



Surrogacy and Women in India: Issues and Perspectives

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ABSTRACT: Surrogacy is when a woman carries a baby for another couple and gives up the baby at birth. In the past decade, commercial surrogacy has grown tremendously in India. India has emerged as an international centre of "surrogacy industry". Thousands of infertile couples from India and abroad are flocking to the Assisted Reproductive Technology (ART) clinics to have a child of their own. Surrogacy raises complex ethical, moral and legal questions. Surrogacy poses a serious threat to human rights and has been thoroughly condemned as it acts as a channel for the exploitation of surrogate mothers. For infertile parents, bearing children is Fundamental Right and for surrogate mother, surrogacy is a gross violation of human rights. In India, Surrogacy is highly unregulated and hardly ever monitored. In the light of above, it had become necessary to enact a legislation to regulate surrogacy services in the country, to prohibit the potential exploitation of surrogate mothers and to protect the rights of children born through surrogacy.

Keywords: surrogacy industry, ill effects, legal framework, and judicial pronouncements etc.

I. INTRODUCTION

The word surrogate originates from Latin word surrogates (substitution) which means to act in the place of. Further the very word surrogate means "substitute" [1]. In general, terms surrogacy is the practice where by one woman carries a child for another with the intention that the child should be handed over after the birth. Surrogate mother "is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents(s)" [2].

Defining surrogacy, it may be very well noted here that surrogacy is of three broad types [3]:

- **Traditional Surrogacy**- It involves the artificial insemination of the surrogate mother by using the sperm of the intended father.
- **Gestational Surrogacy**- This sort of surrogacy involves the creation of an embryo in a Petri dish and its implementation into the womb of the surrogate mother who carries it to the term.
- **Donor Surrogacy**- In donor surrogacy there is no genetic relationship between the child and the intended parents as the surrogate is inseminated with the sperm, not of the intended father but of an outside donor.

If methodology is to be believed, this is the best techniques of surrogate motherhood may not be new after all. It explains the one hundred children's of *Dhritarashtra* and *Gandhari* in *Mahabharata*. The term surrogacy is used when woman carries pregnancy and gives birth to a baby for another woman. This woman may be the child's genetic mother, or she may carry the pregnancy to deliver after having an embryo, to which she has no genetic relationship, transferred to her uterus [4].

To understand surrogacy in the Indian context, one must begin with the fact that, while the Transplantation of Human Organs Act, 1994 banned the sale of human organs, organ loaning an equally difficult and risky venture is being promoted through paid surrogacy. This is due to a medical industry that welcomes profitable international ventures like "reproductive tourism", even when infertility constitutes a small segment of domestic priorities [5].

The ever-rising prevalence of infertility world over has lead to advancement of assisted reproductive techniques (ART). Herein, surrogacy comes as an alternative when the infertile woman or couple is not able to reproduce. Surrogacy is an arrangement where a surrogate mother bears and delivers a child for another couple or person. In gestational surrogacy, an 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 impregnated with the sperms of the intended father artificially, thus making her both genetic and gestational mother. Surrogacy may be commercial or altruistic, depending upon whether the surrogate receives financial reward for her pregnancy.

India has emerged as an international centre of "surrogacy industry". Thousands of infertile couples from India and abroad are flocking to the Assisted Reproductive Technology (ART) clinics to have a child of their own

[6]. Surrogacy raises complex ethical, moral and legal questions. Surrogacy must be legal in India for it to have developed into an industry. What does it mean and how has it come to be? It is currently estimated to be a \$2-billion industry. 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.

The debate began when, in 2008, a Japanese doctor couple commissioned a baby in a small town in Gujarat. The surrogate mother gave birth to a healthy baby girl. By then the couple had separated and the baby was both parentless and stateless, caught between the legal systems of two countries. The child is now in her grandmother's custody in Japan but has not obtained citizenship, as surrogacy is not legal in Japan.

In 2012, an Australian couple who had twins by surrogacy, arbitrarily rejected one and took home the other. A single mother of two from Chennai decided to become a surrogate mother in the hope that the payment would help her start a shop near her house. She delivered a healthy child, but her hopes bore little fruit for herself. She received only about Rs.75,000, with an autorickshaw driver who served as a middleman, taking a 50 per cent cut. After repaying the loans, she did not have enough money. On January 29, 2014, 26-year-old Yuma Sherpa died in the aftermath of a surgical procedure to harvest eggs from her body, as part of the egg donation programme of a private clinic based in New Delhi.

