



HIRED WOMB (SURROGATE MOTHER) - MANY QUESTIONS?

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The desire to procreate is a very fundamental attribute of the human race. Sadly though, many are denied the joy of parenthood due to several reasons, biological or otherwise. With the developments in reproductive sciences and technologies the barriers to parenthood are no longer as formidable as they once were. Over the years, surrogacy has evolved as a much-preferred mode of bringing a child into this world, for childless couples who cannot biologically afford it otherwise. India, in particular has seen a rise in the recourse to surrogacy as an ideal technique for childless couples to enjoy the pleasure of parenthood. The only impediments the system faces now relate to the legal tangles that manifest it in the various phases of the process involved.

It is definitely a commendable work to bless the courtyard of a childless couple with the happy sound of cries of a newly born child by means of surrogate motherhood. But this process has become a net business and as such this has made us to think to make laws on the issues relating to surrogacy.

Surrogacy is a process where women are paid to carry another couple's genetic child through a process of in-vitro fertilization (IVF) and embryo transfer¹. To realize everyone's dream of having their own baby, third party parenting with special emphasis on surrogacy has registered phenomenal progress in the Super-Specialty of Surrogacy and Infertility Treatment and has helped thousands of infertile couples from India and different countries to have their own baby. Some women slip into the role of motherhood easily and some have motherhood thrust upon them. Therefore, some has to go through countless struggles to experience the thrill of holding her first child in her arms.

This is against the culture of our country that a woman has a fetus to give birth to a child in her womb of a man other than her husband². Obviously, the issue of hired womb or say the surrogate mother may bring a bad impact on the so-called institution of marriage as well as on the status of the woman in the family. But discouraged by several futile procedures, the couples become mentally disturbed, socially out casted and financially drained in their journey to attain the joy of parenthood even after several years of their marriage. As such, the journey of parenthood for childless couples is always filled with emotions and uncertainty as they experienced repeated IVF failures³.

Moreover, this will adversely affect the poor women of the country. Therefore, this issue led to raise some questions, such as-

- A big part of our population of the country is living in acute poverty. The poor women may be prey of this illegal business easily.
- In this business, the poor women will have to give birth by bringing up in their wombs the children of the well-to-do couples of the country or the foreigners just for small money.
- Will they do this service just to earn money to meet both ends of their families?
- What is the guarantee that the women allowing their wombs on hiring will be looked after in a better way after giving birth to the children and will bring a change in their living standard?

¹ Surrogacy in India: Meaning, Legal status and the flip side.

² Government of India, 228th report of the law commission on need for legislation to regulate assisted reproductive technology clinic as well as rights and obligations of parties to a surrogacy, 2009.

³ Amrita Pande, wombs in labour, Transitional commercial surrogacy in India, Columbia university press, 2014.



- In addition to the above considerable points, there is another point also as to what extent it is justified to give the right to a woman to conceive the fetus of other person in her womb just for some money.
- Is it justified to give right to a woman of giving birth to a child without developing the basic instincts?
- Can the married life of surrogate mothers not be in trouble after the delivery by giving birth to the children of other couples?

Even today the male society of our country still has most of the doubts on the sex behavior of a woman all over the world. The male society looks the sex behavior of a woman as the honors of their family. In the above circumstances, it is clear that the surrogate mothers may have to face the ignoration, harassment and violence on the part of members of their own families.

So far as I am concerned, it is against the culture of our country that a woman may have the fetus of a man other than her husband in her womb. It is clear that in due course the issue of hired womb may bring a bad impact on the institution of marriage as well as on the status of woman concerned in her own family. In my opinion, both the parents who are adopting the child and the mother who is leaving behind the child after delivery are liable for doing an immoral act.

The other side of the issue: If we look to the other side of the issue, it is not immoral to give birth to a child by means of VITRO method or by a surrogate mother. Now-a-days, the use of science and technology is getting expansion speedily in all fields of life. As such the science and technology are supposed to provide facilities to the people.

Undoubtedly, with the help of science, a beam of happiness can be brought on the faces of those married couples who are unable to give birth to their own children due to one reason or the other. The smile of happiness can be seen on the faces of such couples when a child is handed over to them as their own.

Some other aspects for consideration⁴: There are some other considerable points relating to surrogate mothers, such as:

- In what odd situations the doctor will select the sperm of a certain man and the ovum of a certain woman for the purpose?
- What will be the attitude of the society towards the child born out of a surrogate mother?
- Will the parents of the child born out of a surrogate mother behave really with the child taking the same as their own sibling for a long time?
- What will happen if the couple adopted the child get divorce later on?
- What will such child get as an heir?
- Will not the real and cousin brothers and sisters oppose the child born from a surrogate mother to have a share in the ancestral as well as parental properties?

Not only this, it has come to knowledge through media news that even couples in homo-Sexual relationship (gays and lesbians) are having desire to adopt a surrogate child.

Data tells that the number of homo-sexual persons is increasing all over the world and they are also demanding for the right of parenthood. Does the law accept this version that the homo-sexual couples can be proved good guardians?

