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SURROGACY IN INDIA AND RELATED LAWS

Ipshita Mishra¹

Abstract: The following article discusses the meaning, definitions, process involved, arguments in favor and against surrogacy and the various laws in our country relating to the same. It also enumerates the need for this method of reproduction and the stigma attached to it in our Indian society.

“Motherhood is near to divinity. It is the highest

Holiest service to be assumed by mankind”

- Howard hunter

The concept of family has played an important role in the formation of this society since time immemorial. The privilege to marry and establish a family has been considered a fundamental human right. Human rights law upholds the positive right of all people to marry and form a family. Every society across the world has given importance to the institution of family as the most basic and fundamental unit of social relationship. When individuals get together and bind themselves in a matrimonial bond, then a new family comes into existence and such family gets complete with the birth of the children. Unfortunately, the gift of being able to bear a child is not evenly distributed by nature. This inability to bear a child in medical terms is known as infertility. The paradox of a child completing a family and the fact of inability to bear a progeny leaves the married couple into a difficult situation. This pressure of society on the couple to bear a child sometimes also leads to matrimonial breakdown and also brings the couple to social ridicule.

Till recently the only known alternative method for a childless couple was adoption but now the process of assisted reproductive technologies and its methods have provided multiple opportunities to couples for reproduction through artificial insemination and in *vitro* fertilization or embryo transfer also known as test tubes babies.

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Many a times due to health concerns or otherwise, women are unable to take an advantage of any of these facilities thereby leading to the increasing role of surrogacy, which acts as the savior for such cases where the woman is unable to bear the child.

ASSISTED REPRODUCTIVE TECHNOLOGIES

Assisted Reproduction is defined as ‘manipulating the gametes outside the body and transfer of gametes or embryos into the body. The last two decades have been a witness to a rapid increase in the number of technologies that assist reproduction, increasing the chance of conception and carrying a pregnancy to term. The term “Assisted Reproductive Technologies” (ARTs) encompasses various producers ranging from the relatively simple intrauterine insemination (IUI) to variants of *in vitro* fertilization (IVF) and more commonly known as “test tube baby technology”. Since the latter half of the 20th century, these technologies have developed at a rapid pace. They have also influenced the way in which society views pregnancy, reproduction and motherhood.

Research and promotion of assisted reproductive technologies was undertaken in India as a government initiative. Assisted reproductive technologies such as artificial insemination, *in vitro* fertilization and surrogate motherhood have been proved to be a blessing for any infertile couples. The new reproductive technologies have given hope to many women and helped many women to have children that they would not have had otherwise. But along with potential benefits, modern reproductive technologies have posed various complex legal problems relating to family law and basic human rights. Assisted reproductive technologies have raised a number of human rights issues including right to dignity, individual autonomy, right to know, procreative liberty, etc.

SUROGATE MOTHERHOOD: THE CONCEPT

In Latin “*Surrogatus*”² means a substitute *i.e.* a person appointed to act in the place of another. As per the **Black's Law Dictionary** meaning of surrogacy is the process of carrying and delivering a child for another person. The **New Encyclopedia Britannica**³ defines surrogacy as a practice in which a woman bears a child for a couple unable to produce children in the usual way. According to **Warnock Report** (1984) HF&E, practice whereby

² <http://www.latindictionary.org/surrogatus>, <http://en.wiktionary.org/wiki/surrogatus>

³ <http://www.britannica.com/EBchecked/topic/575390/surrogate-motherhood>

one woman carries a child for another with the intention that the child should be handed over after birth is called surrogacy.

Legal Encyclopedia defines, “A relationship in which one woman bears and gives birth to a child for a person or a couple who then adopts or takes legal custody of her child.”

The Assisted Reproductive Technologies (Regulation) Bill, 2010 defines “surrogacy” as an agreement which a woman agrees to a pregnancy, achieved through assisted reproductive technology where neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate.”

There are two types of surrogacy practices prevailing in India-

(1) Natural surrogacy; and

(2) Gestational surrogacy.

Like in other countries, in India also, the following two types of surrogacy arrangements are being practiced⁴-

Altruistic surrogacy: Where no financial rewards are given to the surrogate mother for her pregnancy or the relinquishment of the child to the genetic parents except necessary medical expenses.

Commercial surrogacy: Where payment of over and above the necessary medical expenses to the surrogate mother is carried out. Offensive terms like “wombs for rent”, “outsourced pregnancies”, or “baby farms” is sometimes referred to by the emotionally charged for commercial surrogacy.

The union of science, society, services and person is what surrogacy makes a reality. Renting the womb means to nurture the fertilized egg in your womb and give birth to the child of another couple with a specific intention, the intention here being either money, or service, or because of altruistic reasons.

⁴ Hrdy SB. Texas, USA: Ballantine Books; 2000. Mother nature: Maternal instincts and How they shape the Human species.

