

Surrogate Motherhood: Challenges and Legal Implications

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Abstract

Surrogacy wasn't a commonly used term until the 21st century, it came up with the rising level of infertility in couples and the stringent procedure of compliance for adoption. Surrogacy has always been the choice of couples for whom genetic link is of utmost importance. At a point of time the rate of commercial surrogacy was at its peak which leads to several issues and challenges that needs to be treated on an urgent basis and obviously an enactment to guide alongside which isn't present till date in India. However, after the passing of the Surrogacy Regulation Bill 2019 in the Lok Sabha, a hope for betterment has arose. This piece of study showcases the challenges faced since time immemorial relating to Surrogacy and how it was being tackled with, without any legislation being present in India. It also stresses on the key points of the upcoming bill of 2019 and how it would prove to be a turning point for the commercial world that developed due to the Surrogacy in India.

Keywords: Surrogacy, Altruistic Surrogacy, Commercial Surrogacy, Assisted Reproductive Technologies.

Introduction

The tremendous breakthrough in science have opened the new contours of nature whose existence have remained as secret since then. The contribution of the bio-medical sciences to the mankind is unimagined. These unprecedented advances in science come with their own attached risks and concerns whether it may be legal, moral, technical or ethical. Advances in the bio-medical sciences and the reproductive techniques have catered to the desire of the men and women who have no or little reproductive capabilities to have their children through techniques known as Assisted Reproductive Technologies (ART) methodized to achieve pregnancy by artificial means which is also termed as fertility treatment. Surrogacy is also one of those techniques which substitute the natural conception and birth and has witnessed a phenomenal growth. Surrogacy is not a new

concept as far as Artificial Reproductive Technology is concerned.

Surrogacy has always been a controversial topic in India mainly due to the absence of a cohesive legislation although in ancient India it was practiced, accepted and respected as well. Its quite weird that surrogacy existed during those times but Indian Hindu Mythology widely mentions instances of surrogacy like Karthikey (the God of war),⁸ the son of lord Shiva but not born out of goddesses Parvati, the Surrogate mother being Ganga. In Mahabharat Dhritarastras wife Gandhari conceived and after a long span of 2 years gave birth to a mass which was then put in a nutrient medium by Rishi Vyasa, according to whom there were 101 cells in the mass delivered by Gandhari and surprisingly those cells finally developed into hundred male and one female child.

As per the Assisted Reproductive Technologies (Regulation) Bill, 2010, which for the first time tried to get a specific legislation pertaining to the critical issues involved in Surrogacy defines Surrogacy as "an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology,

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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.”

Bad health condition of a woman which makes her pregnancy dangerous and weak uterus to hold the fetus also calls for surrogacy arrangement.

Indian Perspective:

Coming to the legal protection and regulation governing the law of surrogacy, the contract and other allied issues, however is considered legitimate in India and in the absence of any legislation to that effect, the only guidelines currently related to this field are those of the Indian Council of Medical Research (ICMR) in 2005 issued guidelines for accreditation, supervision and regulation of ART clinics in India. However, this could not check the abuses of exploitation of surrogate mothers in the background of no strict penal provisions and implementation. Looking into the pressing need and demand for protection against all such misuses the government appointed an expert committee has drafted a legislation known as Assisted Reproductive Technology (ART Regulation) Bill, 2010 for legalizing surrogacy.

There is an urgent need for a strong regulation is called for to meet the demand of the legislature. The 228th Report on “Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy”⁹ reflects the background and the need for developing legislation to regulate this widely unregulated industry in India. The Commission said, “It seems that wombs in India are on rent, which translates into babies for foreigners and dollars for Indian surrogate mothers.” The approach “The parents construct the child biologically, while the child constructs the parents socially” has been widely reflected in the works of many scholars while dealing with surrogacy and related aspects. This certainly reflects, the complexities involving the parentage and legitimacy of the child and rights that would come with this report.

As stated above issues majorly arose due to the commercialization of surrogacy and after a thorough research recently the Minister of Family and Health Welfare, Dr. Harsh Vardhan introduced the Surrogacy Regulation Bill 2019.¹⁰

On July 5, 2019: Cabinet approved the surrogacy regulation Bill 2019

On July 15 2019: It was introduced in the lower house.

The Special features of this bill are:

- It aims at banning commercial surrogacy and legalizing only the altruistic surrogacy (involves no monetary compensation only the medical expenses).
- It has fixed the criteria's relating to the persons going for the same. It's for Intending couples who suffer from proven infertility, for any condition or diseases fixed under the regulations or altruistic one.
- Certificate of essentiality and certificate of eligibility are both required.
- Appropriate authorities are to be appointed by the Central and State government within 90 days of the Bill becoming an Act.
- Surrogacy clinics cannot undertake surrogacy related procedures unless registered under the appropriate authority.
- National and State surrogacy Boards would be constituted.
- Penalties have been fixed for the offences under this act.

