

Surrogacy: Need and Relevance

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Abstract

The term “Surrogacy” denotes a contract in which a woman accepts to bear other’s child in her womb till delivery of that child and after birth she hands over the child to his/her intended parents. Surrogacy is not a new concept in India. It has a very vast history regarding surrogacy from the period of Mahabharata and before the birth of Lord Shri Krishna. The first part of this article describes the term surrogacy with its meaning, definitions, agreement and history of surrogacy in India. Second part of this article describes the evolution of the concept of surrogacy from Biblical time to the present time that how the medical technology has developed by the time and in 1975, the first child was born by using IVF Technology. The world’s second IVF Baby and India’s first IVF child is baby Kanupriya @ Durga who was born in Kolkata on 3rd October 1978.

Earlier in India, in 2002, surrogacy was commercialized that is why number of infertile couples came to India for surrogacy. But from 2015, the commercial surrogacy is totally banned in India. Third part of the article describes the international and national laws regarding surrogacy. In US, the commercialized surrogacy is legal while in United Kingdom, the commercialization of the surrogacy is illegal and thus prohibited by the Surrogacy Arrangements Act, 1985. In India, Assisted Reproductive Technology (ART) Regulation Bill, 2020 has been approved on February 2020 by the Union Cabinet to monitor the medical procedures in India, to assist the intended parents to conceive and the bill will develop the ethical practices for surrogacy in India. Furthermore, the Surrogacy Regulation Bill, 2016 is approved by the Union Cabinet and allow the willing women to serve as a surrogate mother. The Bill also proposes to benefit the widow or divorced women. The fourth part of the article mentions the constitutional and judicial aspects on the legality of surrogacy with the help of some landmark cases alongwith the feminine perspective on surrogacy. The article also raises some questions on the rights of a women to give birth to a child, on her physical and emotional exploitation and on the existing laws in India.

Keywords: Surrogacy, contract, commercialization, human rights, right to procreation, surrogacy Bill 2016

Introduction

Every human being has a desire to have a family including partner and children. The couple wants to be parent of their natural child by giving birth to him or her. The reason behind is to love, traditions to carry family, to perform the rituals on funeral, or preserve the society and community and many more. The couple fulfil this desire by the act of reproduction which is a natural process to give birth to their own child. To give birth to a natural child, natural mother and father of the natural child share all the natural biological process without interference of external agencies (except minimal medical expertise) ^[1]. Child bearing and giving birth to a child is a very easy process for most of the couple, but unfortunately, for some of the couple it is not possible. Sometimes after taking all the medications, help from external agencies and try the new techniques they are not able to bear a child.

Marriage is an institution in Indian society in which a married couple recreate their own offspring. But sometimes, the desires of infertile couple is not fulfilled and they suffer from the curse of childlessness. From a long time, the infertile couple fulfill their wish to complete their family and satisfied themselves by adopting a child. The adoption law is universal in western countries but not in India. This corresponding law is applied only on Hindus in India. In this regard, the relief is provided by the Hindu Adoption and Maintenance Act, 1956 ^[2].

Adoption of a child is not as easy as it was earlier. The lack

of children for adoption and lots of legal and emotional issues have affected it. And the most important fact is the desire of the offspring and now it is possible with the growth of medical techniques. Now the infertile parents can have their natural child through surrogacy.

Meaning of Surrogacy

The literal meaning of the term Surrogacy is Substitution. It is an arrangement in which the surrogate mother or the birth mother agrees to bear a child of other couple in her womb and after giving birth to a child she hands over the new born child and his legal custody to its natural parents permanently ^[3]. In other words it can be also explained that the infertile couple arrange a womb on rent to give birth to their offspring. Therefore, surrogacy is a convenient and attractive option to get a natural child for infertile couple. The surrogate mother is also called “Gestational Carrier”. Mostly, to obtain a child from surrogacy, the intended parents provide the genetic stuff and the child is bear by surrogate mother ^[4]. To define surrogacy, some definitions are being mentioned hereunder:-

According to American Law Reports “a contractual undertaking whereby natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of a natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child’s birth.”

