

Silent Voices: A Critical Analysis of Surrogacy's legal Journey in India

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Abstract: There is Jewish proverb states that God could not be everywhere so he made mothers. Over a couple of centuries the desire to beget a child for an infertile couple was being satisfied by adoption. But modern sciences has provided new opportunities or options we can say to overcome adoption, that's surrogacy which has resulted as a boon for those childless couples who want their own child. Surrogacy is a practice whereby a woman agrees to become pregnant by implanted embryo or medically inseminated sperm and bear a child for another person or persons, to whom she intends to transfer the child's care at, or shortly after, birth and in return receives the compensation for carrying and delivering the child. The Paper is centred on "Surrogacy Market in India". The paper talks about the history of surrogacy, various moral and ethical issues, judicial response and law governing surrogacy in India.

Keywords: Surrogacy, Gestational Surrogacy, Genetic Surrogacy, Total Surrogacy, Egg Donor, Surrogate Mother, Gestational Mother.

INTRODUCTION

A special privilege and a blessing from God has been granted to women to give birth to a new form of life. The knowledge of entering motherhood and loving the feeling of it is cherished by any woman. A divinely natural right of a person is the right to reproduction. For couples, it's a universal phenomenon to wish for children. For a couple, entering into Parenthood is an everlasting rewarding and life-changing experience, and if that dream is not fulfilled, the existential anguish for that couple is immeasurable. Infertility care research has come forward and has improved in every way. The primary importance in the world has been given to the institution of family. When two people enter into a marital bond, a new family comes into being, and with the birth of their children, such a family becomes complete. Children are considered an essential source of happiness from ancient times and vital for the continuity of the family lineage and for the old age days of the parent. Psychologists believe that a child's birth can bind the partners, which can also allow them to survive difficult marriages in the long run.

However, it is shown that a large number of couples are unable to have their baby for different reasons. The data reveals that one in six couples have these issues. The absence of a child is seen as a family stigma that has led to the breakup of marriages. The inability to have a child is known in clinical terms as infertility, which is a growing global issue. The frequency of infertility across the globe, including India, is about 10-15%, according to the WHO Survey. And most of these fertility issues are treatable, but some of them, known as surrogacy, have not found an easy way to deal with them. The childless couple had only the option of adoption previously, but not with the development of technology in the field of artificial human reproductive technologies (ART) has come to rescue such people and provided them with different options to produce a genetically related child.

DISCUSSION

Meaning and concept of surrogacy

Surrogacy, a fresh development in reproductive medical science with the use of a woman's womb to replicate another woman's child. Surrogacy is amongst the most effective and effective ways of addressing the social stigma associated with childless couples. Surrogacy is a new opportunity for couples who are unable to replicate by artificial reproduction to have had a genetically linked infant. For people and couples who wish to carry a child who is particularly close to them, it became an alternative and attractive choice. All over the planet, the idea of surrogacy has been widely accepted. For infertile couples, surrogate motherhood is regarded

as a blessing as it is a ground breaking hope for a child. Surrogacy, according to Black's Law Dictionary, is described as "an agreement in which a woman agrees to be artificially inseminated with the semen of the husband of another woman."

The word "surrogate" derives from the word "surrogates" in Latin, which means "substitute." Traditionally, surrogate motherhood is commonly referred to as "an agreement between a married couple who cannot have a child because of the infertility including its wife and a fertile woman who agrees to conceive the child of the husband through artificial insemination, carry it to adulthood, and surrender here all child's parental rights."¹

Types of surrogacy

Surrogacy is usually classified into three genetic/partial surrogacy and gestatory/gestational surrogacy groups.

In Genetic/ Partial Surrogacy, the female egg is fertilised by the sperm including its childless couple's male partner by surrogate mothers or natural intercourse. The surrogate mother serves as the child's genetic mother in this case and plays the character of a legal and cultural mother. This form of surrogacy is also referred to as Conventional or Partial Surrogacy.

Both the semen and egg are retrieved from the pair or from anonymous donors in the case of Gustatory/Gestational Surrogacy, and the resulting embryo is consequently inserted into the carrying or surrogate mother. The surrogate mother has no genetic connection to the infant in this kind of surrogacy. This form of surrogacy may also be referred to as full surrogacy.