CRITERIA FOR BECOMING A SURROGATE MOTHER

- (a) A surrogate must be in a good overall health.
- (b) Medical problems which could lead to complications with the pregnancy should not exist.
- (c) She should not be overweight, heavy smoker, drinker or substance abuser not suitable as surrogate mother, because of the associated risk to the woman and to the baby.
- (d) Surrogate mother should have born at least one child previously and preferably has completed her own family.
- (e) She should give her own consent.
- (f) She should not be above 35 years of age.
- (g) It is an emotionally and physically demanding task so backing up is required.
- (h) Careful considerations must be given to the medical, emotional, legal and practical issues.

Thought must also be given to the effect of any existing children, the potential surrogate mother's partner, family and friends.

SURROGACY VS. ADOPTION

For a couple, a child is the most precious gift. Those who are unable to have this wonderful gift always feel inferior and frustrated. Surrogacy is a wonderful gift that would bring the big smile on their face. More and more couples are getting benefited by it every year and all thanks to the development in medical science and also the increase in the awareness. The number is ever increasing and countries like India are becoming a major center for surrogacy because of easy availability of surrogate mothers and legal flexibility.

Surrogacy being popular nowadays, another method in existence from a long time is adoption. Although it is also one of the most popular and well-adopted methods, surrogacy certainly has few clear cut advantages over adoption. Genetic factor is one of the major reasons to go for surrogacy. The parents because they have seen the complete process of the pregnancy and childbirth get more attached to the child.

SURROGACY IN INDIA

Surrogacy in India is a very sensitive topic. Foreigners and their cultures now reflect on Indians very much. Indians thought that surrogacy is a foreign trend but now in India also it has got its roots.

The most powerful desire that exists in all the living creatures that includes all animals and humans is the instinct of being a mother and motherhood. In light of the ancient Indian philosophy the biological purpose of life is to propagate one's own traits (genes) and all living creatures are here on a transition phase to pass their traits (genes) to the next generation. Propagation is the ultimate purpose of any species, therefore, birth of an offspring is always dependent on the factors that lead to high chances of survival of the offspring. For example, birds migrate thousands of kilometers to find out a suitable place where environment can support the high chances of survival of their off-springs. In the Canadian Inuit Community which is 300 miles north of Arctic Circle, the seasonality was reported till 1970. But due to modernization and decline of traditional life-style the seasonality in this community has not been reported in the later years.

Infertility is generally known as a social stigma in India. It is hypothesized that the agony and trauma of infertility is best felt and described by the infertile couples themselves. Though, infertility does not claim the life of an individual but it inflicts devastating influence on life of an individual for not fulfilling the biological role of parenthood for no fault of his or her own. It is also known that in general, Indian society has got a very stable family structure, strong desire for children and particularly for the son to carry forth the lineage or *Vansh*. With the enormous advances in the field of medicine, the infertility can now be treated using the new medical technologies collectively called as Assisted Reproductive Technology (ART) such as *in vitro* fertilization (IVF) or intra-cytoplasmic sperm injection (ICSI), etc. The birth of the world's first child, Louise Brown on July 25, 1978, through the technique of *in-vitro* fertilization was a path-breaking step in control of infertility; and is considered to be one of the most important medical advances of the last century. In October 1978, Dr Subhash Mukherjee, Kolkata (India) announced the birth of country's first test tube baby. Dr Mukherjee and his team used the cryopreserved embryo.

There are different types of infertility and in some cases it would be physically or medically impossible/ undesirable to carry a baby to term and hence, to fulfill the desire of such infertile couple to have a child, surrogacy comes as a more feasible option.

Commercial surrogacy was legalized in 2002 in India and keeping in view the advanced technologies available now and the need of so many childless couples, it will act as catalyst for the growth of this industry.

The scale of surrogacy in economic terms in India is unknown, but study backed by the United Nations in July 2012 estimated the business at more than \$400 million a year, with over 3,000 fertility clinics across India.

Manji's case⁵-

BABY MANJI YAMADA v. UNION OF INDIA & ANR. [2008] INSC 1656 (29 September 2008). Baby Manji was born at Akanksha Infertility Clinic and was unable to leave India because of the unclear nationality (Indian or Japanese) till almost three months of his birth. Later the government of India issued a travel certificate for one year as directed by the Supreme Court on humanitarian grounds and in response to which the Japanese government issued a year's visa.

Balaz v. Union of India⁶-

In *Jan Balaz v Union of India*, there was an issue related to Dual citizenship. Since India does not allow dual citizenship, thus, the Gujarat High court gave the two twin babies Indian citizenship whose father was a German national, but they were born through compensated surrogacy in Anand district in India.

According to the court, it was more concerned about the rights of the newborn innocent babies than the rights of the parents and the surrogate mother. The court kept in consideration the laws of Japan, Ukraine, and United States if America.