The New South Wales Law Reform Commission defined

surrogacy as, “an arrangement whereby a woman agrees to become pregnant and to bear a child of another person or persons to whom she will transfer custody at or shortly after birth.

The Assisted Reproductive Technologies (Regulation) Bill, 2010 also defines “surrogacy” as an agreement in which a surrogate woman ready to bear and deliver a child, conceived through medical technology, in which used genetics do not belong to her or her husband and after birth she hands over the new born child to the person or persons for whom she bear child as a surrogate motherhood.

In simple words, a surrogacy is an act in which a woman agrees for the implantation of an embryo generated from a sperm of a man and egg of another woman and to bear a child and after delivery she will hand over the child to the couple or individual for whom she conceived.

Agreement for Surrogacy

An agreement between the infertile couple and the surrogate mother to carry the child in her uterus till full time, to deliver the child to the couple after birth and give up all the parental rights to her child. The surrogacy agreement is actually a contract initiated between the surrogate mother and the intended parents. The agreement includes the conditions to conceive and deliver a child and the rights and duties of both the parties. The agreement also includes the amount and the method for payment to the surrogate mother to rent her uterus.

Surrogacy arrangements can be formal and informal. The formal arrangement based on the contracts between the parties i.e. parents and surrogate mother while, the informal arrangements depends upon the mutual understanding between parties. Further, the surrogacy arrangements can be divided into two categories i.e. Commercial surrogacy and Altruistic surrogacy. Commercial surrogacy is the child bearing act by the surrogate mother in want of some monetary benefits or fee while in altruistic surrogacy no monetary benefits are received by the surrogate mother.

Indian Surrogacy Law Centre considers the permission of the husband of surrogate mother to provide her uterus for rent. This is why the Law Centre recommends that the agreement should be signed not only by the surrogate mother or intended parents but also by the husband of surrogate mother, to show his acceptance to the aforesaid agreement. In addition, the intended parents may appoint a person if any dispute raises afterwards and the name of such appointed person should be mentioned in the agreement.

Recently, from last twenty years, the trend of surrogacy has become a hot topic for debate nationally and internationally. The reason behind this is the growth of infertility in couples. In addition, the lack of children for adoption, growth in the numbers of commercial surrogacy agencies, introduction of new medical technology In Vitro Fertilization (IVF) [5] which makes the surrogacy easy are some reasons to make surrogacy arrangements popular between infertile couples [6].

The concept of surrogacy is not new, it's around 4000 years old. In Israel, Rachel, the wife of Jacob (father of twelve tribes), was infertile and not able to bear a child. She sent her husband Jacob to her maid Bilah.

In India, the practice of Niyog Pratha was existed in ancient Hindu Society. Niyog Pratha was a tradition in which if a woman is childless because of the impotency of her husband she was allowed to conceive with the help of her brother in

law. The new born child was belonged to the parents and brother in law could not claim on child. In short, surrogacy fatherhood was the main essence of Niyog Pratha which was somehow less complicated in legal and emotional terms in comparison to surrogate motherhood. But in Islam, as per the scholars, surrogacy is considered illegal and immoral because the religion does not allow a woman to carry other man's child in her womb except her husband. The idea of surrogacy motherhood can be found in Holy Bible [7]. The earlier christen law promotes the concept of surrogate fatherhood too [8]. The concept of surrogate motherhood was well recognized in ancient period. Some of the instances are mentioned hereunder:-

Surrogacy in Ancient Time

Surrogacy was well recognized and practiced in ancient India. In the Mahabharata, the wife of King Dhratrashtira, Gandhari conceived and her pregnancy was continued for two years, after that she delivered amass. It was found by Rishi Vyasa that there were 101 cells. He managed the cells in a nutrient atmosphere and were grown normally in a full term. On time, the 101 children developed in which 100 children were male and one child was female. There was also an incident which gives an idea that a man can produce a child without the contribution of female. Two children were produced by Sage Gautama, a son namely Kripa and a daughter namely Kripi. Both of the children were test tube babies. Furthermore, Rishi Drona was produced by Sage Bharadwaj in the same manner, who was the Guru of Kauravas and Pandavas.

