

Surrogacy: A Hope to Childless Couple Along With a Challenge to Law

----Chandni and Apoorva Singh Katiyar

National University of Study and Research in Law, Ranchi (Jharkhand)

Students of 7th semester, 4th year

B.A. (Hons.) L.L.B. (Hons.)

Email address- chandni1304@gmail.com, ask251193@gmail.com

Abstract-

It is a belief of our traditional society that picture of a family does not complete without children. Acceleration of birth technologies into a fertility industry has given a new hope to eradicate social stigma associated with infertility and surrogacy is an excellent option. Commercial surrogacy has caused serious concerns in the contemporary era due to medico-legal, ethical and social complexities involved in it. In spite of the controversies involved in it the Assisted Reproductive Technology (Regulation) Bill, 2010, has been passed by parliament with an intention to regulate an already existing surrogacy industry. The flaws and loopholes left behind in the Bill have left much scope for the abuse of its various provisions. And thereby Bill is insufficient for effectively dealing with the matters related to surrogacy. Bill is full of inconsistencies and ambiguousness and hence it is leading to many other criticisms in the various quarters of the society. There is a great need to develop an effective mechanism so as to restrict the unforeseen dangers involved in the Bill and curb the malpractices which has raised a social stigma on our society.

Introduction-

In commercial surrogacy a woman is paid by an individual or couple as a fee to carry and deliver the baby and the child is given to them either privately or through a legal adoption process. This process is generally adopted by those people who have infertility problems or are single.¹ It is contract where surrogate mother carries a pregnancy “for” another.

¹What is commercial surrogacy. See <<http://www.wisegeek.com/what-is-commercial-surrogacy.htm>>. Accessed on date 17th September, 2014.

Warnock Committee (1984) defines surrogacy as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth. This implies that the carrying woman acts at the request of another woman who is usually unable to have a child herself.²

In India commercial surrogacy is legal and is approached by many of the couples from outside the country. Since 2002, commercial surrogacy has been legal in India. India is emerging as a leader in international surrogacy because of the low cost and also clinics in India are adopting competitive approach not only in pricing but also in hiring females as surrogate. Though it seems to be beneficial for all but some of the issues are required to be carefully addressed in the laws so as to protect the rights of the parties. For regulating the surrogacy in India the Assisted Reproductive Technology (Regulation) Bill and Rules, 2010, has been passed.

Surrogacy meaning-

The word 'surrogate' has originated from the Latin term '*surrogatus*' which means 'a substitute', meaning, a person deputizing for another in a specific role or office. This means that a surrogate mother is a woman who bears a child on behalf of another woman, either from her own egg or from the implantation in her womb of a fertilized egg from other woman.

According to the Black's Law Dictionary, surrogacy means "*the process of carrying and delivering a child for another person*". The New Encyclopedia Britannica defines 'surrogate motherhood' as "*the practice in which a woman bears a child for a couple unable to produce children in the usual way*".

Surrogacy has been categorized into two classes according to The Black' Law Dictionary:

Gestational surrogacy:

A pregnancy in which one woman *i.e* genetic mother provides the egg, which is fertilized, and another woman *i.e.* surrogate mother carries the fetus and gives birth to the child.

² M. Stauch and K. Wheat, *Text, Cases & Materials on Medical Law*, New York, 3rd Edition, 2006.

Traditional surrogacy:

A pregnancy in which a woman provides her own egg, which is fertilized by artificial insemination, and carries the fetus and gives birth to a child for another person.

In 'Gestational surrogacy' embryo is created by IVF technology and is implanted into surrogate mother. While in 'Traditional surrogacy' the surrogate mother is impregnated with the sperm with the intention of making her genetic as well as the gestational mother. Depending on the fact whether surrogate is receiving some reward or not for her pregnancy or the relinquishment of the child, surrogacy is commercial or altruistic.

The Assisted Reproductive Technologies (Regulation) Bill, 2010 fill the void that exists in the legal regulation of surrogacy in India. In the Bill surrogacy is defined as "...an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which 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."³

History of Surrogacy-

The modern surrogate pregnancy started in the late 1970's. Women in all the times had various problems in conceiving and to solve the problem of starting the family surrogate mother was assisting them. The first documented surrogate pregnancy was recorded in 1976. Approximately 600 babies were born via surrogacy until 1988, which rose significantly, to over 5,000 births till 1992.

