

## THE PRESSING NEED FOR A CONCRETE LEGISLATION ON SURROGACY IN INDIA

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### **ABSTRACT**

*With the expansion in the economy coupled with increased globalization and availability of cheap labor in India, surrogacy for commercial purposes has based its roots in this country. Due to this kind of a scenario it has become a very lucrative industry, and now it is imperative for a pressing legislation to monitor, regulate and protect the rights as well as mandate the duties of the parties indulged in this process. But unfortunately, there is no law in India to regulate the industry of commercial surrogacy and therefore, it is highly vulnerable to be used for exploitation of the weaker sections of our society by a mightier few. Looking from other non-monetary perspectives as well, it is very important to protect the interests of the parties of a contract of surrogacy to ensure the proper delivery of the child to the commissioning couple without any hassles. As a counter-argument, it can be said that although there is no specific statute that makes laws related to surrogacy, there are remedies available in our legal system, which can be used as recourse by any aggrieved party. But, these remedies are ineffective and obscure to satisfy the basic intent of the contract of surrogacy and have some very patent limitations, which are discussed at length in the article. Lastly, some very salient provisions, which must be made a part of the future law on surrogacy, are suggested in the conclusion part.*

**Keywords-** *Surrogacy, law, commissioning couple, regulation, Supreme Court, rights, duties.*

### **Methodology**

We have relied primarily upon the most landmark judgements related to surrogacy from India as well as UK and USA. We have also referred to the Draft bill, various guidelines, law commission reports and other sources to base our conclusion.

### **Observations**

We have realized that the current state of Surrogacy in India is not a positive one because of a lack of concrete law on it. Moreover, the attitude of the lawmakers seems very discouraging towards

surrogacy, commercial surrogacy in particular.

## **I. INTRODUCTION**

The word 'surrogate' has its origin in the Latin word 'surrogatus'[1], which means a "substitute, that is, a person appointed to act in the place of another". Therefore, a surrogate mother is one who carries in her womb the child of some other woman. According to the Black's Law Dictionary[2], surrogacy means the "process of carrying and delivering a child for another person". The New Encyclopedia Britannica[3] defines 'surrogate motherhood' as the practice in which a woman bears a child for a couple unable to produce children in the natural manner. The Report of the Committee of Inquiry into Human Fertilization and Embryology or the Warnock Report (1984)[4] 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."

Surrogacy is a common method of reproduction in which a woman, who is the surrogate, consents to impregnate herself not with her own child but with the child of the contracting party or the commissioning couple to whom she will surrender the custody of the child, after he or she is born. She could be the child's genetic mother (which means that the embryo was fertilized from her own eggs) or she may just be, as a gestational carrier who lends her womb on rent; to bear the pregnancy till the successful delivery after having been implanted with a foreign embryo. In some cases involving reproductive ailments, surrogacy is the most viable alternative for couples who desire to have a child who is biologically related to them. Within the larger head of surrogacy, there are numerous sub-types. Some of the common types of surrogacy arrangements as discussed by the Hon'ble Supreme Court of India in Baby Manji Yamada v. Union of India[5] are given below. But, for the purpose of further research and study in this paper, we will restrict our scope mainly to commercial surrogacy.

### **A. Traditional surrogacy (also known as the Straight method)**

The surrogate is impregnated with a child who is biologically related to her. But, the ultimate purpose of this arrangement is to surrender the child to the commissioning parents. In a majority of such cases, the male member in the commission couple lends his sperm. The child can be conceived by employing methods such as IUI (intrauterine insemination), or ICI (intra cervical insemination).

### **B. Gestational surrogacy (also known as the Host method)**

In this method, unlike the previous one, the surrogate mother is not genetically or biologically related to the child. She plays the role of a mere gestational carrier who has lent her womb on rent.

There can be an arrangement to surrender the child to parents who are either biologically connected to the child or who themselves also may not be genetically connected to the child in cases where the child took birth through egg donation, sperm donation or a donated embryo altogether.

