

SURROGACY LAWS IN INDIA: BOON OR MODE OF EXPLOITATION

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Abstract: Nature being considered a woman, we are all children of. Hence bestowed woman with beautiful and miraculous capacity to procreate a life within her body. But ten to fifteen percent of women cannot produce or give birth to their offsprings. The characteristic of motherhood which is a basic attribute of womanhood urged them towards an alternative method to fulfill their desire of being a mother. This is how “surrogacy” seems them to be the best option available. But there is very eminent possibility that this boon proving option may become a mode of exploitation of both women’s body and the intended children born out of that surrogacy. Therefore it is required on the part of legislature to come up with such a piece of legislation which can clearly demarcate the rights and liabilities of all those people who are involved in the process of surrogacy. The authors are intended to present the lagging of India in the matters of surrogacy as there is an absence of a devoted legislation and hence there is a threat of “commodification” of both the children and women. The methodology of the research paper is doctrinal and completely based on the databases available in the Indian Law Institute Library, New Delhi. The authors attempt to answer the following research question: (a) is surrogacy only option available to infertile couples? (b) What could be the pros and cons of surrogacy? (c) is it not the mode of exploitation of women? (d) What would be the future of surrogacy in the absence of any dedicated legislation? (e) is India intentionally overlooking the need of legislation on the subject of surrogacy as it contributes to the country’s economy to an extent? (f) what would be the fate of surrogacy: a boon or a mode of exploitation? Keeping all these questions the authors have attempted to present a research paper on the topic: “Surrogacy Laws in India: Boon or Mode of Exploitation”.

Keywords: Surrogacy, Commodification, women, Women rights, motherhood, exploitation

I. Meaning of Surrogacy

The term surrogacy is taken up from the term “surrogate” derived from the *latin* term “surrogatus” which in the literal sense means “something used as a substitute for another”.¹ Surrogacy being considered as a noun means “the role of a woman who is commissioned to bear a child by a married couple unable to have children themselves”.² Surrogate motherhood or surrogacy means “the role of a woman who bears a child on behalf of a couple unable to have a child, either by artificial insemination from the man or implantation of an embryo from the woman”.³ The simple definition of “surrogacy” can be put in the way that it means “the practice by which a woman becomes pregnant and gives birth to a baby in order to give it to someone who cannot have children”.⁴ Surrogate motherhood is “one of the available forms of ARTs that have developed in response to the increasing number of individuals or couples who find themselves unable to conceive a child on their own and it involves the services surrendering that child to the intending or commissioning couple upon the birth of the child”.⁵ Having dealt with the meaning and definition of “surrogacy” in detail as has been provided by several dictionaries and encyclopedia, types of surrogacy need to be mentioned here so as to clarify the concept of surrogation. Surrogacy can be of two ways which can be enumerated as follows:

- a) Traditional surrogacy; and
- b) Gestational surrogacy.

Usually, both the ways of surrogacy are often used interchangeably and hence cause confusion in the minds of people. So, it is quite necessary to mark a stark distinction between the two. Traditional surrogacy provides the status of “biological mother” to the surrogate mother whereas gestational surrogacy provides the status of “birth mother” to the surrogate mother. The reason being that in “traditional surrogacy” the surrogate mother uses her own egg, i.e, her own egg is fertilized with the sperms of the intended father, and hence creates a genetic relation with the child. But in “gestational surrogacy”, the surrogate mother carries a baby that has been conceived using the egg of the intended mother and sperms of the intended father, thus creates no genetic relation with the child.

Having talked about the ways or manners in which surrogacy can be performed, the most important aspect about surrogacy and its kinds, is yet to be talked about. There are two kinds of “surrogacy”, they are:

- a) Altruistic surrogacy; and
- b) Commercial surrogacy.

¹ John P. Friel (ed.), *Dorland’s Illustrated Medical Dictionary*, (W.B.Saunders, Philadelphia).

² Elizabeth A. Martin, *Oxford Dictionary of Law*, (Oxford University Press, New York, 1997, pg.455.

³ G.A.Wilkes, *The Collins English Dictionary*, (Collins, Sydney Auckland Glasgow), pg. 1533.

⁴ Surrogacy, available at: www.merriam-webster.com/dictionary/surrogacy (last visited on March 10, 2016).

⁵ Surrogacy, International Encyclopedia of Marriage and Family, 2003, available at: www.encyclopedia.com/topic/surrogate_mother.aspx (last visited on March 10, 2016).