Suppose, any foreigner homo-sexual couple, especially from America, Britain and Israel comes here and wants a child through the above surrogacy method, then just imagine, what will be happened in case the surrogate mother claim her right on the child in future? Will her claim be illegal?

If our government circulates the most progressive directions relating to surrogate mothers, even then these provisions will not be applicable on the foreigners because they will bring such child with them and will not be available in our country for cross-examination in this connection.

⁴ Government of India, 228th report of the law commission on need for legislation to regulate assisted reproductive technology clinic as well as rights and obligations of parties to a surrogacy, 2009.



In this regard, there is another issue also whether such surrogate children may not be used in any criminal or illegal activity by the persons having some vested interests. For the time-being, I am not having answers of such questions and in this whole issue there are a lot of doubts in the offing. Certainly, it is not easy to bring this issue of surrogate mother in the ambit of legal procedure. And before giving shape to such laws, there is a great need to think over on this issue deeply within the Indian society.

India has emerged as a leader in international surrogacy in the last few years and sought after destination in fertility tourism related to surrogacy. Indian clinics becoming more competitive, not just in the pricing, but also in the hiring and retention of Indian females as surrogates. Clinics charge patients roughly a third of the price compared with the same procedure in the UK⁵. But issues pertaining to parentage, sex selection, birth certificate, right to privacy of donor etc. have necessitated these changes in the law.

The Indian Legal system vastly differs from the rest of the world. Since surrogacy is considered to be a question of public policy for many countries, surrogacy is not sanctioned and may not be even permitted outside the borders. However, Surrogacy Laws in India have been much in favour of International Surrogacy Arrangements.

The Government of India issued a notification in the year 2013, which allowing import of human embryos for purpose of artificial reproduction paving the way for foreign couples to bring in frozen human embryos and to rent a surrogate womb in India. As a result of this notification a PIL was filed by advocate Jayashree Wad who said the country has virtually become a "baby factory" as a large number of foreign couples have been coming to India in search of surrogate mothers. On this the Government of India has recently told the Supreme Court in an affidavit that the Foreigners cannot rent a womb in India and Surrogacy services would only be available for Indian couples. The government does not support commercial surrogacy and as such it has decided to prohibit the import of human embryo for the purpose of commercial surrogacy for foreigners. The Directorate General of Foreign Trade (DGFT) has recently decided to withdraw its 2013 notification which allowing free import of human embryo to India for artificial reproduction. However, Import of embryos for research would not be banned

The government of India is even considering the case of giving 12 weeks maternity leave⁶ to such working women who have babies with the help of surrogate mothers and those who adopt the babies.

Surrogacy Laws in India: Surrogacy Laws in India are also undergoing an immense change lately. The Union of India is taking steps to position India as a legally risk-free destination when it comes to international surrogacy arrangements. The Indian Government is implementing legal mechanisms to ensure that the child born out of surrogacy arrangements in India would have a safe passage back home. Though such measures have affected few nationals, it could be considered legally safe in the long run for surrogacy in India.

Indian Judiciary also perceives right to bear children as a human right, For instance, Andhra Pradesh High Court in a case⁷ upheld "The right to reproductive anatomy" of an individual as a facet to his "Right to privacy" and also agreed with the decision of the supreme court of USA⁸ in which characterized the right to produce as "One of the basic civil rights of the man". The couple thus have right to practice their right in the most reasonable and practicable manner accessible to them given their infertility.

The High Court of Gujarat⁹ conferred citizenship of India on two twin babies fathered in the Anand district, through compensated surrogacy by a German national. The Court observed "We are primarily concerned with the rights of two new born, innocent babies, much more than the rights of the biological parents, surrogate mother or the donor of the ova. Emotional and legal relationship of the babies with their surrogate mother and the donor of ova is of vital importance".

⁵ Surrogacy Arrangements Act, 1985, available at www.surrogacy.org.uk

⁶ Maternity benefit Act, 1961.

⁷ B.K. prasarthi v/s State of Andhra Pradesh, AIR 2000 A. P. 156.

⁸ Jack T. skinner v/s State of Oklahoma, 316 US 535.

⁹ Jan Balaz v/s Union of India AIR 2010 Guj 21.



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The Supreme Court held that- Commercial surrogacy sometimes referred to by the emotionally charged and potentially offensive terms wombs for rent, outsourced pregnancies or baby farms¹⁰

As on now, as per Government of India guidelines dated 03.11.2015, the foreign nationals including OCI/PIO card holders are not allowed to commission surrogacy in India. But the new law will not allow hire surrogate mothers by NRIs and foreigners . According to the new law, 23 years will be the minimum age to become a surrogate mother. Coming as a boon to single women, the government of India has recently announced that surrogacy laws will be changed soon which will allow them to become surrogate mothers.

As a matter of fact, the process of surrogacy is no more closed as it used to be earlier and much information is available even in the online space about surrogacy arrangements in India. Excellent medical facilities, convenience in approach, abundant information on the Internet, favorable legal position and economic viability has immensely positioned India as a preferred destination for International Surrogacy Arrangements, helping thousands of couples achieving parenthood.

¹⁰ A pasayat Baby Manji Yamada v/s Union of India & anr, W.P. (C) no-369 of 2008.