



SOCIO-LEGAL LENS OF SURROGACY LAWS IN INDIA

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"World's Lowest Cost Packages", "World's Best Quality Services", "World's Best Possible Results." These lines are the advertisement online for surrogacy in one of the clinics in India. Scrolling down further on the website it states "Surrogates readily available" "Only three visits required". These can be the lines of hope for many who would want to have their biological child and for some reasons are unable to have. These lines are also the lines of hope for many families who may be struggling for hand to mouth situation and by bearing a child for some one else their economic worries may be resolved. But in between the hopes of two stake holders and consenting parties, that is one who wants child through surrogacy and one who is ready to bear child under surrogacy, there are plethora of socio, legal, political and economic issues. These issues have been of concern since the time the concept of surrogacy was medically proved to be possible. But the dimension of the questions is widened with the recent debates which the new Surrogacy Regulation Bill 2016 has led to. This paper looks at the legal development in the surrogacy arrangements and analyses it from socio legal perspective.

SOCIETAL PERSPECTIVE OF SURROGACY IN INDIA

Growing Infertility among the couples has been a major concern in the wellbeing of the families. According to a survey conducted by International Institute for Population Science (IIPS), out of 250 million individuals estimated to attempting parenthood at any given time, 13 to 19 million couples are likely to be infertile. Nearly 30 million couples in the country are suffering from infertility. In a patriarchal society like India this issue assumes greater importance and hence from time to time steps towards resolution of this problem have become necessary. Family as a unit has been the most important part of the Indian Society. Family here is perceived as husband, wife and children as main members of this unit. Hence children constitute a very significant role from societal, legal and biological angle. It is said that the child constructs the parents sociologically and parents constructs the child biologically. Having own biological child has been always preferred in the Indian Society and hence the problem arises when the parents are unable to construct a child through conventional biological means. It is here that the advancement of medical science has become a hope for many as through Assisted Reproductive Techniques(ART) they are able to have their biological child. One of the greatest advancement of medical science in the field of ART has been giving a biological child to the intending parents through surrogacy. The societal change and acceptance to homosexuality, readiness of a single parent to have a child, increasing instances of live in relationship have opening another dimension to the whole issue of who is a couple and who can enter into a contract of surrogacy with surrogate mother.

All these societal changes and advancement in medical science have made RENT – A - WOMB a million dollar industry in India estimated to be around 445 million dollars. An arrangement which is unique in nature involving interest of the person entering into the contract and also the "unborn" which is the sole purpose of entering into the contract to "rent a womb", popularly called as

“Surrogacy agreement”. Surrogacy Agreements or arrangements are the gift of development of medical science and has become one of the major attractions of medical tourism industry in India. Given the socio economic back ground of the Indian Population on one hand and the ease of economic spending and social acceptance of surrogate child in the other countries on the other hand, commercial surrogacy in the country is on rise. The commercial surrogacy took care the needs of the surrogate mother in terms of the compensation decided in the tripartite agreement between the commissioning parents, doctor and surrogate.

India has become a hub for commercial surrogacy, a industry which has been termed as gold pot by the law commission. It has become a favourable destination especially for foreigners, reason being medical, personal, legal and economical, predominantly being economical and legal. The cost factor involved is much less as compared to other countries. Also the demand - supply plays an important role. The women who are ready to bear a child for other person are easily available because of the need for money. Hence the mismatch of economic backgrounds of the parties has become one of the main reasons for Surrogacy Agreements in India being termed as Gold Pot by the Law Commission. The reports indicate that women for various financial needs of there;s which could range from a small amount like Rs.10,0000 to any some don't mind in bearing a child for the other couple. There are reports which indicate that some women even tell lies about the physical health just to earn few thousand rupees. Such instances are cause of concern for the rights of women bearing child and also for the child who she will be giving birth. Hence the moot question is should commercial surrogacy be permitted and should these contracts for commercial surrogacy be legally enforceable.

LEGAL FRAMEWORK: PAST

Reproductive Rights have assumed significance at the international forum. Universal Declaration of Human Rights (UDHR) in its Article 16 states (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

UDHR has formed the basis of legal framework relating to surrogacy in India.