Altruistic surrogacy is that kind in which the surrogate mother agrees to gestate a child for the intended parents without being compensated monetarily in any way. The term “altruistic” is derived from the term “altruism” which means “unselfish concern for the welfare of others”.⁶ As per the ART Glossary the “altruistic surrogacy” means “whereby, a woman agrees for no financial gain, to become pregnant and bear a child for another person or persons to whom she intends to transfer child’s care at or shortly after the child’s birth”.⁷ On the other hand, “commercial surrogacy” is that kind of surrogacy in which the surrogate mothers receive medical, nutritional and overall health care through surrogacy agreements.⁸

II. ETHICAL JUSTIFICATION FOR THE CONCEPT OF SURROGACY

As per the religious histories and Hindu mythology, this technique of assisted reproduction is not that new at all. History witnesses an episode where Abraham’s infertile wife Sarah commissions her maid Hagar to bear her child by persuading Abraham to sleep with her.⁹ Rachel, the barren wife of Jacob commissioned her maid Bilhah to have a child by Jacob.¹⁰ Indian mythological history also witnesses the similar events whether the birth of Lord Krishna or one hundred children of Dhritarashtra and Gandhari in Mahabharata.¹¹

Surrogacy is considered as a last resort or hope to be taken by a married couple who have faced failure in conceiving the child because of multiple miscarriages or failed repeated IVF attempts for unexplained reasons. Hence, it is pertinent that motherhood is the very basis of womanhood and all women are not able to carry their own genetic offspring because of the “infertility”.¹² This is the situation where the concept of “reproductive autonomy” comes in picture. Here quoting authors like Robertson, Dworkin and John Harrison is must. For Robertson, “moral right to reproduce is as central to personal identity and dignity”; Dworkin sees “the right to procreative autonomy as firmly embedded in every genuine democratic culture; and John Harris says “the freedom to pass on one’s genes is also widely perceived to be an important value and it is but natural to see this freedom as a plausible dimension of reproductive liberty”.¹³ One could raise a question on the extent to which this liberty should be allowed to flourish.¹⁴ The ethical concern regarding the surrogacy is that “there is a possibility of surrogacy becoming gradually a form of commodification whether of women or intended babies. As in case of surrogacy, the social values of children can be put in question and can lead to exploitation of women. Warnock’s committee condemned surrogacy as “presenting an unacceptable danger of exploitation in almost every case and declared commercial surrogacy as positively exploitative which can be inferred by this statement, “it is inconsistent with human dignity that a woman should use her uterus for financial profit and treat it as an incubator for someone else’s child”.¹⁵

Hence it can be said that surrogacy raises many questions for law and hence it is a herculean task for the legislature to legislate such law which could answer all the questions pertaining to the rights of the intended children and surrogate mothers. Resultantly, each country has a different take on the matter of surrogacy. The global scenario pertaining to the concept of surrogacy can be put in a way that Italy, Germany, Turkey and Japan completely prohibits surrogacy arrangements. Commercial surrogacy arrangements are permitted in California and the Ukraine. Canada, Israel and UK have limited enforcement of Surrogacy Contracts.

Hence main ethical considerations involved in the practice of “surrogacy” are:

- Exploitation of women acting as surrogate mother;
- Social values of intended child can be in question;
- Commodification of the intended child or surrogate mother may occur; and
- Reproductive liberty if not limited may threaten the social and cultural values of any society or community respectively.

III. DEVELOPMENT OF SURROGACY LAWS IN INDIA

India can be seen as emerging leader in the field of international surrogacy and could be seen as most suited destination of “fertility tourism” in the world. In India, surrogacy can be closely linked to arrival of foreigner infertile couples in the want of child. Media usually covers such cases because gradually India has now become the most preferred destination because India is the only country with all the favourable conditions for “surrogacy”. India lacks any specified legislation so as to regulate surrogacy. In India, total cost which might incur in whole surrogacy process is comparatively lesser than that incurs in other countries, poor women of rural areas can easily agree to become a surrogate mother if any considerable amount is offered to them with the help of which they can secure the future of their children and make their families economically stable. Lack of specified legislation also is one of the major reasons for attracting couples of other countries for surrogacy. Hence cheap medical facilities, advanced reproductive technical know-how, coupled with poor socio-economic conditions, and lack of regulatory laws in India combine to make India an attractive option for “medical tourism”.¹⁶

⁶Information on Surrogacy, available at: information_on_surrogacy.com/altruistic_surrogacy (last visited on March 11, 2016).

⁷ Available at: www.rtc.org.au/glossary/. (last visited on March 11, 2016).

⁸ Commercial Surrogacy in India, available at: https://en.wikipedia.org/wiki/commercial_surrogacy_in_india (last visited on March 11, 2016).

⁹ Genesis 16.

¹⁰ Genesis 30:1-8.