Surrogacy is then further split into two forms based on financial compensation. Commercial surrogacy is first, and altruistic surrogacy is second. The surrogate is typically compensated in terms of cash paid more by couple in commercial surrogacy. Surrogacy is not financially compensated in Altruistic Surrogacy, as this form of surrogacy is mostly practised out of love within close friends or family members not for the compensation or personal benefits.²

Commercialization of surrogacy in India

Reproduction is the gift of god and instead of embracing it he people are now commercialising it and making money out of it. It is hard to imagine the child as commerce but the hard reality is that the surrogacy among poor is seen as a mode of income. Babies are associated as the product of love, not money, a conception that occurs far away from any commercial activity. Across time there are instances when underprivileged parents of the society has viewed their children as potential economic assets and way of income. Likewise, the harsh reality is that the surrogacy has become a commercial business in countries like India, which is giving rise to many questions leading to political debate.³

Commercial surrogacy, or "wombs for rent," is a growing business in India.⁴ In India Surrogacy because of its commercialisation is often referred by "parenthood by proxy", "womb on hire", "baby booming business", "baby firm"⁵. Surrogacy in recent times has turned a biological function of a woman's body into a money earning machine. Surrogate in countries like India are recruited by the operating agencies to make large profits. The commercialization of surrogacy is raising fears of a black market of baby-selling and turning it into a breeding farms, In India surrogacy is becoming a booming business for the underprivileged sections and to the surrogate operating firms due to the fact that surrogate mothers are easily available and the entire cost of this method is way to less as compared to other countries.

¹ Buchanan, Jim, *Baby M & Surrogate Motherhood: A Resource Guide*, 1987. 17p. Vance Biblios Winston, K. I. & Bane, M.J. (1993). *Gender and public policy: Cases and comments*, Boulder, CO: West view Press, Inc.

² Jayaram P. Ok to rent womb in India, court ruling and new bill legalise worth about US \$ 445 million, *The Traits Time*.

³ Proposed Draft Assisted Reproductive Technologies (Regulation) Bill & Rules-2010, Ministry of Health and Family welfare and ICMR, India.

⁴ <http://www.stanford.edu/group/womenscourage/Surrogacy> , visited on 27th December 2019

⁵ Yashomati Ghosh, "Surrogacy and Law: An Affirmative Approach to Deal with the Ethical and Legal Dilemma", Vol. II.Issue 1, 2011 *Journal of Law Teachers of India* (83 to 92) at 84.

In India, most Indian surrogates are paid in interest charges over a span of 9 months and stay after the baby is born. If they are unable to deliver, they were not always charged at all and if they face miscarriage, often they must lose a portion of their fee. Indore town in Madhya Pradesh, Mumbai in the state of Maharashtra, Pune, Anand town in the state of Gujarat, Thiruvananthapuram, Delhi and Kolkata are the hot places to find surrogates in India. Many private clinics have undergone mushrooming growth in Pune City, Indore, Anand and Surat. Such clinics act as intermediaries between foreign couples and willing adoptive mothers.⁶

Moral and Ethical issues relating to surrogacy

The concept behind surrogacy is a virtuous one because it is based on the altruistic philosophy of one woman doing well to others supporting another woman, but the entire idea is already moulded into business with either the evolving scenario or its commercialization. The following are some of the legal and ethical problems related to surrogacy:

- **Complicated procedure-** Most women, because of economic need or insecurity, serve as surrogate mothers. But don't know that the surrogacy process requires a complex procedure that also can harm the surrogate's health and life, which can be unrecoverable in nature.
- **Interest of the Child-** For certain procedures, the surrogacy process often requires the transfer of money to the surrogate as well as the clinic, leading to the selection of the child on the basis of sex or characteristics given to them upon payment of another sum of money. This often leads to children being treated as a product that is morally incorrect and morally reprehensible in nature. The treatment also entails different complications, such as the birth of sextuplets or quadruplets. Which often harms the child's interest, as parents may not be able to look after such a number of children born against their wishes. In addition, surrogate children may be born with defects due to the procedure and also the couple often denies parental rights of defects.
- **Surrogacy Degrades the Dignity of Woman-** Dignity is something this was one of the fundamental human rights that everyone cherishes. It is often proposed that surrogacy degrades a woman's natural integrity. As it involves the use of a woman's reproductive gift for cash. They also give birth to a child who, but after delivery, is handed across to the commissioning parents. The pregnant is generally bound by the contract concluded between the parties during in the time of pregnancy, so sometimes there is no opportunity to bring any decision concerning her anatomy and child. In addition, surrogacy is seen as a commercial transaction because of which the surrogates try to establish the special bond with the child during pregnancy, thereby either absent or suppressing the normal mother-child bond and the whole method.
- **Surrogacy has been equated with Prostitution-** Many individuals have also opposed and correlated the practise of surrogacy with prostitution, as it entails the sale of a woman's reproductive ability and the use of her body in exchange for cash payments. It is further proposed that the sperm bank has really no choice and now has to abide by all the contractual terms put forward by the commissioning parents, similar to either a prostitute who really has no access and control before a customers who has solicited her favour and paid money; In both cases, physical services are rendered, and in both cases, material compensation is offered again for physical facilities supplied.⁷
- **Exploitation of Poor Women-** Many individuals have also opposed and correlated the practise of surrogacy with prostitution, as it entails the sale of a woman's reproductive ability and the use of her body in exchange for cash payments. It is further proposed that the sperm bank has really no selection and now has to abide by all the contractual terms provided forward by the commissioning parents, similar to either a prostitute who really has no access and control before such a customers who has solicited her favour and paid money; In both cases, physical services are rendered, and in both cases, material compensation is offered again for physical facilities supplied.