National Guidelines for Accreditation, Supervisions and Regulation of ART Clinics, 2005:

Currently Surrogacy arrangements are governed by National Guidelines for Accreditation, Supervisions and Regulation of ART clinics, 2005 in India framed by Indian Council of Medical Research. A brief analysis of these guidelines are:

1. The ART clinic must not be a party to any commercial element in donor programmes or gestational surrogacy.
2. A surrogate mother carrying a child biologically unrelated to her must register as a patient in her own name. While registering she must mention that she is a surrogate mother and provide all the necessary information about the genetic parents such as names, addresses, etc. The birth certificate shall be in the name of the genetic parents.
3. The entire expense relating to entire term of pregnancy and pre and post-natal care shall be borne by the genetic parents.
4. The surrogate mother would also be entitled to a monetary compensation from the couple for



agreeing to act as a surrogate; the exact value of this compensation should be decided by discussion between the couple and the proposed surrogate mother. Hence surrogacy agreement is very much crucial.

5. A surrogate mother shall relinquish all parental rights over the child.
6. Surrogacy by assisted conception should normally be considered only for patients for whom it would be physically or medically impossible/ undesirable to carry a baby to term.
7. Advertisements regarding surrogacy should not be made by the ART clinic. The responsibility of finding a surrogate mother, through advertisement or otherwise, should rest with the couple, or a semen bank.
8. A surrogate mother should not be over 45 years of age.
9. Before accepting a woman as a possible surrogate for a particular couple's child, the ART clinic must ensure (and put on record) that the woman satisfies all the testable criteria to go through a successful full-term pregnancy.
10. Any person can become a surrogate mother, relative or otherwise.
11. No women can act as surrogate for more than thrice in her life time.

These guidelines suffer from certain defects as regards to Rights of Surrogate Mother.

There has been no mention of the minimum age. As regards to number of times she can become a surrogate mother is three as per the guidelines. Further, the guidelines are silent on the point of pregnancy of her own children. For instance, if her own pregnancy was three and she becomes surrogate for more three, it would be harmful to her health. There is no mention about the insurance arrangement by the genetic parents in case of any eventuality during the pregnancy.

There is no criminal liability on part of ART clinics if they do not follow the guidelines. The guidelines are thus inadequate to deal with surrogacy arrangements.

Hence it is found that the guidelines have remained mere black letters of law.

228TH REPORT OF THE LAW COMMISSION OF INDIA

The Law Commission of India in its 228th Report on "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Surrogacy" published in August 2009 studied the issue of surrogacy in India and Foreign jurisdictions. The Commission studied the legal and moral issues involved in surrogacy. After studying the cases on surrogacy¹ which had given rise to legal issues pertaining to welfare, protection and guardianship rights of the child, the Commission recommended most important points to be taken into consideration while drafting the ART Bill.

The Report highlighted that the Draft Bill prepared by ICMR is full of lacunae and is incomplete. It recommended that we need a legislation not only to regulate ART Clinics but also rights and obligations of all the parties to a surrogacy including rights of the surrogate child. The following are the important recommendations of the Law Commission:

1. Surrogacy arrangement to be continued to be governed by Contract amongst parties requiring the consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s) etc. But such an arrangement should not be for commercial purposes.
2. Arrangement should also provide for financial support for surrogate child in the event of death of



the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.

3. A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.

4. One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.

5. Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.

6. The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.

7. Right to privacy of donor as well as surrogate mother should be protected.

8. Sex-selective surrogacy should be prohibited.

9. Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

Legal framework Proposed: The Assisted Reproductive Technology (Regulation) Bill, 2014 & the Commercial Regulation Bill 2016: Based on the recommendations of the Law Commission, the Parliament was to draft a bill for regulating ART in India. The Parliament had drafted a Bill in 2010 which got lapsed. Again in the month of September 2015 the Ministry of Health and Family Welfare drafted a Bill. While the bill is still pending, Surrogacy (Regulation) 2016 has been drafted and passed by the Cabinet.

While ART bill aimed at regularising surrogacy contracts and ART clinics, Surrogacy Regulation bill 2016 has made the surrogacy laws more stringent. This part of the paper aims at comparing some of the important provisions of both.