Surrogacy, or the transfer of embryo from one womb to another was also in practice that time. At the time of seventh child (Balram), of Devki and Vasudev, the embryo was transferred to the womb of the first wife of Vasudev namely Rohini, to prevent the child being killed by the Kansa, the brother of Devaki [9].

In ancient time, around late 1800's the history of surrogacy mother can be found in the culture of American Indians where it really began. If any woman was found infertile in their society, the husband was allowed to take other women to give birth to his natural child. The barren wife was not biologically connected to that child [10].

The American Indians were not the only cultural tribes who used surrogacy to develop the families and tribes but also in Europe, Spain and some other places the culture of surrogacy was well developed. In old times, if the queen was infertile or could not deliver a male child, the king brought many surrogates to deliver a male child. After delivery that new born child was belonged to King and Queen and the surrogate mothers were kept as nannies to take care of the child. This surrogacy was kept secret to make people believe that the child was the successor of the throne [11].

Evolution of Surrogacy

The first case of surrogacy can be found in the “The Book of Genesis” in Biblical time. The story is about the Sarah and Abraham. Sarah and Abraham, a married couple wanted their own offspring but Sarah was infertile so she requested to her maidservant, Hagar to deliver a child for them. The child was raised up by Sarah and Abraham while the biological mother of the child was Hagar.

In 1884, the first victorious artificial insemination was completed in a woman. This procedure was opened a way to

obtain surrogacy for infertile parents.

In 1969, Edward, worked in the National Institute for Medical Research, London, discovered that the activated human sperms could be promoted the fertilization of in vitro matured egg cells. This discovery was proved as a milestone in the field of treatment for infertile women and in 1975, the first child was born by using IVF Technology.

After a year, in 1976, the first surrogacy legal agreement came into existence, brokered by Noel Keane of United States. The surrogate mother did not receive any monetary benefits from the pregnancy. Later, Noel Keane established a commercial Infertility Center for infertile parents to arrange surrogate pregnancies. This practice resulted a boom in the area of surrogacy in United States. The thousands of babies are born every year in United States with the help of Surrogacy from the last two decades^[12].

In 1984, in the most famous case^[13] on surrogacy, Mary Beth was hired by the Bill and Betsy Stern as a surrogate mother to carry a baby. Both the parties were agreed on the payment of \$10,000. The egg cells of Surrogate mother were used in the artificial insemination process and the surrogate mother was also the biological mother of the child. When the baby was born, the surrogate mother denied to hand over the baby to the intended parents and too te custody of baby, Baby Melissa. The case was filed by the intended parents and the New Jersey Supreme Court held that the agreement between the Sterns and Surrogate mother was illegal and granted the custody of the child to her natural father Bill however, the Hon'ble Court granted the visiting right to surrogate mother as she was also the biological mother of the child. The case was a turning point in the field of surrogacy and after this case, infertile couple avoided the traditional way of surrogacy and moved towards the use of gestational surrogacy.

After this case, the "American Bar Association" declared the laws on surrogacy in 1989. Surrogacy was allowed in the Unites States with the declaration to ban surrogacy in some states. The Districts of Columbia and other 11 states strictly prohibited the practice of surrogacy while the six states allow surrogacy through contracts. Many states criticized the concept of surrogacy which is using for the purpose of business to earn money not only by the firms^[14] but also by the surrogate mothers. In this regard, Western Europe and Australia has enacted strict laws for surrogacy which have provisions to prohibit surrogate mother to earn money through surrogacy. There are also provisions for the surrogate mother to claim the child within two years to surrogacy while in Asian and Eastern Europe the child belongs to intended parents as per the contract^[15]. In India, the child which born through surrogacy hands over the intended parents and also the rates of the surrogacy are very low in India in comparison to other developed countries that allowed surrogacy^[16]. This is the reason that the infertile couple from western countries are coming to India to obtain a child through surrogacy. But from 2015, the commercial surrogacy is banned in India.