### **C. Altruistic surrogacy**

It is a type of surrogacy where the surrogate receives no monetary compensation for the services rendered by her over and above the expenses related to the carrying out of the treatment.

### **D. Commercial surrogacy**

It is a type of surrogacy in which a surrogate is paid in monetary terms to bear the child in her womb. This procedure is legal in several countries including India where due to good medical infrastructure, increasing international demand and easy availability of surrogates, this industry is reaching higher proportions. Terms such as wombs for rent, outsourced pregnancies or baby farms sometimes refer to commercial surrogacy.[6]

Commercial surrogacy is the process wherein an individual or a couple makes the payment of a fee or rent to a woman in lieu for her bearing and delivering the baby. After the birth, the baby is surrendered to the individual or the commissioning couple. Couples with fertility problems, same-sex couples, and single people who wish to be parents are the most common types of people who seek the help of surrogate mothers.

Intended parents, i.e. those who wish to have a child of their own, may arrange a surrogate pregnancy or contract pregnancy because a woman who intends to parent is infertile in a sense that she cannot successfully bear the child in her womb. For instance, a woman who may have undergone hysterectomy; or suffering from a uterine malformation; or suffering from recurrent pregnancy loss or any other unhealthy condition that makes it dangerous for her to be pregnant. It is also a possibility that a female intending to be a parent may be fertile and healthy, but still unwilling to undergo pregnancy.[7]

Alternatively, the intended parent may be a single male or a male homosexual couple. It is a natural instinct amongst human beings to have a genetic child of their own.

## **II. THE RISE OF COMMERCIAL SURROGACY IN INDIA- A BABY FARM**

In today's times, India has become one of the top destinations for fertility tourism.[8] India has a large pool of women, belonging mainly to modest economic backgrounds who want to be surrogates for a fee.

Indian surrogates have been increasingly popular with infertile couples in other nations because of the relatively low cost. Indian clinics are at the same time becoming more competitive, not just in the pricing, but in the hiring and retention of Indian females as surrogates. Clinics charge patients anywhere between \$10,000 and \$28,000 for the complete package, which includes fertilization of the embryo, the payment to be made to the surrogate and also the delivery of the baby. If we include the expenses of travel tickets, medical procedures and accommodation, it would cost a couple three times cheaper to come to India for a surrogacy treatment. As a result, ART industry is now a 25,000 crore rupee industry in India. Anand, which is a small town in Gujarat has transformed into a hub of commercial surrogacy. Medical Tourism has become a distinct sub-set of tourism itself.

Analogous to the demand of English-speaking youth willing to work for business process outsourcing firms based in the west for low wages, the demand of 'wombs-on-rent' has increased due to easy and cost effective availability of would-be surrogates, presence of decent medical infrastructure and well-qualified doctors having specialized clinics.

### **III. LEGAL BASIS OF SURROGACY**

The legal basis of surrogacy emanates from the right to form a family and procreate. Article 16.1 of Universal Declaration of Human Rights, 1948 states that "men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family." As far as the Indian judiciary is concerned, in the case of *B. K. Parthasarathi v. Government of Andhra Pradesh*[9], the Court upheld "the right of reproductive autonomy" of an individual as a facet of his "right to privacy" in conformity with the law laid down by the US Supreme Court in *Jack T. Skinner v. State of Oklahoma*[10], where the right to reproduce was characterized as one of the basic civil rights a man has. Very recently, in *Khursheed Ahmad Khan v. State of U.P. & Ors*[11], the Supreme Court made a reference to the freedom of an individual to procreate as many children as he likes. In *Suchita Shrivastava v. Chandigarh Administration*[12], the Supreme Court held that a woman's prerogative to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. The court further held that it is important to recognize that reproductive choices can be exercised to procreate as well as to refrain from procreating. This means that there should be no restriction in any sense on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on employment of contraceptive methods. Furthermore, women also possess freedom to choose birth-control methods like undertaking of sterilization procedures. Taken to their logical conclusion,

reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children.

