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Commercial Surrogacy in India and Rights of Surrogate Mother

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ABSTRACT

Surrogacy has provided opportunities to have a genetically related child to the couples who are unable to reproduce through artificial reproduction and in vitro fertilization. I show that while transnational surrogacy may challenge conventional understandings of kinship and family, it simultaneously renaturalizes state definitions of citizenship and motherhood. It also discusses different kinds of surrogacy after which it mentions a discussion on commercialization of Surrogacy in India. By the use of this process through commercial surrogacy not only the intended couples will be benefited but the poor women can also earn one, by becoming surrogate mother for couples. Through the surrogacy (regulation) bill 2019 provisions have been made to regulate centers providing surrogacy, although bill completely prohibited commercial surrogacy.

Keyword: Surrogacy, Gestational surrogacy, Surrogate mother, Bill, Egg donor.

I. INTRODUCTION

Nature has bestowed the beautiful capacity to procreate a life within women and every woman cherishes the experience of motherhood. Right to reproduction is an innate right of an individual. The desire for children among couples is an universal phenomenon. Parenthood is a life changing and eternally rewarding experience. The pain and agony of not fulfilling the dream of parenthood is immeasurable. The science of infertility treatment has moved forward by leaps and bounds. Every society across the world has given primary importance to the institution of family. When two individuals come together and enter into a matrimonial bond, a new family comes into existence and such family becomes complete with the birth of the children. From the ancient times, children are considered as a necessity for the continuation of the family lineage and a source of happiness for the parents. Psychologists points out that birth of a baby creates a bond between the spouses which can help stressful marriages to sustain in the long run.

However due to various reasons, a large section of the society are unable to have their child. Research has stated that one in six couples have such problems. The absence of a child is

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considered as a stigma to the family. There are many instances where the inability to have a child led to matrimonial breakdown. The inability to have a child which is known as infertility in medical terms is a global problem. According to the WHO Report the incidence of infertility across the globe including India is around 10-15 percent (**Annual Report 2008-2009**).

Some forms of infertility which were considered untreatable in the past have simple solutions today. Till recently the only solution for childless couples was adoption. The advancement in medical science particularly in the field of artificial human reproductive technologies (ART) has come to rescue of such individuals and provided them with various options to beget a genetically related child. There are various options in ART like artificial insemination, In-Vitro fertilization, embryo transfer etc. Among all the methods surrogacy has become popular.

The American Law Reports* defined the term "Surrogacy" 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, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child's". (**Chatterjee, 2015**). Surrogacy, as a generic term, is a legal arrangement between a woman, also known as the surrogate, and the intended parents who are willing to have a child. In modern times, this arrangement has become common and acceptable in society. Many people opt for surrogacy if the mother or the woman who intends on having a child cannot conceive one for a variety of medical or personal reasons. Having a baby is likely a threat to the life of a mother. Surrogacy is a blessing for parents or people who intend on having a baby but are unable to, which makes it even more important to have proper regulations on this matter.

II. TYPES OF SURROGACIES

Surrogacy is mainly divided into two types

1. Traditional Surrogacy: - By this method, 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 the birth of the child. Here, the woman is the biological mother of the child because it is her egg, which was fertilize with the sperm of the donor or the sperm of the father means the child will be genetically attached to the mother (**Chatterjee, 2015**).

2. Gestational Surrogacy: - And here in this methods the fertilization is done through In Vitro Fertilization (IVF) first. In these methods, the egg and sperm of the intended parent is collected for artificial fertilization i.e. through IVF. Once the embryo is formed, then it is transfer into the surrogate mother womb with the help of ART (**Chatterjee, 2015**).

In traditional surrogacy, the surrogate conceives through artificial insemination with sperm from

the intended father or a donor and is genetically related to the child. Whereas in gestational surrogacy, an embryo created from the intended parents' and/or donor gametes is transferred to the surrogate who carries the pregnancy but is not genetically related to the child. Gestational surrogacy has now largely replaced traditional arrangements (**Spar, 2005**) and is becoming an increasingly common family building option (**Perkins et al., 2016; White, 2016; Kneebone et al., 2022**).

III. LAWS AND ETHICS OF SURROGACY IN INDIA

In India, surrogacy has always remained a controversial topic as it has always been discussed upon legal, social and ethical aspects. Surrogacy for foreigners was allowed from 2002 but it has been restricted after the provision in draft (**ART Bill 2014**). All the forms of commercial surrogacy in India can be banned in future according to the Surrogacy Bill, 2016. There have been cases that have resulted in both the favor and against the practice of the procedure when the attempt did not result in success. In every case, the commercial agreement unlocks the prospect of human corruption. We must think that a surrogate may get treated like a slave because she is doing all this because she needs money and history is known with examples where financially weak is always exploited by the one who controls the finances. So it should be discouraged at large extent and as the guidelines states that only altruistic surrogacy should be allowed. Surrogacy should be treated as a charitable procedure instead as a financial agreement (**Singh et al., 2019**).