In India the commercialization of the surrogacy is allowed in the year 2002. According to the "Assisted Reproductive Technology (Regulation) Bill, 2010", approx.15 percent couples found infertile in all over world^[17]. The infertility in couples has been declared a disease by the "World health Organization" and 19 to 20 million people are reported infertile by the WHO^[18]. Thus, the infertility has become a big problem for the world today. This is why, the surrogacy

seems a good option for infertile couples, gays, lesbians and single persons. The world's second IVF Baby and India's first IVF child is baby Kanupriya @ Durga^[19] who was born in Kolkata on 3rd October 1978. In 1994, the first Indian child through surrogacy was born in GG Hospital of Chennai^[20].

Surrogacy Laws in Western Countries

As the infertility is increasing in couples, the demand of surrogacy is also increasing. But the lack of proper rules and regulations have made surrogacy a complex issue for all over world. In 1992, the 19 states adopted the laws for surrogacy and most of the states banned surrogacy in their states. 13 states banned the commercial surrogacy and ten states banned the interference of third party or brokers between the surrogate mother and intended parents^[21].

In United Kingdom, the commercialization of the surrogacy is illegal and thus prohibited by the surrogacy Arrangements Act, 1985. As per the provisions in UK, the child belongs to surrogate mother and hands over the intended parents only after the adoption or by parental order^[22]. These provisions have made the commercial surrogacy very difficult in UK^[23].

The United States recognizes only the genetic relationships of the child with his intended parents. The citizenship of the child in US is governed under sections 301 and 309 of "Immigration and Nationality Act" (INA). According to this Act, the child should have genetic relationship with the father to acquire the citizenship of US^[24].

In France, as per the Article 17/6 of Civil Code, the agreement with the third person related to the pregnancy is totally void. In Germany, the all types of surrogacy arrangements are null and void. In South Africa, Children's Act, 2005^[25] allows the "commissioning parents" and enables the surrogacy agreements only after the High Court validates it. In Netherland only traditional surrogacy is allowed. Commercial surrogacy is not permitted in Netherlands. In Belgium also the commercial surrogacy is banned.

Surrogacy Laws in India

Today, India is the most favorite place for the infertile couples from across the world because of the less strict laws and regulations, lower cost and easy availability of surrogate mothers and the issues and exploitations are increasing day by day because the surrogate belong to the weaker category of Indian society. The fertility care centers including IVF and surrogacy, is a booming market in India. The earning from the business from his fertility market is around Rs. 25,000 crores in India^[26].

Commercial surrogacy is not only increasing the ethical and moral issues but also the legal issues. That is why, from the last few years the efforts are being made to regulate the laws for surrogacy. The agreements of surrogacy, based on the free consent of the parties are valid in India under the "Indian Contract Act, 1872", however the sale and loan of human organs are prohibited under "Transplantation of Human Organs Act, 1994".

In 2002, a fifteen members committee of experts had drafted a bill with the collaboration of Indian Council for Medical Research (ICMR) and National Academy of Medical Sciences and submitted the bill to the Union Health and Law Ministries on National Guidelines to accreditation, supervision and regulation of "Assisted Reproductive

Technologies (ART) Clinics in India. The bill has some guidelines to regulate the surrogacy in India and the guidelines were also published in 2005. However, the guidelines had no legal effects they could not implemented strictly in India^[27].