These incidents highlight the total disregard for the rights of the surrogate mother and child and have resulted in a number of public interest litigations in the Supreme Court to control commercial surrogacy. The 228th report of the Law Commission of India [7] also recommended prohibiting commercial surrogacy and allowing ethical altruistic surrogacy to needy Indian citizens by enacting a suitable legislation. In the light of above, it had become necessary to enact a legislation to regulate surrogacy services in the country, to prohibit the potential exploitation of surrogate mothers and to protect the rights of children born through surrogacy.

II. THE SURROGACY (REGULATION) BILL, 2016; ISSUES AND PERSPECTIVES

On August 24, the Union cabinet approved the Surrogacy (Regulation) Bill, 2016. 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 [8], 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 services.

The Surrogacy (Regulation) Bill, 2016 has several checks on who is an eligible candidate for surrogacy, and also has restrictions on who can be a surrogate mother. The government, in this legislation, has also tried to define a couple in "need" for a surrogate child. Here are few things we should know about the proposed bill:

(i) Ban on Commercial Surrogacy [9]

The Government of India has proposed to amend the surrogacy laws in India because of increase in commercial surrogacy in India. Government said that India "has emerged as a surrogacy hub for couples from different countries", which has spiraled into unethical practices, putting both surrogate mothers and their babies at risk. However, instead of putting into place checks and balances for this growing industry, the government has proposed simply banning it. No person, organisation, surrogacy clinic, laboratory or clinical establishment of any kind shall undertake commercial surrogacy, provide commercial surrogacy or its related component procedures or services in any form or run a racket or an organised group to empanel or select surrogate mothers or use individual brokers or intermediaries to arrange for surrogate mothers and for surrogacy procedures, at such clinics, laboratories or at any other place [10].

(ii) Regulation of surrogacy and surrogacy procedures [11].

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 Surrogacy (Regulation) Bill, 2016 allows married Indian couples with "proven infertility" to try the surrogacy route. This will, by omission, keep out any homosexual couples as the law does not cover them, as well as live-in partners, and single men and women who might want a surrogate child. 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.

(iii) Payment to a surrogate mother [12]

If you're a heterosexual married couple who have proven infertility, and you find someone who agrees to be a surrogate mother, you can't pay her. You can pay for any and all of her medical bills, but that's all. If you're heterosexual couples who have proven infertility, and you have found someone who agrees to be a surrogate mother without payment, you have to make sure that person is a "close relative".

(iv) Surrogacy will be allowed only once

If you have a child already or you adopted a child in the past or you already have a surrogate child, you cannot approach a surrogate mother a second time [13]. And if someone has been a surrogate mother once in the past, they

cannot do so again. The number of oocytes [14] or embryos to be implanted in the surrogate mother for the purpose of surrogacy, shall be such as may be prescribed.

(v) Foreigner Nationals can't get Indian surrogate mothers [15].

The bill effectively bans foreigners to seek an Indian surrogate mother. This includes non-resident Indians (NRIs).

(vi) Prohibition of conducting surrogacy [16].

No person including a relative or husband of a surrogate mother or intending couple shall seek or encourage conducting any surrogacy or surrogacy procedures on her except for the purpose specified in the bill [17]. Any establishment found undertaking commercial surrogacy, 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. [18].

(vii) Prohibition to abortion [19] and abandon [20] child born through surrogacy.

The intending couple shall not abandon the child, born out of a surrogacy procedure, whether within India or outside, for any reason whatsoever, including but not restricted to, any genetic defect, birth defect, any other medical condition, the defects developing subsequently, sex of the child or conception of more than one baby and the like. No person, organization, surrogacy clinic, laboratory or clinical establishment of any kind shall force the surrogate mother to abort at any stage of surrogacy except in such conditions as may be prescribed.

(viii) The child born through surrogacy will have all the rights of a biological child [21].

Any child born out of surrogacy procedure shall be deemed to be a biological child of the intending couple and the said child shall be entitled to all the rights and privileges available to a natural child under any law for the time being in force.

(ix) Written informed consent of surrogate mother [22].

No person shall seek or conduct surrogacy procedures unless he has explained all known side effects and after effects of such procedures to the surrogate mother concerned; obtained in the prescribed form, the written informed consent of the surrogate mother to undergo such procedures in the language she understands.

(x) Prohibition and regulation of surrogacy clinics [23].