In 1976, the first legal agreement was made between a set of intended parents and a traditional surrogate mother for this she was not given compensation for this. With the born of first IVF baby the way of gestational surrogacy was paved as it was not a surrogate motherhood arrangement.⁴ India's first and world's second IVF (In Vitro Fertilization) baby Durga was born in Kolkata on Oct. 3, 1978.

³ Section 2(aa), Assisted Reproductive Technologies (Regulation) Bill, 2010.

⁴History of Surrogacy. See <<http://www.information-on-surrogacy.com/history-of-surrogacy.html>> Accessed on date 18th September, 2014.

In August 2007, 58 years old lady gave birth to twin granddaughters since her daughter, could not conceive due to cervical cancer. While, in 2008, 56 years old Jaci Dalenberg acted as a gestational surrogate mother for her daughter and delivered her own grandchildren. In Japan 61 years old gave birth to her own grandchild, this became headline of the country as surrogacy is disapproved in Japan.⁵

From traditional surrogacy of centuries past to commercial surrogacy of today, many miracles and hardships have been faced by this method. There can be more changes to this or not which is to be seen from the future of it.

India as a field of commercial surrogacy-

India is becoming the priority of couples for commercial surrogacy in the world. Since 2002 it has been legal in India. Indian surrogates are becoming popular for surrogacy because of the low cost which is charged for surrogacy in India. Since surrogacy in India is much simpler and less costly so foreign couples are gathering to India get a baby of their own genes.

In *Manji Yamada Case*,⁶ the commercial surrogacy was legal in India by Supreme Court. In this case, it was held-

if there is any grievance of the petitioner for the order passed by the Central Government, such remedy, as is available in law may be invalid. It is also to be noted that a National Commission and the State Commission has been formed under Commissions for Protection of Child Rights Act, 2005 for protection of child rights and for any violation of child rights or offences against children, children's courts is there for providing speedy trial of or of violation of and for matters connected therewith and incidental thereto. Section 13 in Chapter III of the Act is to be taken into consideration while any action taken by the Commission.

Further, in *Jan Balaz v. Union of India*,⁷ the Gujrat High Court held that the babies born to surrogate mother, who is Indian citizen and biological father is a foreign national would get

⁵ *Ibid.*

⁶ *Baby Manji Yamada vs. Union of India and Another* (2008) 13 SCC 518.

⁷ From L.P.A. No. 2151 of 2009, High Court of Gujarat.

Indian citizenship by birth. But the case is not a precedent as it is pending before the Supreme Court.

Relation between surrogate mother and the surrogate child-

There is only a relation of womb leasing or womb for rent between the surrogated mother and child. She do not have right to keep the child after the birth because she is not the mother in case when ova and sperm are from different persons and not even the owner of the genetic material. She is only a contractor who is willing to give the end product once the contract between her and the person is fulfilled.⁸

Indian Baby M case

In *Baby Manji Yamada v. Union of India*,⁹ the baby was born by a surrogate mother in Gujarat under an agreement with the Japanese couple. The commissioning father was the genetic father but commissioning mother was not genetic mother. Due to discord between the couple, the genetic father desired to take custody of the child but has to move to Japan because of visa. A birth certificate indicating the name of the genetic father was issued. The grandmother of child under article 32 of the Constitution of India filed a petition in the Supreme Court which was relegated to National Commission for Protection of Child Rights and was ultimately send to the genetic father.

Surrogacy can lead to legal complexities regarding motherhood. This was in the case *Jaycee B. v. Superior Court*¹⁰ where the couple was unable to create embryo by using in vitro fertilization techniques, the child was born using sperm and eggs from anonymous donors rather asking the surrogate to use her own eggs as in *Baby M case*¹¹ surrogate said that she was its biological mother and her right to raise the child pre-empted the commissioning parents' and the commissioning parents were refused to be handed over with the child. In this case the child many people who could claim to parenthood such as a genetic mother, a commissioning mother, a surrogate mother, a genetic father and a commissioning father. One month prior to the birth of

⁸Anita Rao, *Surrogacy Arrangements: Legal and Social Issues*, *Journal of Law Teachers of India*. Volume 1(Issue No.1-2) 2010.

