

COMMERCIAL SURROGACY IN INDIAN CONTEXT

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INTRODUCTION:

Law is considered to be an important component to control and punish the people who break it. Therefore, law is considered to be an important mechanism to run the society. Commercial Surrogacy has been legalized in 2002 and many couples who are unable to conceive or procreate children are spending millions on the Reproductive Industries to fulfill or achieve their parenthood dreams. Nowadays there are many options for infertile couples, as well as singles and homosexuals who want children.

The urge of parenthood leads them to seek alternative solutions including Assisted Reproductive Technology (ART), In Vitro Fertilization (IVF) and Intra-Uterine Injections (IUI). The most shocking thing about this process is that there is still no codified law or statutory provision which could regulate this process. Moreover, what we have is an A R T Bill, 2010¹ which is still pending in the Parliament and waiting for its approval. This bill does not talk about the Life Insurance for every surrogate mother in case of any miss happening to them. Not only this, there are many other loopholes in the present drafted bill. This bill has proven to be a boon for the unfit couples but also this bill is also increasing the crime against women in form of trafficking of eggs, supply of surrogate mothers to different countries and also there is Human rights violations of these surrogates which cannot be ignored.

DEFINITION AND TYPES OF SURROGACY:

The literal meaning of surrogate is substitute.

A standard definition of surrogacy is offered by the American Law reports in the following manner; “A contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, and to terminate all of her parental rights subsequent to the child birth”.²

According to the Black’s Law Dictionary, “Surrogacy means the process of carrying and delivering a child for another person”.³

Advances in medical sciences and technology, particularly in assisted reproductive techniques like donor insemination and embryo transfer methods have revolutionized the reproductive environment and have led to an increase in popularity of surrogacy. With the introduction of

¹ Assisted Reproductive Technology Bill, 2010.

² American Law Reports, Validity and constructs of surrogate parenting agreement, 77 ALR 4th 70. (1989).

³ Law Commission of India in Report No-228, Need for legislations to regulate Assisted Reproductive Technology Clinics as well as rights and obligations of parties to a Surrogacy, Aug 5, 2009.

financial agreements in exchange for the surrogate child becomes a 'saleable commodity'. As a result, complications arise and questions must be raised regarding the rights of the surrogate mother, the child and the commissioning of parents.⁴

The ART Bill has defined surrogacy as '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 to her husband, with the intention to carry it to the term and hand over the child to the person or persons for whom she is acting as a surrogate.'⁵

Surrogacy is divided into two types and i.e.;

1. Traditional Surrogacy- By this method, a sperm of the donor or the sperm of the father is artificially inseminated in the women and the women get pregnant and she carries the fetus till birth of the child. Here, the woman is the biological mother of the child because it is her egg, which is fertilize with the sperm of the donor or the sperm of the father means the child will be genetically attached to the mother.⁶
2. Gestational Surrogacy- By this method, the fertilization is done through In Vitro Fertilization (IVF) first. The egg and the sperm of the intended parent is collected for artificial insemination through IVF and then it is transfer into the surrogate mother womb with the help of Assisted Reproductive Technique.⁷

HISTORY OF SURROGACY:

Surrogacy in its modern scenario has its roots originating from ancient Egypt, where infertile women were allowed to undertake the practice of allowing another woman bear the biological child of her husband in order to avoid divorce. It was a practice though not held commonplace but was still considered an act and not a criminal offence. In modern times, it was in the year 1978 that in the United Kingdom, the first successful IVF procedure was carried out and resulted in the birth of baby Mary Louise. This heralded a new found hope for childless couples as well as ushering in a new branch of science. This did however also raise a multitude of questions in morality, law and ethics with regards to the field of assisted reproductive techniques.⁸ The roots of surrogacy can also be traced long back in Indian history as well. The world's second and India's first IVF (In Vitro Fertilization) baby Kanupriya alias Durga was born in Kolkata on Oct 3, 1978. Since then the field of Assisted Reproductive Technology (ART) has developed rapidly. But legally the laws related to surrogacy are still in the nascent stage. At present the agreement between the parties based on the ART Guidelines are the guiding force. The codified law is yet

⁴ Centre for Social Research, "Surrogate Motherhood: Ethical or Commercial" Report (May 2012).

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 85.