The petitioner, submitted before the Supreme Court to provide his Pass port in the Indian Consulate in Berlin and also that an NGO in Berlin would respond back to the Indian consulate on the status of the children and their welfare.

⁵Baby Manji Yamada v. Union Of India &Anr. [2008] INSC 1656 (29 September 2008).

⁶ Balaz v. Anand Municipality, AIR 2010 Guj 21

The government after considering the above agreed to send the twin babies to Germany and the German government too retracted with the same. Then, in May 2010 the twins were sent to Germany by providing entry and exit documents that allowed them to leave India and enter Germany.

INDIAN COUNCIL FOR MEDICAL RESEARCH GUIDELINES⁷

In the year 2005 The Indian Council for Medical Research has given guidelines regulating Assisted Reproductive Technology procedures. In the 228th report on Assisted Reproductive Technology the Law Commission of India submitted procedures discussing the importance and requirement of surrogacy, and also the steps taken to control surrogacy agreements. The Law Commission of India gave the following observations:

- (1) Every condition necessary for the surrogacy agreement should be governed by the contract among parties but such should not be for commercial purposes.
- (2) 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 a surrogacy arrangement should be there to provide for financial support for surrogate.
- (3) The life insurance cover for surrogate mother should necessarily be taken care of in the surrogacy contract.
- (4) Since, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different thus, one of the intended parents should be a donor , since the bond of love and affection with a child primarily originates from biological relationship. Additionally, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. If the intended parent is single, he or she should be a donor as well to have a surrogate child.
- (5) Recognition of the surrogate child to be the legitimate child of the commissioning parent(s) by the legislation itself thereby, eliminating any need for adoption or even declaration of guardian.
- (6) The name(s) of the commissioning parent(s) only should be present on the birth certificate of the surrogate child.

⁷ Indian Council for Medical Research Guidelines, 2005 ; 228th report

- (7) There should be protection of the Right to privacy of donor as well as the surrogate mother.
- (8) Prohibition of sex selective surrogacy should be done.
- (9) Only the Medical Termination of Pregnancy Act 1971 should govern the cases of abortions.

INDIA – A SURROGACY HUB

India is fast becoming a “cheap deal” for childless couples from across the world. People come here, find a surrogate mother through agents, get a passport and take away the baby. Surrogacy poses a series of social, ethical, and legal issues such as the effects of surrogacy on matrimonial life of both surrogate and contracting parents as well as on the society, citizenship of the child, rights of the child, surrogate mother and the commissioning couple, paternity, and maternity rights, maintenance and financial support which needs to be evaluated carefully.

Exploitation of women through the means of surrogacy is a disturbing factor which the law has to deal with and also the commercialization of surrogacy is something that has been a key concern. Surrogate mothers of Indian origin have been increasingly accepted marking India as industrialized surrogacy nation. Now India is a promising leader in international surrogacy and is sought after destination in the precinct of infertility tourism.

India is the favored destination for the childless couples because it has an advanced medical system and English versant doctors. The major reason, as compared to the rest of the world, is that the process here is simpler and more cost effective. Moreover, surrogacy in India, whether traditional or gestational, has not been prohibited by the legislature. In the absence of any legal framework, the condition of surrogacy in India is that of ‘Legality without Legislation’. Many western countries do not permit surrogacy. However, no clear cut figure on how many foreigners visit India each year for surrogate birth is available. But anecdotal evidence reveals an upward swing in the number of barren couples from variety of countries visiting Indian fertility clinics. Hence, an unregulated growth in the “business of surrogate birth” could bring in an element of exploitation in the near future. Eventually, people are going to smell money and unscrupulous operators will get into the industry.

The government in India is promoting it as a medical tourism destination, but the exchange of money for babies is making many people uncomfortable. India, surreptitiously, has become Centre of a fertility market with its “reproductive tourism” Industry reportedly estimated at Rs25, 000 crore today. ART that is the clinically called assistive reproductive technology, has been in vogue in India since 1975, and today an estimated two lakh clinics across the country offer artificial insemination, IVF and surrogacy. As evident from the recent decisions of The Supreme Court on September 29, 2008 in *baby manji Yamada’s* case where it observed that Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms like baby farms and wombs for rent. This can be presumed as legal as it is not prohibited by any Indian Law but concurrently no Law allows it too.

THE REGULATION OF SURROGACY AT PRESENT IN INDIA

Surrogacy, the term itself in India starts with the considered process of complications. The legal procedure of making the law is a complicated method and is stuck with different legislative levels. Surrogacy, the necessary social issue, there is not even a single specific law with its changing in this sector of surrogacy from the year 2006-2014, the guidelines, now on the current timing in relation with the treatment of surrogacy are those stated by the Indian Medical Association (IMA). This dates back to 2006.