(A) The Case Reported:

The only reported judgment of the Supreme Court in surrogacy matters is Baby Manji Yamada (2008), which received due notices being a case of "Commercial Surrogacy". An intended may be a single male. In this case, the court has to consider the petition of a Japanese grandmother who wanted the issuance of a travel document for her Japanese divorced son's daughter. In another matter decided by the Gujrat High Court in Jan Balaz (2009), the matter in appeal is still pending in the Supreme Court and the decision of the High Court holds that the babies born in India to Gestational mothers are Indian Citizens, are entitled to Indian Passports, has been stayed by the Supreme Court. However, twin German Children born to German Couple were permitted to leave India upon the directions of the Apex Court to Central Adoption Resource Agency (CARA) to permit adoption of the children as a special case. Now the issue of nationality and citizenship arise a matter of grave concern is still undecided (**Verma and Singh, 2022**).

IV. SURROGACY AND WOMEN'S RIGHT TO HEALTH: INDIAN SCENARIO

The concept of surrogacy in India is not new. Commercial surrogacy or “Womb for rent,” is a growing business in India. In India, English speaking environment and cheaper services attract the willing clients. Future projections of surrogacy practice range from opportunity to exploitation – from rural women in India uplifted out of poverty to a futuristic nightmare of developing country baby farm (**Jadva et al., 2003; Anu et al., 2013**). In case of surrogacy in India, it is hard to tell that whether these women are exercising their own personal rights or whether they are forced to become surrogate mothers due to their mother-in-law's or husband's desire to fulfill material and financial needs (**Kevin, 2008; Kimbrell, 1993**). Opponents of surrogacy argue that the practice is equivalent to prostitution and by virtue of that similarity, it should be disallowed on moral grounds. Surrogacy contracts are “dehumanizing and alienating since they deny the legitimacy of the surrogate's perspective on her pregnancy (**Jadva et al., 2003; Anu et al., 2013**). Surrogate mother tries to avoid developing a special bond with the child in her and views the pregnancy as merely a way to earn the much-needed money (**Jadva et al., 2003**). The payment for bodily services dehumanizes the surrogate mother and exploits her reproductive organs and capability for personal gains of the wealthy (**Kevin, 2008; Honjo et al., 2003**).

V. RIGHTS OF THE SURROGATE MOTHER

A recent government-funded study of 100 surrogate mothers in Delhi and Mumbai found there was “no fixed rule” related to compensation and no insurance for post-delivery healthcare. It cited cases where surrogates were implanted with embryos several times to raise the chances of success. Despite the hot criticism, the Act has been welcomed by quite many organizations like Stop Surrogacy Now, who wants to reduce India's status as a Rent-a-Womb nation. The legislation through the Surrogacy Act also penalizes the abandonment of the surrogate child, as it was a common occurrence in the past. The Indian laws treat cases related to surrogacy on a case-to-case basis. On occasions, the law recognizes the woman who gives birth as the mother of a child. However, on other occasions, it recognizes the commissioning couple as the legal parents of a child born to a surrogate. In general, commercial gestational surrogates are almost entirely conceptualized as ‘vessels’. We identify several instances of child abandonment and discuss their implications with regard to the moral conceptualization of commercial gestational surrogates.

Some commissioning parents have, however, effectively abandoned the children they commissioned and in such cases, commercial surrogates may find themselves facing

unexpected maternal responsibility for children they had fully intended to give up. These are known as surrogate orphans. The surrogate orphans were an unfortunate by-product of some of the surrogacies, as was seen in the case of Japanese Couple, The Yamadas. The case is mentioned below:

- The surrogate mother should be married.
- She must have had a child prior to the surrogacy offer.
- She is also required to be between 25 to 35 years of age.
- The surrogate mother shall be allowed to offer her services just once.
- The Act also forbids any exchange of monetary nature between the surrogate mother and the seeking couple.

(A) The public health risk of surrogacy:

Childbirth is a natural process. Pregnancy is an innately dangerous state for a woman, especially in low-income countries. In India, surrogates are implanted with multiple embryos in order to increase the chances of pregnancy, which however increases health risk for babies and the mother. It can also harm the female donors as well as the surrogate causing multiple pregnancy, low birth weight, and malformed babies (**Kondapalli and Perales-Puchalt, 2014**).

Although rare, there is a small risk of ovarian hyper-stimulation syndrome, leading to abdominal pains, nausea, vomiting, breathlessness, and fainting. There is rare risk of transfer of human immunodeficiency or hepatitis virus (**Venkatashivareddy et al., 2015**).

(B) The Surrogacy (Regulation) Act, 2021:

The Indian Parliament passed the Assisted Reproductive Technology (Regulation) Act and the Surrogacy (Regulation) Act early in December 2021, both of which would become landmark laws. The Surrogacy (Regulation) Bill had already been passed in the Lok Sabha but not in the Rajya Sabha, thus it was submitted to a Parliamentary Standing Committee for additional review. Finally, on December 25, 2021, the President signed the Surrogacy (Regulation) Act of 2021, which governs surrogacy practise and process.