⁹ JT 2008 (11) SC 150

¹⁰ 42 Cal.App.4Th 718 (1996)

¹¹ *Supra* footnote 9.

the baby Jaycee the intended parents separated and John rescinded his obligations under the surrogacy contract so that he could avoid paying child support for Jaycee. A Californian court granted temporary custody of the baby Jaycee to Luanne and ordered John to pay for child-support. The court case resulted in child being without legal parents for three years.

Perspective of Indian culture towards commercial surrogacy-

Though in India commercial surrogacy has been legalized but still it is a question that whether the legislation has been by Indian culture and if the answer is in affirmative then how far it has been accepted by Indian culture. Since in country like India, there are several social stigmas and banishment which are faced by surrogate mothers.

What is in practice now is the involvement of the bodies of poor women in surrogacy, in country like India where there is socially conservative culture; it is enough to cause contemptuous ridicule. The surrogate mothers are treated as disposable objects, and highlights “unnatural” aspects of pregnancy and reproduction. In country like India surrogacy is associated with paid sex-work and this comparison of surrogacy with prostitution associate a disgrace to the surrogate women.¹²

In India Commercial surrogacy continues to be highly disgraced and many of the surrogates spend the term of pregnancy in surrogate hostels, away from their families and communities. This is done because of the reason that they want to keep the pregnancy a secret because in our country it is acceptable only within marriage, while bearing a child for economic achievement is generally seen as ‘dirty work,’ ‘baby-selling’ or ‘womb-renting.’

Legal and Ethical issue-

There are various legal and moral issues attached with the surrogacy. One of the moral issues is that surrogacy is considered as resulting into commoditizing the child and interferes with the nature by breaking the bond between mother and child and also exploits the poor woman.

¹²Wombs for Rent: A Bioethical Analysis of Commercial Surrogacy in India. See : <http://www.tuftscopejournal.org/issues/S11/articles/show/wombs_for_rent>. Accessed on Date 11th September, 2014.

The India Judiciary has also recognized the reproductive right as a basic human right. In *B. K. Parthasarathi v. Government of Andhra Pradesh*¹³, the Andhra Pradesh High Court while agreeing with the decision of US Supreme Court in *Jack T. Skinner v. State of Oklahoma*¹⁴, where right to reproduce was held as “one of the basic civil rights of man” upheld that “the right of reproductive autonomy” of an individual as a aspect of his “right to privacy”.

In *Javed v. State of Haryana*¹⁵, the Supreme Court upheld the two living children norm to debar a person from contesting a *Panchayati Raj* election it refrained from stating that the right to procreation is not a basic human right.

Reproductive right is given constitutional protection; surrogacy also gets the same constitutional protection. However, with legalization of surrogacy various countries have different views. In England, Surrogacy Arrangements Act 1985 prohibits commercial surrogacy and its arrangements are legal. In US also, commercial surrogacy seems prohibited.

In the *Baby M case*¹⁶, New Jersey Supreme Court concluded that surrogacy contract is against public policy though the custody was allowed to commissioning parents in the “best interest of the child”

There are different surrogacy laws in different states in the US. In 1988 *Baby M case* forced many to put on legal thinking caps in US where the year was also a battling year for Australia. In *Kirkman sisters' case* the younger sister agreed to gestate the child of her older sister Maggie. The baby girl was handed over to Maggie and her husband at birth. This started legal debate and Australian states tried to settle the complications in surrogacy. This resulted in commercial surrogacy being declared as illegal, contracts for it as unenforceable and payment as is illegal.

Lacuna in the Bill-

The Assisted Reproductive Technology (Regulation) Bill, 2010 has given a new hope to the couples to have their offspring. It has legalized surrogacy in India but has veiled the surrogacy in legal, ethical and social complexities. The Drafted Bill drastically suffers from numerous flaws.