⁶ Pyali Chatterjee. Role of law relating to Commercial surrogacy in India and protection of surrogate mothers, Sept 28, 2015.

⁷ Ibid.

⁸ Merino, Faith (2010). Adoption and Surrogate Pregnancy. New York: Info base Publishing.

to be adopted and implemented. With the recent growth in the Intended parents opting for surrogacy here, India has become the much sought after surrogacy destination. With the acceptance of same sex marriages/union and the recognition of the basic human right to have family and children has given rise to surrogacy manifold. However, at the same time nations all across the globe are condemning commercial surrogacy as it results in commercialization of human reproductive system and co modification of children. For its various socio-ethical reasons, surrogacy has become a topic of deep interest amongst the government of different nations, medico-legal luminaries as well as public at large.

Though there was either enacted or proposed laws in many countries with reference to surrogacy, there exist a lacuna of information and applications of these laws among the ones who are affected most of it. This was evident in many cases the world. A case in point would be the enforced ban on surrogacy in China. There is a amalgamated pool of ethical and legal issues that are hovering around the practice of assisted reproductive techniques and none are more important than in the case of surrogacy. The primary reason here is that in the case of surrogacy, be it gestational or traditional surrogacy, there is no specific outlined plan for the protection of the mother and the child, in case the contract is not honored by the intended parents. Most insurance companies are not having plans to cover surrogate mothers specifically and even in places where schemes are available, the premiums are very high and the knowledge is not distributed among the surrogate mothers.⁹

LEGAL ISSUES IN SURROGACY:

- Medical advancements in surrogacy and legal standings in this respect have brought the traditional concept of motherhood under debate. Two prime considerations of genetics and legitimacy are the basis for legally acceptable definition of a family. But author like Andrea E. Stumpf says that “In the process of procreation different participants should have mist rights at different stages of procreation”. Prior to gestational period, the psychological dimensions of the intending parent is most critical.
- Family laws have only biological and mental concepts. The case of infertile wife proves the mental concept more distinctly. She will have no biological connection with the child but her initiative with her husband makes the surrogacy process successful.
- For a married couple, the procreation process is purely private. But in surrogacy arrangements third parties are involved like surrogate mother, doctor, lawyers.¹⁰

⁹ Kanna, Shilpa. “Regulators Eye India’s Surrogacy Sector”. India Business Report, BBC World, Aug 23, 2015.

¹⁰ Dr. Nandita Adhikari, “Surrogacy Motherhood”, Law and Medicine 167 (2012).

- One of the most serious charges against surrogate motherhood contracts is that they exploit women. It is difficult to assess with any confidence whether surrogacy contracts are exploitative and whether exploitation is a valid reason for prohibiting these arrangements.
- At a glance, 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. 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 there due to unpredictable regulations governing surrogacy in India.

COMMERCIAL SURROGACY:

Indian legal framework

In India, the first child born through gestation was at Dr. Nayna Patel's Akansha Fertility Clinic in Gujarat during 2004. After this only India became the favorite destination for Commercial Surrogacy for the Foreigners. It was in the case of Baby Manjhi, for the first time Honorable Supreme Court in its judgment asked the government to pass a law for governing and regulating the procedure of Surrogacy as well as said that Commercial Surrogacy is legal in India.¹¹ According to that, Legislature has prepared a bill called Assisted Reproductive Technologies (ART) Regulations Draft Bill, 2010 which still pending in the parliament for its approval.

The Law Commission of India¹², submitted its Report No-228, whereby it says that the price fixed for the Commercial Surrogacy Agreement in India, between the intended parents and the surrogate mothers, is near about \$25,000-\$30,000 that is around 1/3 from the other countries¹³. Simply because of the low cost, modern medical facility, easy availability of surrogate mother and with no strict laws to regulate the commercial surrogacy, India becomes the favorite destination for the foreign couples for Commercial surrogacy. That is the price fixed between intended parents and reproductive clinics, but the amount, which is given to the surrogate mother for renting her womb, is very less in compare to the service, which she rendered. As in proposed bill, there is no mentioning of the fess given to the surrogate mother by reproductive clinics and also the economic rights of the surrogate mother are getting violated and because of this the income of these clinics are increasing¹⁴.

¹¹ Baby Manjhi v Union of India & Anr. (2008) 13 SCC 518.