No surrogacy clinic, unless registered under this Act, shall conduct or associate with, or help in any manner, in conducting activities relating to surrogacy and surrogacy procedures. No paediatrician, gynaecologist, human embryologist, registered medical practitioner or any person shall conduct, offer, undertake, promote or associate with or avail of commercial surrogacy in any form. No surrogacy clinic shall employ or cause to be employed or take services of any person, whether on honorary basis or on payment who does not possess such qualifications as may be prescribed. No registered medical practitioner, gynaecologist, paediatrician, human embryologist or any other person shall conduct or cause to be conducted or aid in conducting by himself or through any other person surrogacy or surrogacy procedures at a place other than a place registered under this Act. No surrogacy clinic, registered medical practitioner, gynaecologist, paediatrician, human embryologist or any other person shall promote, publish, canvass, propagate or advertise or cause to be promoted, published, canvassed, propagated or advertised. Any registered medical practitioner, gynaecologists, paediatrician, human embryologists or any person who owns a surrogacy clinic or employed with such a clinic or centre or laboratory and renders his professional or technical services to or at such clinic or centre or laboratory, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act (other than the provisions referred to in section 35), rules and regulations made thereunder shall be punishable with imprisonment for a term which shall not be less than five years and with fine which may extend to ten lakh rupees [24].

(xi) Surrogacy regulatory bodies.

Implementation will be through the national and State surrogacy boards [25]. The government has proposed that it will establish a National Surrogacy Board at the central level, chaired by the health minister, and State Surrogacy Boards and appropriate authorities in the states and union territories. They will overlook all cases of surrogacy and regulate hospitals and clinics that offer this in India. Registered surrogacy clinics will have to maintain all records for a minimum period of 25 years [26]. Whoever contravenes any of the provisions of this Act, rules or regulations made thereunder for which no penalty has been elsewhere provided in this Act, shall be punishable with imprisonment for a term which shall not be less than three years and with fine which may extend to five lakh rupees and in the case of continuing contravention with an additional fine which may extend to ten thousand rupees for every day during which such contravention continues after conviction for the first such contravention [27].

III. THE SURROGACY (REGULATION) BILL, 2016; WHETHER IT VIOLATES FUNDAMENTAL RIGHT

The cabinet's decision does not appear to be in consonance with constitutional provisions. Article 14 [28] of the Constitution guarantees "equality before the law and equal protection of laws to all persons". Article 21 [29] guarantees "protection of life and personal liberty of all persons". Restricting conditional surrogacy to married Indian couples and disqualifying others on the basis of nationality, marital status, sexual orientation or age, does not appear to qualify the test of equality and has no connection with the intended objectives of the proposed legislation. Further, the right to life includes the right to reproductive autonomy — that includes the right to procreation and parenthood.

It is not for the state to decide the modes of parenthood. Constitutionally, the state cannot interfere in the prerogative of a person(s) to have children, naturally or through surrogacy. Infertility cannot be a condition to undertake surrogacy. The proposed law ought to be put in the public domain before the country's parliamentarians debate it.

Surrogacy has been in vogue in the country for more than 10 years. The proposed bar in the Surrogacy (Regulation) Bill, 2016 on it violates the fundamental rights of stakeholders. Foreign and single parents who commission the services of surrogate mothers enjoy protection under Articles 14 and 21 of the Constitution — equality under law and the right to life. Right to reproductive autonomy and parenthood, as a part of right to life of a single or foreign person, cannot be circumvented, especially when the law already permits parenthood through inter-country adoptions from India — by single persons or foreign couples. The draft bill bars medical professionals from offering their services in surrogacy procedures (except for altruistic surrogacy). It also deprives surrogate mothers of their right to livelihood.

The government has justified the barring of foreigners to prevent the misuse of surrogacy. This could prove counterproductive. The yardsticks governing domestic altruistic surrogacy will offer an opportunity for corruption and exploitation, pushing surrogacy into unethical hands. It could foster an underground abusive trade in surrogacy. Relatives will be generated and surrogates will be impregnated in India and shifted to permissible jurisdictions.

Given that the surrogate mothers will be Indian nationals, whose safety will be at risk once surrogacy becomes an underground business, there is a dire need to enact a comprehensive law that factors in the current societal practices associated with surrogacy. The problems pertaining to adoption of Indian children by foreigners were resolved by guidelines, which over the years have acquired statutory status. A similar approach could be adopted to regulate surrogacy. There should be an appropriate mechanism to judge the suitability of surrogate parents — citizens or foreigners should not matter. An agency along the lines of the Central Adoption Resource Agency — that administers adoption of Indian children by foreigners — could be created to regulate surrogacy. A democratic law, which we have been waiting for, for the past 10 years, must regulate surrogacy in the country.