¹³ AIR 2000 A. P. 156

¹⁴ 316 US 535

¹⁵ (2003) 8 SCC 369

¹⁶ 537 A.2d 1227

Though it tends to regulate an already existing surrogacy industry but it is down falling because it is inadequate in dealing with all the matters of surrogate significant issues remained unaddressed in the Bill such as citizenship, status of the surrogate child, etc and moreover it is falling apart as to shield and preserve the rights and wellbeing issues of the women who undertake the surrogacy process. The flaws and loopholes left behind in the Drafted Bill have left much scope for the abuse of its various provisions and hence it is full of inconsistencies and ambiguousness and hence it is leading to many other criticisms in the various quarters of the society.

Some of the issues arising out of the Bill are-

- The maximum age limit for the couples or individual of becoming eligible to make use of ART is not prescribed by the Bill.
- The Bill forbids the sex selective surrogacy consistent with the Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act but no means or effective body has been prescribed by the Bill as to keep check on the clinics that whether the conduct of clinics are following the same or not.
- Whereas the child is concerned the Bill lacks clarity regarding the rights of the child and the right to be nurtured by the women who gave birth.
- The Bill doesn't mention the specific period for which a new born baby is to be kept with the surrogate mother, if health issues arise due to complications of the baby.
- The Bill neither appoints nor authorizes any court or any quasi-judicial authority in order to adjudicate the dispute related to surrogacy process or agreements.
- As per the Bill the choice of reducing the fetus is not left with the surrogate mother who is carry them but it is with the commissioning parents to reduce, which can also be done with the advice of the expert.
- There is no legal framework for protecting the non-commercial surrogacy agreements which carried out with the help of the Bill and thus don't protect the surrogate mother if in any case she is not being treated well.
- It is very well know fact that most of the women who agree for surrogacy are from poor family background and money is the prime concern of them. Since the surrogate mother belongs to poor and educational background and the duty to decide the compensation is

on surrogate mother there is a possibility of discrepancy in such payments as their bargaining power may be inclined towards the unfavorable.

- If there is a foreign couple then they have to appoint the local guardian in order to take care of surrogate mother during the time of pregnancy and delivery. But there is no clarity about eligibility of the guardian that who should be guardian, what will be the responsibilities, role of the guardian in case of any calamity to the surrogate mother or the child etc.
- The Bill which legalizes commercial surrogacy prohibits the use of surrogate mothers' egg, so the infertile couple has to look for an egg donor and the surrogate woman has to undergo IVF technique in spite of the option of intra uterine insemination (IUI) where surrogate will be subjected to a complicated and hazardous procedure.
- The legislation is contradictory about the protection of secrecy of the surrogate as it mentions that she has to mention her own name for the purpose of medical treatment and provide the name of the couple for whom she is acting as surrogate. Now here the identity of surrogate is revealed so it is not clear that the legislation is protecting the privacy of surrogate.
- According to Bill, a woman may be given three successful births being a surrogate and this would also include the three attempts for a couple and can donate six times egg in the interval of three months, this all is jeopardizing the physical and mental health of woman as this is a high figure to undergo IVF technique.

Conclusion-

Right to reproduce is a fundamental and an inborn human right. Surrogacy has been proved an excellent option to triumph over biological infertility. It is a belief of our traditional society that picture of a family does not complete without children. Acceleration of birth technologies into a fertility industry has given a new hope to eradicate social stigma associated with infertility. Surrogacy has been proved a boon to the childless parents to gratify their desire of parentage. No doubt India is a leader in international surrogacy. The main reasons of India becoming destination for surrogacy is the cost offered for surrogacy in India is far cheaper than the other countries and the surrogacy whether commercial or traditional is not forbidden by the law in

India. India has become the surrogacy capital of the world. This is all done with the help of the Assisted Reproductive Technology (Regulation) Bill, 2010, which has been passed by parliament with an intention to regulate an already existing surrogacy industry. But the satire is that through the means of commercial surrogacy the surrogate mothers are exploiting by the commissioning parents. Surrogacy is resulting in misuse due to the various unfair practices which are accompanied to it. There should be an effective regulatory measure to tackle all such kind of malpractices related to surrogacy. Bill is insufficient for effectively dealing with the matters related to surrogacy. Due to the various medico-legal, socio-ethical reasons surrogacy has become a topic of discussion among the public at large. So the need of the hour is that the inconsistencies, inadequacies, ambiguities involve in the Bill should be given clarity as soon as it is possible.