#### **IV. INTERNATIONAL ASPECT**

In United Kingdom, surrogacy arrangements are legal but commercial surrogacy or paying money to the surrogate mother is illegal.[13] Furthermore, advertisements related to surrogacy are also prohibited under the Act.[14] Another glaring distinction of the UK law on surrogacy is that in the UK, the surrogate mother is considered to be the legal mother[15]. It is further provided that if the surrogate mother consents or agrees to the child to be treated as the child of the commissioning or intending parents the court has the power to make a parental order to that effect. This section also prohibits giving or taking of money or other benefit (other than expenses reasonably incurred) in consideration of the making of the order or handing over of the child. Therefore, surrogacy arrangements in the UK are based on trust rather than monetary considerations as in India. Consequently, the supply of surrogates in the UK is far lesser than the actual demand.[16]

In US, commercial surrogacy is legal in some states but illegal in others. It is quite noteworthy to mention the case of Jaycee B. v. Superior Court[17]. This case gave rise to serious complexities with regard to the custody of the newborn child. In this case, a baby was born through surrogacy arrangement in which the sperm was contributed by a donor and eggs by another donor. This fertilized egg was then implanted in the body of the surrogate. So, after the birth of the child, she had five individuals to stake a claim to her parenthood, i.e., the genetic father, who contributed the sperm, the genetic mother, who contributed the eggs, the intending father, the intending mother and the surrogate. What created further complexities was that the intending parents divorced each other right before the birth of the child. After three years of birth of the child, she was parentless. The court finally gave custody to her mother and asked the father to pay for child support. In the Baby M case[18], the surrogate refused to hand over the custody of the child to the commissioning parents, by holding that the care of the commissioning parents would be in the greatest interests of the child.

#### **V. REGULATION OF SURROGACY- A BIG VACUUM**

It can be stated without any doubt that surrogacy is legal and permitted in India. Moreover, as already discussed above, it is a booming industry. But, unfortunately, there is no legislation which

governs, monitors and regulates surrogacy arrangements in India.[19] Nevertheless, the Draft Assisted Reproductive Technologies (Regulation) Bill, 2010 and Rules('Bill')[20] is a pending bill in the parliament which is yet to be enforced and made affective. Also, the Indian Council of Medical Research issued the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in 2005.[21]

Some of the main provisions of the Bill are:

- i) Appointment of a local guardian to look after the needs of the surrogate in case of non-resident couples.[22]
- ii) Entering into a surrogacy agreement by the couple/individual and the surrogate, which shall be legally enforceable. This agreement may also provide for monetary compensation in favour of the surrogate mother. Therefore, the Bill expressly approves commercial surrogacy, but, the Law Commission report seeks to prohibit commercial surrogacy and seeks to restrict it to altruistic surrogacy only.[23]
- iii) Payment of all surrogacy related expenses by the commissioning couple.[24]
- iv) The surrogate shall relinquish all parental rights over the child after his/her birth and the birth certificate of the child shall bear the name of the commissioning parents.[25]
- v) The commissioning couple shall be bound to accept the custody of the child irrespective of any abnormalities in the child.[26]
- vi) The bill also provides for maintaining confidentiality of information related to the surrogate.[27]
- vii) A child born through surrogacy shall be presumed to be the legitimate child of the commissioning couple. In case the couple separates before the child is born, he shall still be presumed to be the legitimate child of the couple.[28]
- viii) Other salient provisions include constitution of National Advisory Board for ART, Duties of ART Clinic, sourcing, storage, handling and record keeping for gametes, embryos and surrogates, rights and duties of patients, donors, surrogates and children.