The ART bill has defined certain important terms like couple, commissioning parent², surrogacy, surrogacy agreement etc. Thought the term couple³ is defined liberally and includes any relationship between male and female, in context of surrogacy, commissioning couple is used which in the bill means married couple. At the face of it excludes all those individuals who are not married, from entering into surrogacy agreements. This itself violates the basic fundamental rights to other like homosexuals, single parent & persons living under live in relationship. Unfortunately the defect seems to be magnified in the Surrogacy Regulation Bill, 2016 as according to this bill the main essentials to enter into a surrogacy agreement are Only Indian couples, who are legally married for at least five years, and the couple must produce a medical certificate testifying that either partner is medically unfit to produce children. The provision in the new bill is conservative in approach. It rules out the possibility of categories of persons who are today accepted in the society but are unable to have reproductive ability like homosexuals, single parent etc. It specifically mentions about the medical certificate to be produced which rules out the hope to those people who might be fit but due to some deformity or disability would not like to take the risk of conceiving a child. The new bill also prohibits couples who have their own children, to opt for surrogacy. So if there provision sees



its way through the Act, no more cases like that of Sharukh Khan's surrogate child would be there. This provision again raises the debate whether it violates the fundamental rights of such couple who have children.

The next important aspect of who can be a surrogate mother, in the ART Bill 2014. The analysis highlights that surrogate mother⁴ could be any woman who is an Indian citizen. Surrogacy agreement is mandatory and provision with regards to all expenses and insurance to be borne by the commissioning couple is specifically mentioned. Provision for complications arising out of pregnancy is also incorporated and is the responsibility of the commissioning couple. The ART bill 2014 specifically covers the provision for adequate compensation to the surrogate mother for her acceptance to act as surrogate mother. Moreover the power to decide mechanism is also given to the state. This was a welcome provision as compared to the earlier guidelines as there was no clarity about the enforceability of the agreement and compensation to the surrogate mother. At least the ambiguity was attempted to be resolved. The surrogacy regulation bill 2016 is attempting to abolish commercial surrogacy.

This change has led to the debate across length and breadth of the country. Various analogy is drawn by people saying that selling of an organ is prohibited, selling of blood is prohibited so why permit commercial surrogacy. The arguments which lie in favour is there is no donation of any organ of the body. It's purely an acceptance by the person who is able to bear the child to provide that service. And for providing for this service under the strict framework keeping Right to health as a priority, commercial surrogacy should not be prohibited. Looking at the socio economic conditions of the people who have accepted to become surrogate mother in the past, it can be concluded that prohibition will not lead to complete stoppage but rather lead to more illegal ways of hiring surrogate mother, which may prove to be more dangerous.

In the ART bill 2014 any the essentials to become a surrogate mother following important conditions are mentioned i) Ever Married Indian Women ii) Minimum age 23 and maximum 35. Iii) Should have one child of her own of at least 3 years age. iv) Should not be allowed as surrogate for more than one successful live birth in her life and with not less than two years interval between two deliveries v) Surrogate mother shall be subjected to maximum three cycles of medication. The analysis highlights that any woman can become surrogate mother, whereas in the Surrogacy Regulation Bill 2016 following conditions are laid down to be a surrogate mother viz., Only a married woman with at least one child, Surrogate mother must be a close relation of the couple seeking surrogacy, a woman is allowed to surrogate only once, and a couple can avail surrogacy only once in their lifetime. Thus in the new bill only a close relative can become surrogate. The new bill has raised sociological and psychological questions, especially with regards to the impact on the surrogate child when he comes to know who gave birth and who are the parents are two different couples.

CONCLUDING OBSERVATIONS

Through the focused study of limited provisions of the proposed legislations pertaining to surrogacy it is observed that the ART bill aimed at providing financial and health security to the surrogate mother whereas the Surrogacy Regulation Bill 2016 has focused on the health of the surrogate mother ignoring the reasons behind which a person would accept to become a surrogate. If



commercial surrogacy is to be prohibited, then by some mechanism financial security should be provided to the surrogate mother and her family.

Surrogacy involves conflict of various interests and has an impact on the primary unit of society viz. family. The other important issue which remains to be addressed at the societal level is should surrogacy agreements be commercialized or should commercial surrogacy be permitted. This fact needs to be answered in the light of the women who volunteer for surrogacy, their economic background and also the impact on their existing family on their surrogacy pregnancy vis a vis who would like to enter into a surrogacy agreement.

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