The need to regulate the surrogacy laws in India was realized in 2008 with the landmark case of *Baby Manji Yamda v, Union of India*^[28]. In this case a Japanese Couple came to India with a desire to have a baby and they entered in an agreement with an Indian surrogate mother. Later the couple took divorce and got separated. The father of the surrogate child claimed the custody of child but as per Indian law the single father cannot adopt a girl child and there were no efficient laws enacted to solve the issues of surrogacy. The apex Court directed that the matter would be solved under the provisions of "National Commission for Protection of Child Rights". The Hon'ble Supreme Court decided that the father is genetic father of the child and held that he was given the custodial rights of the child. The child was returned with her grandmother after the Government issued the passport to the child. Surrogacy was declared permissible in India by the Apex Court which increased the International confidence in Indian Surrogacy Market.

In another case, *Jan Balaz v. Anan Municipality and Others*^[29], the Gujrat High Court held that the name of surrogate mother would also be mentioned in the birth certificate of child and the child would also provide with the Indian citizenship. In return, the surrogate mother would give the child in adoption to German couple who are the intended couple.

After the judgement in the case of *Baby Manji*, the need to enact a strong legislation was realized, resulting the Assisted Reproductive Technology (ART) Bill and Rules, 2008 were drafted. Some issues related to surrogacy was not mentioned in the aforesaid bill and unaddressed so the bill was subsequently drafted in 2010 to protect the rights of surrogate mother and commissioning parents, but was not passed by the Government. It is pertinent to mention here that from 2015, the commercial surrogacy has been banned in India by the order of Supreme Court^[30]. Recently in February 2020, Assisted Reproductive Technology Regulation Bill, 2020 has been approved by the Union Cabinet to monitor the medical procedures in India to assist the intended parents to conceive and the bill will develop the ethical practices for surrogacy in India^[31]. The ART Bill, 2020 prohibits commercial surrogacy and allows altruistic or traditional surrogacy in India. Proposed legislation also prohibits the exploitation of surrogate mothers and children.

In the meanwhile, the Surrogacy Regulation Bill, 2016 was pending before the government for consideration. In 2020, the bill was approved by the Union Cabinet and allow the willing women to serve as a surrogate mother. The Bill also proposes to benefit the widow or divorced women. The 15 major changes have been suggested by the 23 members committee. In the proposed bill only, Indian couple can opt surrogacy in India and the insurance of the surrogate mother has been increased to 36 months from 16 months^[32].

Surrogacy in Constitutional Context in India

Commercial surrogacy is totally prohibited in India, Only Indian married couple can be commissioning parents with some conditions. These restrictions and conditions impose a ban on foreigners, unmarried couples, single parents, gay

couples, overseas Indians to commission surrogacy in India. These restrictions and conditions are the violation of the "Golden Triangle" of Indian Constitution including Article 14, Article 19 and Article 21.

Article 14 of the Indian Constitution guarantees the "equality before the law". While the surrogacy legislation providing the benefits of surrogacy only to married Indian couple which is unjustified and illegal and the laws pertaining to surrogacy are not fair as per the "touchstone of the constitution" and encourages the unreasonable classification in state. Article 21 of Indian Constitution guarantees protection of life and personal liberty of all persons. The Puttaswamy judgment specifically recognised the constitutional right of women to make reproductive choices, as a part of personal liberty under Article 21 of the Indian Constitution^[33]. In the case of *Suchita Srivastava v. Chandigarh Administration*^[34], the Supreme Court held that the right to make choices related to the reproduction with personal liberty under Article 21 and it includes the '*privacy, dignity and bodily integrity*' of the woman.

The reproductive right of all persons is a basic human right. In *B.K.Parthasarathi v. Govt. of A.P.*^[35], the Court held that the right to privacy includes "the right of reproductive autonomy" of an individual and shown its consent with the decision of the US Supreme Court in *Skinner v. State of Oklahoma*^[36], which defined right to reproduce as a civil right. Furthermore, in the case of *R. Rajagopal v. State of T.N.*^[37] the Apex Court held that the right to privacy is a "right to be let alone" and comes in the ambit of Article 21. In the cases of *Gobind v. State of M.P.*^[38]. And *Kharak Singh v. State of U.P.*^[39]. The Apex Court identified right to privacy as a constitutionally protected right under Article 21 of the Indian Constitution. The decision to produce a baby through surrogacy is the persona choice of an individual. This right comes in the ambit of 21 and free from the unwanted arbitrary interference of the State.