⁶ Gostin Larry ed. Surrogate Motherhood: Politics & Privacy. 1990. 320p. Indiana University Press.

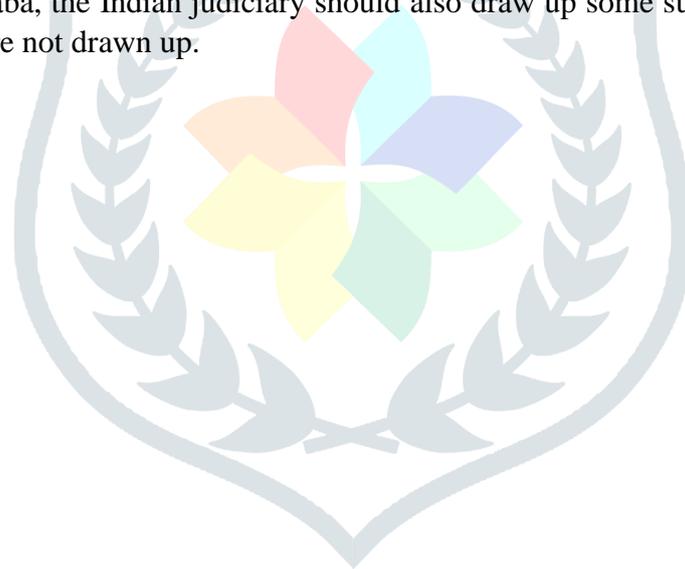
⁷ Anesh V. Pillai, "Surrogate Mother and its Challenges to the Indian Legal System", Vol.1 No.2, 2011 The Legal Analyst (89 to 93) at 92.

The Surrogacy (regulation) bill, 2019

The Surrogacy (Regulation) Bill, 2019 was introduced in Lok Sabha on July 15, 2019 by Dr. Harsh Vardhan. This Bill addresses various parts of surrogacy, including surrogacy legislation, eligibility requirements for intended spouses, surrogate mother eligibility criteria, national and state surrogacy boards, etc. Commercial surrogacy is forbidden by the Bill, and altruistic surrogacy is only authorised. No direct benefit to the surrogate mother other than medical costs and health coverage mostly during pregnancy affects this form of surrogacy. A 'Certificate of Essentiality' and a 'Certificate of Eligibility' issued by the relevant authority should be available to the intending couple for surrogacy. An order of parentage and custody of the surrogate child passed by a Magistrate's court and health coverage for a duration of 16 months covering postpartum delivery conditions for the surrogate would be approved only upon fulfilment of the certificate of proven infertility of either or both members of the expected couple from the District Medical Board.⁸

CONCLUSION

In ancient as well as modern times, surrogacy has found its place, instances can be taken from Mahabharata to Bhagwat puran to other religious texts to understand the fundamental principle of surrogacy. The definition of surrogacy has also changed with the new age and the advancement of technology. Surrogacy is now seen as a business activity for all sides and as a commodity for children. New problems are brought to light in the changing surrogacy scenario, the abuse of women, the interest of the child, the dignity of women, etc. As India becomes a booming surrogacy industry, a clear law on the regulation of surrogacy and protection of surrogate mothers, along with the interest of the baby child born from surrogacy from abuse in India, needs to be adopted. Both surrogate mothers and adoptive parents are somehow abused due to the lack of proper regulation, and the benefit is received by arms dealers and commercial agencies. Although the 2019 fertility treatment bill is at Lok Shaba, the Indian judiciary should also draw up some surrogacy guidelines until the period when proper laws are not drawn up.



⁸ <http://prsindia.org/billtrack/surrogacy-regulation-bill-2019>, visited on 15th Jan 2021