According to the Surrogacy (Regulation) Act of 2021, any couple engaging in commercial surrogacy would be sentenced to up to 5 years in jail and a fine of up to Rs 50,000 for the first offence, and up to 10 years in prison and a fine of up to Rs 1,000,000 for consecutive offences. Anyone found to be involved in the exploitation of surrogate mothers or children born via surrogacy risks a maximum sentence of 10 years in prison and a fine of Rs ten lakhs. According

to the Surrogacy (Regulation) Act of 2021, a national and state-level surrogacy board would be established, and only ethical altruistic surrogacy will be conducted in India, while commercial surrogacy will be prohibited (**Meena and Vinjamuri, 2022**).

VI. CONCLUSION

surrogacy is a blessing if it uses in a right manner, but now's a day's surrogacy will become business. Government have to take more severe steps for regulating the bill, then only the misuse of surrogacy can be stopped. Putting a ban on commercial surrogacy is not a solution, it will not protect the surrogate mother against exploitation. Instead of making surrogacy exclusive for infertile married couples, the State should ensure that everybody gets the chance to procreate and those who help them in doing so get their due, financially or otherwise.

VII. REFERENCES

1. **Annual Report (2008-2009)** Ministry of Health and Family Welfare, Government of India available at http://monh.nic.in/FINAL_HEALTH_MINISTRY_ANNUAL_REPORT_2008_09.pdf accessed on 09/04/2014 at 5:30 p.m.
2. **Anu., Kumar, P., Inder, D. and Sharma, N. (2013)**. Surrogacy and women's right to health in India: Issues and perspective. *Indian J Public Health*, 57:65-70.
3. **Assisted Reproductive Technology (Regulation) Bill**. New Delhi: Ministry of Health and Family Welfare, Government of India, Indian Council of Medical Research; 2014.
4. **Chatterjee, P. (2015)**. Role of Law Relating to Commercial Surrogacy in India and Protection of Surrogate Mother. *International Journal of Recent Scientific Research*, 6(9): 6187-6192.
5. **Honjo., Arai, S., Keneko, H. Ujiie, T. (2003)**. Antenatal Depression and Maternal-Fetal Attachment. *Psychopathology*, 36:304-11.
6. <https://blog.ipleaders.in/is-surrogacy-legal-in-india>
7. <https://blog.ipleaders.in/rights-of-a-surrogate-mother/#:~:text=She%20must%20have%20had%20a,mother%20and%20the%20seeking>
8. **Jadva V, Murray C, Lycett E, MacCallum F, Golombok S. (2003)**. Surrogacy: The experiences of surrogate mothers. *Hum Reprod* 18:2196-204.
9. **Kevin, T. (2008)**. The ethics of surrogacy contracts and nebraska's surrogacy law. Vol. 41. *Creighton Law Review*, p. 185-206.
10. **Kimbrell (1993)**. *The Human Body Shop: The Engineering and Marketing of Life*. New York: Harper San Francisco; p. 101.
11. **Kneebone, E., Beilby, K. and Hammarberg, Karin (2022)**. Surrogates' and intended parents' xperiences of surrogacy arrangements: A systematic review, *Reproductive BioMedicine.*, doi: <https://doi.org/10.1016/j.rbmo.2022.06.006>
12. **Kondapalli, LA. and Perales-Puchalt, A. (2014)**. Low birth weight: is it related to assisted reproductive technology or underlying infertility. *Fertil Steril*, 99:303-10.
13. **Meena, R. and Vinjamuri, L.P. (2022)**. Surrogacy in India: Its Legal Aspect in India. *UGC CARE Group 1, Volume- IX, Issue-II (V): 111-123*.

14. **Perkins, K. M., Boulet, S. L., Jamieson, D. J., Kissin, D. M.** , National Assisted Reproductive Technology Surveillance System, G., 2016. Trends and outcomes of gestational surrogacy in the United States. *Fertility and sterility*. 106(2): 435-442.e432. doi: 10.1016/j.fertnstert.2016.03.050.
15. **Singh, G., Hazarika, N., Singh, V.J., Cojandaraj, L. and Singh, G. (2019)**. Infertility and Surrogacy, *Think India Journal*, 22(16): 1140-1146.
16. **Spar, D.L. 2005**. For love and money: The political economy of commercial surrogacy. *Review of International Political Economy*. 12(2): 287-309. DOI: 10.1080/09692290500105615.
17. **Venkatashivareddy, B., Gupta, A. and Ramesh, V. (2015)**. Surrogacy: blessing or curse to poor society in India. *Healthcare in Low-resource Settings*, 3:5465; pp 47-47.
18. **Verma, A. and Singh, Y. (2022)**. Social Implications of Surrogacy in India, *Studies in Indian Place Names* (UGC Care Journal) ISSN: 2394-3114 40 (60): 2242-2247
19. **White, P.M. (2016)**. Hidden from view: Canadian gestational surrogacy practices and outcomes, 2001-2012. *Reproductive Health Matters*. 24(47): 205-217. DOI: 10.1016/j.rhm.2016.06.006.