¹² Supra. note 3

¹³ Ibid. at 11

¹⁴ Id at note 5.

In an article written by Deborah Conlon, it was found that near about 3000 fertility clinics were there in 2002 in India, and by Commercial Surrogacy this industries has earned more than \$400 million per year¹⁵.

Human trafficking and Economic Exploitation of Women For Commercial Surrogacy

The National Rapporteur on Trafficking in Human beings of Dutch¹⁶ while doing its research on Human Trafficking For The Purpose Of The Removal Of Organs And Forced Commercial Surrogacy, raised their concern for the surrogate mother who comes for the commercial surrogacy. That whether such women were coming voluntarily or forcefully to become a surrogate mother for commercial surrogacy? Poverty is one of the main reason for the commission of the crime as well as the poor people get easily victim of the trafficking. Moreover, while answering the same Jyotsana Gupta, a senior lecturer in gender studies and diversity at the University of Utrecht, argues, “Indian surrogate mothers are usually under enormous pressure from their husband and family”¹⁷. Therefore, from the report we can find that the Indian women who belongs to the poorer sections of the society are the ones who are in great danger. They can easily become the victim of trafficking because of poverty and lack of education (illiteracy). And since there is no statutory provision or regulatory provision for the same so the wrongdoer can easily commit the crime and escape the punishment.

Dr. Roel Schats¹⁸, chief medical officer of the IVF center of the VU Medical Center, argued against Commercial Surrogacy, “It is a form of modern slavery to use an Indian Woman as a breeding machine without the benefit of any form of care”. Also slavery is considered as a human right violation and Art 4 of UDHR says that,” No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their form”¹⁹.

Certain laws which regulate surrogacy in India:

1. The Assisted Reproductive Technology (ART) Regulation Bill, 2008.
2. The Law Commission of India Report on “The need for legislation to regulate assisted reproductive technology clinics as well as right and obligation of parties to a surrogacy”.
3. The Assisted Reproductive Technology (ART) Regulation Bill, 2010. It was created when the ART Regulation Bill, 2008 was imparted by the government of India and the new ART Regulation Bill, 2010 was created on the guidelines made by ICMR (Indian Council for Medical Research).

¹⁵ Deborah Conlon, “No Pain, No Gain”: Outsourcing Surrogacy in India, Development Perspectives, May 29, 2014.

¹⁶ National Rapporteur on Trafficking in Human Beings, Human trafficking for the purpose of the removal of organs and forced commercial surrogacy, The Hague: BNRM, 2012, at 18.

¹⁷ Ibid at 19.

¹⁸ Ibid at 20.

¹⁹ Art-4 of The Universal Declaration of Human Rights, 1948.

4. The Assisted Reproductive Technology (ART) Regulation Bill, 2013. This bill is the revised form of 2010 bill. The draft bill 2013 is an exhaustive document containing 100 sections addressing various issues relating to ART.
5. The Surrogacy (Regulation) Bill, 2014.

United States of America's Legal Framework:

Surrogacy and its related issues come under the state jurisdiction and laws regarding surrogacy differ largely in different states. While there is proper written legislation in some states, there are common simple laws in the other. 20 years ago, the famous 'Baby M' case in New Jersey, US²⁰ made the world sit up and take note of the issue of surrogacy. In US, the first formal agreement between the couple and surrogate mother was signed in 1976. Soon brokers entered in the scene and the commercial surrogacy started getting exploited.

In a case in 1987, *Stern v. Whitefield*²¹, the superior court and then supreme court stripped of parental and visitation rights of Whitefield (the surrogate mother) and allowed Stern parents (biological parents) to keep the baby. This case spurred most US states to enact legislation on surrogacy in 1995. There is facility of surrogacy contracts in some states while there are such states too that completely rule out any such some of the states while there are such states too that completely rule out any such enforcements. Commercial surrogacy is illegal in some states of US. There are some surrogacy friendly states which accept both Altruistic and Commercial Surrogacy and easily make it possible that the intended parents have legal rights over the child. However, there are some states that only permit this arrangement for married heterosexual couples. If seen in a broad sense, gestational surrogacy has more support in comparison to little no legal support for traditional surrogacy. Embryo research is not only included in one's insurance cover in the US and is seen as a major drawback. It takes the cost of surrogacy package quite high and US citizens opt for India as their surrogacy destination. As far as legal matters are concerned, where the surrogate stays, where the contract has taken place and where the delivery of the child takes place, play an important role. This means that if intended parents live in a non-friendly state, they can pick a surrogate who lives in a surrogacy friendly state. Arkansas, California and Illinois come in the category friendly state.