Surrogacy- Issues and Concerns:

Surrogacy raises serious issues concerning legal rights of the parties concerned and parenthood i.e. paternity and maternity rights, guardianship and custody of the child along with the matters relating to maintenance and financial support. Whether the human body is an object that is possessed by an individual

and is that individual the owner of her body so as to be entitled to put it through abuse i.e. undergoing artificial reproductive techniques for procreation is a pertinent question.

The legitimacy and legal status of the babies born out of ART technique and the question as to who are the legal father and mother of the child is a matter which needs address. The status of the ova donor and the sperm donor is not clear. The succession rights and the citizenship of the baby raise huge concern as well. The concern regarding the surrogate mother to recover to normal life after the handing over of the child to the commissioning parents raises an issue as to the responsibility of the surrogacy clinics whether they can be made liable for their fault or not if afterwards the surrogate still persists with health problems.

Current International Scenario:

Risking the life is another very critical issue in a country where no doubt the health care sector is very advanced but the womb lent might not be taken proper care of and the contractual terms might not be sound enough to insure you about your health. So that is why it is a tourist place for surrogacy and instances are many which put spotlight on the murky commercial surrogacy market. The practice of surrogacy is popular beyond the borders or territorial jurisdiction of the government of the commissioning parents. Australian parents prefer surrogacy the most amongst the other nationals of the world and India, Thailand and some other Asian countries have been the most viable cost-effective tourist spots for them and thus are usually preferred to USA where the best facilities and proper regulatory environment is available.

In this backdrop, another very pertinent question that rises here – Is not it a forced removal of indigenous children from the community, going overseas and asking for a womb to brought up your intended offspring for reasons not so befitting and if question being raised which woman, would willingly, freely, rent out their womb with availability of other choices for earning enough money and to live decently?

Analyzing the global trend in various countries it is found that in the U.K, USA surrogacy is highly regulated and comparatively costlier to other countries whereas, in Germany and Canada, surrogacy is outlawed or prohibited. In a series of controversies surrounding surrogacy and question of citizenship of the baby born out of such procedure, the German authorities refused to give passports to children born of surrogate procedures. In an article under the Sydney herald “Babies left in limbo as India struggles with demand for surrogacy” (2008)¹¹ the story of a German couple, Jan Balaz and Susan Lohle, in the wait of their twin sons, Nikolas and Leonard, have been trapped in citizenship limbo is highlighted owing to the issues of claiming citizenship of German and who were denied passport because , German nationality is determined by the birth mother. These issues left the slow-moving Indian judicial system to wrestle with their citizenship status. When born to an Indian surrogate mother, the Constitution of India entitles the Indian citizenship, but it remains critical as to what happens if the biological mother is a foreign citizen and the child applies for citizenship of that country and is denied? This question when raised by a Bench led by Justice Ranjan Gogoi in the above case, the concept of dual citizenship for surrogate children which is not allowed in India, whether could be considered in any circumstances? This dual citizenship can give limited entitlements to such children.

Judicial Analysis:

The Supreme Court, in the 2008 case of Baby Manji Yamada v. Union of India,¹² discussed surrogacy and noted that “commercial surrogacy is reaching industrial proportions because of the ready availability of poor surrogates. It mentioned the Commissions for Protection of Child Rights Act, 2005 but stopped short of demanding that the government take immediate action to regulate the whole surrogacy industry, and not just address the issue of the rights of the child once it is born”. In Jan Balaz v. Anand Municipality¹³, the Court held that Surrogate babies born in India are Indians.

In *K Kalaisevi v Chennai Port Trust*¹⁴, the court stated that “Surrogacy is a well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child's genetic mother (the more traditional form for surrogacy) or she may be, as a gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo. In some cases, surrogacy is the only available option for parents who wish to have a child that is biologically related to them.” This was also stated in *Sadhna Agarwal v state of Chhattisgarh*¹⁵ and 5 other cases which are “*State of Punjab v. Sodhi Sukhdev Singh*, AIR 1961 SC 493, p. 502 27 *Liverpool and London SP&I; Association v. M.V. Sea Success &Asso. Ltd.* (2004) 9 SCC 512 (para 65) 28 *Senior Electric Inspector v. Laxminarayan Chopra*, AIR 1962 SC 159, p. 163 W.P.(S)No.4927/2016 *Manji Yamada v. Union of India*.”

Suggestion and Conclusion

From all the above discussed matters it can be rightly said that surrogacy being and awarding experience for infertile intending couples cannot be banned completely due to the large number of issues and challenges arising because of it but can be curbed and minimized if dealt in the right way. However, the Surrogacy Regulation Bill 2019 might rise to our expectations by doing the needful since it has the proviso of banning the commercial surrogacy, reducing the complications involved as well as giving a remarkable boost to the adoption Industry which might further reduced the number of uncared or orphaned

children. All this depends on the implementation procedure of the same. Thus, it is suggested to tighten and provide a stricter method of implementation of the provisions of the Surrogacy Regulation Bill 2019 if it turns out to be the only legislation in India on Surrogacy.

Ethical Clearance: Not required, as the research article is based on surrogacy and the literature is discussed from the decided judicial decisions. The research is doctrinally undertaken.

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