¹¹ Srimad BhagwadGita: Sk:X Ch.2; Sl:1-15; K.Kannan, *Medicine and Law* 342 (Oxford University Press, New Delhi, 1st edn., 2014).

¹² Jonathan Herring, *Medical law and Ethics* 352 (Oxford University Press, New Delhi, 4th edn, 2012).

¹³ *Supra* note 12 at 340.

¹⁴ *Supra* note 13 at 354-359.

¹⁵ Warnock 1984, para 8.10; Shaun D. Pattison, *Medical law and Ethics* 310 (Sweet and Maxwell, South Asian Edition, 2013).

¹⁶ Surrogacy Report by Centre for Social Research, Surrogate motherhood-ethical or commercial.

One very important aspect of surrogacy in India is the issue of adoption because the provisions of adoption are very stringent in India. This issue can very well be understood by examining the “German Couple Case” in which it was observed that “lawful adoption is possible in India only when the surrogate mother agrees with her husband to grant the adoption to the couple seeking the child”.¹⁷ The problem arises if the couples seeking a surrogate mother are foreigners, of inter-country adoption procedures, which are not grounded on statutory provisions but has been considered in the judgements of the Supreme Court¹⁸ and high courts. The absence of any regulatory legal framework and any precedent in the concerned issue has created problem in the case of *Jan Blaz v. Anand Municipality*¹⁹, the case involved issues pertaining the citizenship of the child born out of surrogacy and also it involved the issuance of passport. The passport officer has argued that “children born out of surrogacy could not be treated as Indian citizens”. The Gujarat High Court showing its concern more towards the “rights of the children” said that “children are Indian nationals, and the gestational surrogate who has given birth to the child was the natural mother”. It held, “no presumption can be drawn that child born out of a surrogate mother, is the illegitimate child of the commissioning parents, so as to have a legal right to parental support, inheritance and other privileges of a child born to a couple through sexual intercourse. The only remedy is a proper legislation drawing such a presumption including adoption”.²⁰ But the Supreme Court has yet not resolved the legal issue.

Again a case²¹ highlighting the stark need of a legislation which may clearly provide and protect the rights of the children born out of surrogacy came up. The Supreme Court while disposing of a petition²² filed under Article 32 of the Constitution though had not taken any pro-active role but gave permission to take the child after the passport was issued, and it was observed that “liberty is given to any person to approach the commission constituted under the Commission for Protection of Child Rights Act, 2005, if any foul play was suspected”.²³

Hence, the most important issue towards which Courts need to show some concern is “the rights of the children born out of the surrogacy” and it should be given primacy over all other issues involved in the process of surrogacy.

In India, there is no specific legislation on the subject of “surrogacy”, a surrogacy agreement can be declared void under Section 23 of the Indian Contract Act, 1872.²⁴ Hence, this stimulated the legislators to enact legislation on the subject but till now no legislation could be passed. The subject of “surrogacy” is guided by the “ICMR GUIDELINES ON SURROGACY”²⁵ which led to the Assisted Reproductive Technology (Regulation) Bill, 2008 which aimed to provide for a national framework for the regulation and supervision of ART, on the lines of which the Law Commission has also submitted its report.²⁶

IV. CONCLUSION

Examining all the aspects of “surrogacy”²⁷ some may consider it as ethical but simultaneously some may consider as a mode of commodification of children as well as women’s body. Hence, conclusively it can be said that surrogacy may prove a boon to barren or infertile women but at the same time it may be considered as a mode of exploitation of a women’s body. As we all know that “every coin has two faces” and so is the case with surrogacy also and therefore the authors are of the opinion that “surrogacy though a very beneficial process for all those couples who cannot procreate but due to lack of any specified legislation, it can become a very prominent tool of exploitation of both women and the intended children”. Hence, there is a prominent need of enacting a devoted legislation on the subject of “surrogacy”, so as to avoid its misuse and also to demarcate the rights of the surrogate mothers, the intended children and the commissioning parents and also of all those persons involved in this complete procedure of “SURROGACY”.

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¹⁷ *Supra* note 12 at 350-351.

¹⁸ *Craig Allen Coates v. State* (2010) 8 SCC 794.

¹⁹ Gujarat High Court Judgement dated 11/11/2009 in L.P.A 2151 OF 2009.

²⁰ *Supra* note 12 at 352.

²¹ *Japanese Child case*.

²² *Baby Manji Yamada v. Union of India & Anr.* (2008)13 SCALE 76.

²³ Times of India reported that passport had been given and the child had been taken to Japan, November 6, 2008.

²⁴ On the consideration of being immoral or against public policy.

²⁵ Available at : icmr.nic.in (last visited on March 13, 2016).

²⁶ Report No. 228 dated August 5, 2009.

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