United Kingdom's Legal Framework:

In UK, the medical community has themselves established a Voluntary Licensing Agency (VLA) which ensures that ART is practiced only by persons with adequate qualification and facilities. Regarding statutory laws in UK., the first legislations dealing with different aspects of surrogate motherhood was given in 1985, called 'The Surrogacy Arrangements Act'. Subsequently in 1990 the other law was enacted viz – "Human Fertilization and Embryology Act (HFEA)" and later on was amended in 2000 & 2001. The Surrogacy Arrangements Act, 1985 makes commercial

²⁰ 109 N.L. 396 (1988), 537 A.2d 1227.

²¹ Ibid.

surrogacy arrangements unlawful. Though paying for more than medical surrogacy expenses is not allowed but relationship status has recognition under Sec-30²². Couples can only partake in altruistic surrogacy and can consult non-profit organizations during the process. It is illegal for any woman to advertise herself as a surrogate mother. Despite of financial considerations, there is no legal force behind surrogacy arrangements. Once the surrogate mother has given birth to the child, she is the legal care taker of her baby until an adoption has been finalized. However, even if she gave one of her eggs in the process. Even if the surrogate is not genetically related to the child, she has the legal right over the child. Till the time an adoption order comes, she can legally practice her parenthood.

SUGGESTION

1. First suggestion is a use of solid uniform international law to control the trafficking related to commercial surrogacy and a need to pass the pending bill.
2. As there is no law relating to quantity or dosage of synthetic hormone for egg removal process, this helps the doctor in misusing it for their personal benefit and with this respect poor women are becoming victims.
3. There is no mechanism mentioned to check that how many times the same woman has donated her eggs and in what interval.
As according to Sec 26(8) of ART BILL, 2010 a woman can donate her eggs not more than six times in her entire life.
4. NGO's should evolve as a major source as stating this topic in large and awareness the people about surrogacy and how it includes Human Trafficking.
5. Focusing it as a major issue in current scenario, the India Government and International authority should consider the Human egg under the guiding principles on Human Organ transplantation of WHO and in transplantation of Human Act, 1994.
6. Reproductive clinics should have a counseling department so that it can check that the surrogate who have entered into the contract is voluntarily or forcefully and it should also tell all the process and steps involved in the surrogacy process.
7. There is an urgent need to have a specific law or legislation for the regulation and control of surrogacy in India. The terms and conditions must be clearly laid down and proper balance should be maintained between the duties of surrogate mother and the protection of dignity of her rights.

²² Sec 30 of the Human Fertilization and Embryology Act, 1990.

8. It is noticed that after the birth the surrogate mother is left without any medical support it is recommended that there should be a provision of intensive care and medical support during 3 months after pregnancy.
9. Special courts or legal authority should be created for adjudication and determination of legal issues and disputed arising out of surrogacy, is required, because such power cannot be left to advisory boards who neither have the legal acumen nor they have a expert to decide such problems of surrogacy.
10. There is an urgent need for multilateral and legally binding instrument that would establish a global and ethical practice of international surrogacy.

CONCLUSION

As listed in above discussion, unfortunately there is currently no law regulating the fertility industry in our country. Its now the time of India to take stock, evaluate, access, and decide the future course of surrogacy .A clear cut law must be enacted by the new draft law on surrogacy , with proper checks, safeguard and adequate precautions to ward of the ills of the commercial over tones of surrogacy. There is a need to prepare a legislation to regulate not only the ART clinics but also the rights of the surrogate child. Surrogacy has both negative and positive impact and if this process used wisely and with proper care it would provide happiness to millions of couples but if not used wisely then it would hamper the society at large.

If we can bring a law to regulate surrogacy misuse can be stopped, As infertility affects 10% of the population in our country and yet we don't have a law to regulate surrogacy and in the absence of law Reproductive clinics were flourishing day by day with the increase number of trafficking of woman and minor girl in Indian market as well as in the International market.

According to Dr. Kamini Rao, "Surrogacy is a blessing if used in the right manner but it has been misused on many occasion".