IV. ROLE OF INDIAN JUDICIARY

The court found surrogacy on its own "no offense to our present laws." This is also the current state of the law in India. A law is made in a given context, with certain horizons. As new activities emerge, these are judged by the law made in an earlier context. In this sense, all activities are judged by a law made with another context in view. Law is forever caught in the text and the context [30]. A new activity may or may not have been contemplated by the legislature. What is important, however, is the text of the law. A new activity may not have been contemplated by the law and yet qualify as prohibited within the text of the law. At other times, an act may be un contemplated and also beyond the text of the law. Such acts are legal because these are not illegal within the text of the law. The legislature then may take note of the gap and legislate on it.

The India surrogacy journey can be said to have actually begun in 2002, when the Supreme Court, the apex Court of the Country, acknowledged commercial surrogacy in India as a legal, even though India's first surrogate baby was delivered on June 23rd, 1994 [31]. Subsequently, by virtue of *Baby Manji Yamada V/s Union of India* [32] in this case Baby Manji was born to a surrogate mother through in vitro fertilization using a Japanese man's sperm and an egg from an unknown donor at Anand. In less than a month, 'Baby Manji' has already seen fierce legal battles in two constitutional courts, Rajasthan High Court and in Supreme Court, where an NGO has raised questions on legal propriety of surrogacy and the child's nationality. Anxious for the outcome are her Japanese father and grandmother. Therefore the writ of Habeas Corpus has been filed claiming that money making racket is perpetuated in the name of the surrogacy. Therefore, Apex Court held that commercial surrogacy is permitted in India and consequently that has increased the international confidence in going in for surrogacy in India.

In the case of *Jan Balaz V/s Union of India* [33] the Gujarat High Court has come to a decision that the child born in India to a surrogate mother, an Indian national whose biological father is a foreign national, would get citizenship in India by birth. Emotional and legal relationship of the surrogate child with biological parents, moral and ethical issues is vital importance. The crux of this case is that the Gujarat High Court conferred Indian citizenship on two twin babies fathered through compensated surrogacy by a German national in Anand districts.

The Division bench of the HC comprising Justice K.S Radhakrishnan and A.S. Dave, in this landmark judgement observed that a comprehensive legislations defining the rights of the child born out of surrogacy agreement, rights and responsibilities of a surrogate mother, egg donor, commissioning parties, legal validity of the agreement, the parent child relationship, responsibilities of the Infertility clinic was also required. Upholding the citizenship rights of the boys, the Court said: "we, in the present legal framework, have no other go but to hold that the babies born in India to gestational surrogate are citizens of this country and therefore entitled to get the passport and therefore direct the passport authorities to release the passport withdraw from forth with."

It is aptly pointed out in the 228th Law Commission Report that in *Javed V/s State of Haryana* [34], though the Supreme Court upheld the two living children norm to debar a person from contesting a Panchayati Raj election it refrained from stating that the right to procreation is not a basic right. The judiciary in India has too recognized the reproductive rights. In *B.K. Parthasarathi V/s Government of Andhra Pradesh* [35], an important question of law as to the constitutional validity of Section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994 is raised in these writ petitions.

In all these three writ petitions, the individual petitioner is either an elected Chairman or some other office bearer of one of the local bodies created under the Andhra Pradesh Panchayat Raj Act, 1994. The "right of privacy" as a constitutionally protected right is not to be found in the express language of the Constitution of India. However, the said right is recognized as a facet of Article 21 of the Constitution of India. The High Court of Andhra Pradesh subsequently held that 'the right of reproductive autonomy' of an individual is his 'right to privacy'.

In order to legalize the act of surrogacy it is very well said by Kerala High Court in its judgement, *P Geetha Nagar V/s Kerala Live stock development Board* [36] held that 'even in the absence of statutory frame work, surrogacy in India is not illegal, thus the country becoming a favourite destination for international destitute of children. Before referring to the specifics, it is appropriate to appreciate the essential terminology employed in this field.

Establishing paternity may be easy enough with one quick genetic test, but the issue is not simple and easy for the courts. What will happen if a non-custodial father has been the "father" to a child for 15 years only to learn that he is not the biological father? Does he get a refund on the child support he is paid? Or if a surrogate mother breaks her contract, can she go after the husband and wife clients for monetary support for the resulting child? These are tough legal questions for judges and policymakers. The Indian system only recognizes the birth mother. There is no concept of DNA testing for establishing paternity as far as the Indian legal system is concerned, i.e., the name on the child's birth certificate has to be that of the birth mother and her husband.