ASSISTED REPRODUCTIVE TECHNOLOGY BILL, 2013

It has been quite a while that The Assisted Reproductive Technology Bill, 2013 has been pending and it has not been presented in the Indian Parliament. It will not allow commercial surrogacy that involves exchange of money for anything other than paying for medical expenses for the mother and the child.

There has been a loud criticism of the bill since it will prohibit the following from its ambit-

- Couples already having a child
- Foreigners/overseas citizens
- Live-in partners/holders
- Single parents
- Homosexuals
- widows

ARGUMENTS FOR SURROGACY

It is often argued by the supporters and advocates of surrogacy that it is beneficial for all the people involved. Others claim that the right to procreate is an important right. For example, in the United States this right is protected by the Constitution. However, Cline states this right is not literally spelled out in the constitution. Margaret Jane Radin argues that if men are to donate sperm and receive money for that transaction, then surrogacy should also be allowed as an analogous transaction for women. This Constitutional argument can also be used as an argument against surrogacy. Due to the substantive due process privacy right the birth has a right to companionship of her children which cannot be overridden by contract.

In addition to arguments already discussed, following points are often advanced in favor of surrogacy.

❖ PERSONAL AUTONOMY-



The principle of personal autonomy states that people have the freedom to choose what happens to their bodies provided no harm occurs to others. In relation to surrogacy, a couple should have the freedom to pursue their own about her procreative arrangements and a woman should have the choice of about her own body, so long as harm is not caused to others. In a great number of surrogacy cases the principle of personal autonomy has operated successfully. But there are also a large number of cases where the principle has broken down for various reasons. Taken to the extreme, the personal autonomy argument could become a question of rights.

One fundamental weakness of the autonomy argument is that decisions a women makes in relation to childbirth do involve other people, including the child. Even if it were accepted that a woman can relinquish a child she has borne the principle of autonomy implies that resultant harm or good can be determined and measured. This is obviously not the case. The converse of the principle is the question of the degrees to which an individual's autonomy can be overridden by the state in order to prevent potential harm.

❖ FAMILY FORMATION-

It could be argued that in the public interest, surrogacy has a legitimate place in family formation given that in today's society a range of modes of family formation are already

accepted. The family may include step-parents single parents, divorced parents, adopted parents, parents in de facto relationships and children born by *in vitro* fertilization. As there is no longer one accepted concept of a family, surrogacy could not subvert a concept that already has a wide variety of expressions. Therefore, singling out surrogacy for prohibition could be considered discriminatory. Opponents of this argument contest that all of the other forms of family formation do not involve the deliberate creation of children with the intention from conception to transfer custody at birth.

❖ GIFT OF LIFE-

Surrogacy, particularly IVF surrogacy, offers an infertile couple the gift of life for which nothing else can be a source or substitute. It is often suggested that the fact a couple goes to such extremes to have a child means that when it arrives it will be truly loved, some claiming even more loved than many children born to natural parents. Because surrogacy involves the giving of life it is not open to the same abuses as euthanasia or abortion, which involve the taking of life.

❖ THE NATURAL MYTH-

If one condemns all tampering with natural mothering and family formation then logically other forms of family formation such as adoption, guardianship, custody, step families and even contraception must also be condemned. Extending this argument further, all technological advances which affect the natural order, such as organ donation, dialysis and other medical advances which keep people alive could also be condemned for tampering with “nature”.

ARGUMENTS AGAINST SURROGACY

The Roman Catholic Church is just one of many religious institutions that oppose surrogacy. The Church is against all kinds of surrogacy, even altruistic surrogacy, even though it does not involve the payment of fee to the surrogate. The sanctity of marriage and the spiritual connection between mother, father, and child is violated. It finds commercial surrogacy to be especially offensive. The miracle of human birth is turned into a financial transaction by surrogacy and the church maintains and holds that it reduces the child and the woman bearing it to object of negotiation and purchase. It turns women into reproductive

machines and exploiters of children. The church argues that surrogacy also leads to a confused parent-child relationship and ultimately damages the institution of family.

CONCLUSION

To conclude after having all the arguments for and against surrogacy I would like to say that since it is the modern times now and change is a very fundamental reason for growth for all times to come. Thus, the concept of surrogacy should be welcomed in our country taking in consideration all the pros and cons relating to it and most importantly the need which is connected to it.

Misuse of cross-border commercial surrogacy and ART techniques ranges from being a tool to enjoy the ride to procreate to being a medium for exploitation. Thus, it is imperative to protect the basic human rights of the parties involved by provision for a well-structured legal regime. Which would not only protect the basic rights of the child but also the surrogate mother in the global infertility market.

Laws should be made and only altruistic surrogacy should be welcomed and any misuse of such pious act should be condemned through laws making them strictly punishable to avoid any injustice.

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