. Social Impact of Surrogacy

In India, the welfare state approach to surrogacy laws in India raise questions about its impact in specifics in surrogacy and the wider community. In India Surrogacy has been the subject of rising attention by experts from a variety of discipline, including health policy¹⁶, social work¹⁷, feminist ethnography¹⁸, and bioethics¹⁹. The labor of holding a child is more confidentially bound up with a women's individuality than other types of labor. The work of pregnancy is long term, compound and involves an emotional and physical bonding between mother and fetus. 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 responsive issue bearing with many social, legal, moral and political implications. The Bill of 2015 was claims for insuring the medical, social and legal rights of the surrogate mother and the genetic parents. In the projected bill various guiding principle are laid down related to the measures that the ART clinics have to follow. Where some includes the rights, duties, offences and the penalties the ART clinics, and 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 technique requiring handling of spermatozoa or the oocyte out the body, or the use of a surrogate mother. In today time, anyone can open infertility or assisted reproductive technology (ART) clinic; no permission is required to do so. Therefore, it becomes necessary to control and keep the check on the clinics, so that the services they are providing are ethical. The proposed bill, due moral, social and legal concern has been take by the drafters, but the bill lacks on certain aspects like due compensation to the woman. The west up to 50 per cent of the total cost goes to all the surrogate mother while in India is 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. Some times provides for an arrangement of legally enforceable where the surrogate mother can receive monetary compensation. In our country Commercial surrogacy has divided as the "surrogacy capital of the world", is projected to become a whopping US\$ 2.3 billion industry by 20 -12 -21. In our country poverty rate has 32.7%, people lives below the worldwide poverty line thus, and such high level of poverty level makes Indian citizens prone to exploitation from the western countries. Generally some question has arises is that if the Indian government is legalized renting the women's womb that why we can't we legitimize the renting of women's body i.e. prostitution. Selling and buying both are main importans organs. The Transplantation of Human Organ Act, 1994 has banned the sale of human organs, organ loaning, but the lawful of commercial surrogacy as per Assisted Reproductive technology Bill, 2014 is remendly the above act was void. Giving birth to a baby is not a manufacturing process rather it is the incorporation of a very special bond which starts to develop when the fetus is in the mother's womb. "Surrogacy".means an agreement in which a woman agrees to a pregnancy, achieve 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, predictable data of the infertility rate is minimum 15% of the world. Total fertility rate of India is 3 per woman, but the fertility rate per woman is 2 in United State. Moreover it is important that the rate of infertility in India

is due to the lack of proper health care facilities and not because of biological reasons. In our country has fertility rate of 3 per woman and the population of 1,241,491,960 is not in any need of promoting surrogacy.

V. Law relating to Surrogacy in India

The legal aspect of surrogacy varies from one jurisdiction to another. Some jurisdiction completely bans surrogacy declaring commercial surrogacy as an criminal offence while on the other hand some jurisdiction allows surrogacy on limited grounds of altruism. India is the only country where surrogacy is neither band nor completely regulated currently there is no law in India for regulating surrogacy. National academy of medical science, and practitioners of ART, the As it is not directly as unenforceable by law, it is denied to be enforceable and fully valid. After several years of discussion and debat, primarily among the ICMR, the Ministry of Health and family welfare published the non-binding national guidliness for Accreditation, Supervision and regularition of ART Clinics in 2005. The Indian council of medial research has drafted the Assisted Reproductive Techonology Bill 2008 to regularize and legitimate different forms of reproductive technologiest including commercial surrogacy. The law commission of India in its 228th Report it has reasoned as to why surrogacy laws are needed.

The Draft Assisted Reproductive Technology Bill and Rules 2010, it the latest draft of following the incoperation of additions and modifications to the draft of 2018. Accoriding to Assisted Reproductive Techonology Bill, 2013 provisions, no woman less than 21 years of age and over 35 years can act as a surrogate mother .

Currently there is no legislation in India for regularting Surrogacy. As it is not directly declares as uneffordable by law.it is deemed to be enforceable and fully valid. The legal status of surrogate in India can be better understood after going through the above rules and regulations applicable in India.

VI. Legal Status of Surrogacy in India

The Report highlight that surrogacy is legal, as well as secured under international and domestic law the commission cites Article 16.1 of the Universal Declaration of human rights 1948 which provides that “men and women of full age without any limitation due to race, nationality or religion has the right to marry and found the family”. The law Commission stresses that this right includes protection of surrogacy. However, the commission opines that despite of this fact other countries in the world have not recognize this rights as part of reproducitve rights. The commission call for regulation of surrogacy with a caution that the need of the hour is to adopt a pragmetic approach by legalising Altruisitic surrogacy arangment and prohibit commercial surrogacy.

VII. Ethics of surrogacy-

The big question arises that the surrogacy is ethical or not; whether the surrogacy is ethical in developing countries or not. Majorly, Surrogacy is interpreted to just an economic transactions between the commissioning parents and surrogate mothers. But, instead of this above all lies many factors like the emotions of the women ,baby rights etc. Which needs to be understood .The most ancient roots of this refer to infertility in the Genesis.

It is very difficult to associate the women's reproductive system by different religious and cultural backgrounds. Further, it has been found that in Jewish laws that the couples who are suffering from these types of problems, they are helped in every possible way as long as nobody is harmed while doing this.

The Catholic churches do not favour the assisted reproductive technologies but favour all the treatments given to the women for the infertility. Baptist, Methodist, Lutheran, Mormon, Presbyterian, Episcopal, United Church of Christ, Christian Science, Jehovah's Witness, and Mennonite religion, these all have liberalisation towards the treatments of infertilisation. In Islamic Laws, there is all freedom for the cure of infertility. It also extends to the use of In Vitro Fertilisation in which only husband and wife are involved⁶⁰. In Hinduism this topic is not very seriously in debate as that of others. They never debated on the Assisted Reproductive Technology because they always believe in the Karmas of the person which actually starts after the birth of the child. They never opposed the Assisted Reproduction rather considered as the treatment and not the violation of the religious beliefs.

VIII. Conclusion

Surrogacy does bring to brightness a twist of possible difficult links as these exclusive aspects of surrogacy as late it becoming the most controversial of all the assisted reproductive techniques in recent times the right to reproduce is a fundamental and inherent human right. Surrogacy is the only method to overcome both biological and social infertility. Advances in assisted reproductive technology, raise in its use and positive social progress in recognizing and accepting different family formations and ways of achieving parenthood have all contributed to an increase in surrogacy arrangement. In ancient time, surrogacy have been a method for begetting a child. But with the development of science and other technology, this method is being used for begetting a child not only by the infertile couples but also by any one who wishes to have a child. A technology made a contraception easier and less expensive a market emerged to fulfil this demand. As a result the increasing use of surrogacy has raised legal, ethical, moral and religious debate all over the world. As surrogacy agreement is involved more than two people, where all of whom can legitimately claim that he/she is the parent of the child. Therefore an inconsistency can arise about who should assume the parental rights and responsibilities towards the baby or child. As India is becoming a booming industry for surrogacy, it is both in various attendant complexity and inscrutable impact on the society due to the lack of inclusive piece of legislation. There is need to adopt specific legislation for the regulation of surrogacy and protection of surrogate mother in India.

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