The proposed law is also the violation of right to livelihood. Article 19(1) (g) specifically guarantees the "freedom of trade and profession" in India. The surrogacy industry in India is not only the source of earning for surrogate mothers but also for the surrogacy clinics.

Surrogacy and Feminine Perspective

It is presumed that surrogacy is an "equal exchange" such as money has been paid for child birth through surrogacy or to take womb on rent. But this is not the reality. The surrogate mother who gives birth to a child gives a lot more except handling over a child. Most of the time, the surrogate mothers come from poor families with a burden to earn money to fulfil the basic needs of their families, while the intended parents belong to a financially secure family and sometimes this contract enforces on the basis of the helplessness of surrogate mother in which she has to compromise not only physically but emotionally too.

In the case of *Johnson v. Calver*^[40] the surrogate mother was black while the intended parents were white. California Supreme Court held that surrogate mother had no rights to hold the child born through gestational surrogacy. The Apex Court considered the contract legal and enforceable and the intended mother as a natural mother. The court even did not provide the visitation rights to surrogate mother. No doubt, that the child born through surrogacy belongs to gestational parents but to give birth to a child is totally natural process

in which a mother involves emotionally with the child in spite the surrogacy is traditional or gestational.

In the case of *Runkles v. Maryland* the Hon'ble Court discussed the matter of baby selling, however, the court did not find that the appellant is accused of baby selling. Many feminist social workers pointed out the concept of baby selling through contracts and agreements. The need of strict legislation to control the issues of surrogacy regarding the rights of surrogate mother and intended parents, rights of children born through surrogacy and mental and physical health issues, is mandatory. The legislation should be so effective that the surrogacy cannot turn into baby selling.

Many physical changes during the pregnancy can also be seen in a female that can be harmful for them afterwards such as low and high blood pressure, anaemia, swelling and other hormonal disbalances in body. The surrogate mothers often come from poor family and sometimes almost illiterate, they do not understand the post surrogacy trauma and the later risks of their emotional and physical health when their child born through surrogacy goes apart.

All the feminists do not oppose surrogacy. According to them reproduction or give birth to a child is a natural right of a woman and nobody can interfere in that right. To restrict women to enter in surrogacy is to violate their right to life including right to reproduce and right to choose. Sometimes the surrogate mother wants to give birth to a child for intended parents for the sake of humanity or natural love. So, to prevent women to take their decisions is against the law however, the problem of exploitation of surrogate mothers, intended parents and child born through surrogacy cannot be denied.

Conclusion

The commercial surrogacy is banned to restrict the child sale in India and also on the ethical and moral grounds. Beside this the lawmakers ignored the fact that India is a poor country and for many women surrogacy is the source of livelihood. The restriction on commercial surrogacy either deprives them to earn or forces them to give birth a child through surrogacy on minimal compensation or no compensation. This situation is much more dangerous to commercial surrogacy. In the case of *Roe v. Wade*^[41], the court has decided that every woman has a right to take decision regarding her body and therefore she has a right to enter into a contract related to commercial surrogacy.

No doubt, that the lawmakers want to protect the rights of surrogate mothers and child born through surrogacy and their intensions are right but the way they are implementing the laws are not in the right way. This is the obligation on state that it cannot interfere in the privacy of individuals, subjected to some reasonable restrictions. A balanced path should be adopted by the State to make strict laws for surrogacy so that the constitutional rights of surrogate mother cannot be infringed and any type of exploitation related to surrogacy can also be prevented. If the commercial surrogacy is banned, some other arrangements should be made to protect the rights of surrogate mother such as a health or life insurance with a good compensation or some other facilities for the life time especially for the surrogate mothers who belong to poor family. Only then the surrogacy can be recognized as a boon for the society.

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