In 2008, the Supreme Court of India in the Manji's case (Japanese Baby) has held that commercial surrogacy is permitted in India and it has again increased the international confidence in going for surrogacy in India [37]. The law commission of India has submitted the 228th Report on "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligation of Parties to an surrogacy" [38]. The main observations had been made by the law commission are as: Surrogacy arrangements will continue to be governed by contracts amongst parties, but such an arrangement should not be for commercial purposes. A surrogacy arrangement should provide for the financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child.

A surrogacy contract should necessarily take care of life insurance cover for surrogate mother. Legislation itself should recognize surrogate child to be legitimate child. The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only. Right to privacy of donor as well as surrogate mother should be protected. Sex selective surrogacy should be prohibited. Cases of abortion should be governed by Medical Termination of Pregnancy act 1971 only [39].

Most women who get involved as surrogates do so because they are in need of money. The surrogate mothers are often unaware of their legal rights and due to their financial situation they cannot afford the services of lawyers [40]. Surrogates are physically exploited once they have signed contracts agreeing to give birth to babies for clients. To make matters worse, if the pregnancy is indeed aborted, the surrogates often receive just a fraction of the original payment. The contracts can also place liability on the mother for risks including pregnancy-induced diseases, death and post-partum complications [41]. Many surrogate mothers face emotional problems after having to relinquish the child. However, a study showed that surrogate mothers do not appear to experience psychological problems as a result of the surrogacy arrangements. Although it is acknowledged that some women experience emotional problems in handing over the baby or as a result of the reactions around them, these feelings appeared to lessen during the weeks following the birth [42].

V. LEGAL QUESTIONS ENCASING SURROGACY CONTRACT AS TO

- Whether surrogacy agreements are against public policy. What would be appropriate damages for breaches of the contract? Would they be monetary, or would they require specific performance?
- Whether payment of fee in lieu of surrogacy contract violates child trafficking law? Is it payment for services rendered or for the child?
- Would prohibition of surrogate contract violate constitutional 'rights to privacy' or 'right to procreate'?
- Who would be the legal mother? Who should participate in decisions affecting the welfare of the foetus and the newborn?
- What would be the status of surrogate child in the absence of grant of citizenship?
- Who would get the custody of the child, if surrogate mother changes her mind before surrendering the child?
- Whether children born with new technology (IVF) are entitled to inherit with the same rights as a natural-born child?
- Whether the identity of the gamete donor would be disclosed?
- Whether the child born under surrogacy arrangement has a right to know about his genetic origin?
- Whether there is any misuse of modern reproductive technologies pertaining to sex-selection?

VI. SUGGESTIONS

- Personal laws governing the surrogate child's right needs to be amend.
- Paramount consideration should be given to the welfare of the child.

- Commercial surrogacy should not be legalised fully, only right to enjoy parenthood should be there.
- The Artificial Reproductive Technology clinics and practice should be regulated by the proper legislations.
- Most importantly, the rights and obligations of the biological parents, surrogate mother should be determined by the statute not by the contract. Such a socially sensitive issue should not be regulated by contractual relations.
- There is need to re draft the ART Bill in compliance with public policy.

VII. CONCLUSION

It seems ironical that people are engaging in the practice of surrogacy when nearly 12 million Indian children are orphans. Adoption of a child in India is a complicated and a lengthy procedure for those childless couples who want to give a home to these children. Even 60 years of Independence have not given a comprehensive adoption law applicable to all its citizens, irrespective of the religion or the country they live in as Non-Resident Indians (NRIs), Persons of Indian Origin (PIOs) or Overseas Citizens of India (OCIs). As a result, they resort to the options of IVF or surrogacy. The Guardian and Wards Act, 1890 permits Guardianship and not adoption. The Hindu Adoption and Maintenance Act, 1956 does not permit non-Hindus to adopt a Hindu child, and requirements of immigration after adoption have further hurdles [43].

There is a strong need to modify and make the adoption procedure simple for all. This will bring down the rates of surrogacy. Altruistic and not commercial surrogacy should be promoted. Laws should be framed and implemented to cover the grey areas and to protect the rights of women and children. While infertility is a growing problem in India, there are many different ways of making a family. Adoption is an underutilised option that can not only give happiness to a childless couple but also provide a home and a future for an orphan child. While the Bill will now be placed before Parliament and the details debated, the basic tenet of disallowing commercial surrogacy is at its heart, and will remain.

The legal perspective on surrogacy has to be essentially coloured by moral & ethical overtones on which the public policy considerations are grounded. Since the courts need to fight with such issue, it is important to delineate the major ethical issues involved.

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