One of the major fallacies noted in the Draft ART Bill, 2008 by the Law Commission of India in its 228th Report[29]('Report') titled 'Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy' is that the draft bill does not establish or empower any judicial or quasi-judicial authority to exclusively adjudicate disputes arising out of surrogacy arrangements. The report moves on to suggest that special 'Surrogacy Courts' should be established to look into disputes connected with or arising out of

surrogacy arrangements. This is primarily because of the reason that the ART industry in India is in a booming stage, and consequently, disputes related to surrogacy are also getting common.

As far the ICMR guidelines are concerned, they are merely suggestive in nature and are not enforceable in a court of law. Consequently, any aggrieved party seeking to enforce it's rights in a court of law arising out of any dispute from surrogacy has very ineffective, limited and obscure legal remedies available. It is so because any matter or dispute related with, even partially, with surrogacy will have to be lined up in a court of law under the legally compulsive garb of a civil dispute between the parties arising out of a breach of contract. Under the present regime of laws, there is no special recognition to a dispute arising out of a treatment of surrogacy carried out.

The legal recourses available today to a person having any disputes with regard to surrogacy can be summed up in the following points-

- A. In cases of surrogacy related disputes, the Indian Contract Act would apply and thereafter the enforceability of any such agreement would fall within the purview of section 9 of the Code of Civil Procedure (CPC). Even if the parties at dispute resort to this, their pleadings and defenses will not have any strong legal basis. The guidelines issued by Indian Council of Medical Research are not enforceable in a court of law. These are merely directive and suggestive in nature and do not have the force of law
- B. The biological parent(s) can also file an application under the Guardians and Wards Act 1890 to seek an order of appointment or a declaration as the guardian of the surrogate child.
- C. In the case of Baby Manji Yamada v. Union of India, Baby Manji, who was born on 25-7-2008, under a surrogacy agreement carried out between Japanese biological/genetic parents and an Indian surrogate mother. Her genetic parents (the intended parents) had some matrimonial disputes which led to their divorce a few months before the birth of the child. So, a writ petition under Article 32 was filed by the Grandmother before the Supreme Court for the custody of the child.

In this case, it was noted that the Commissions for Protection of Child Rights Act, 2005 has been enacted for the constitution of a National Commission and the State Commission for protection of child rights and children's courts for providing speedy trial of offences against children or of violation of child rights. Therefore, this Commission has been set up for grievances related to deprivation and violation of child rights, non-implementation of laws



providing for protection and development of children and non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of the children and to provide relief to such children, or take up the issues arising out of such matters with appropriate authorities. Therefore, this is another remedy which the parties can exhaust to settle surrogacy related disputes. The commission is exclusively dedicated to cater to the disputes arising from violation of children's rights. In this case, the writ petition under Article 32 of the Constituion was disposed of and the grandmother of Baby Manji was directed to move to this Commission to redress her grievances.

In the case of Jan Balaz v. Gujarat High Court, the question before the Gujarat High Court was whether, a child who is born in India to a surrogate mother, but whose biological or genetic father is a father is foreign national, would be conferred citizenship by birth in India. Before this case, there was no such precedent in the country. The court conferred Indian citizenship on two twin babies named Balaz Nikolas and Balaz Leonard. The court observed that it was concerned about the rights of two newborn, innocent babies, much more than the rights of the biological parents, surrogate mother, or the donor of the ova. The court further held that the emotional and legal relationship of the babies with the surrogate mother and the donor of the ova is also of critical importance. The court further took a humanist perspective by introspecting even though the surrogate mother is not the genetic mother or biologically related to the baby, but, is she merely a host of an embryo or a gestational carrier? The courth further sought to enquire the status of the ova (egg) donor, which in this case an Indian national but anonymous. The court pondered over questions such as:

Is the ova donor is the real mother or the gestational surrogate? And;

Are the babies motherless, can we brand them as legal orphans or Stateless babies?

In this way, many ethical and legal questions were looked into by the court in this case for which there were no good explanations, so far, at least, in this country. It is true, babies conceived through surrogacy, encounter a lot of legal complications on parentage issues, this case reveals. Legitimacy of the babies is therefore a serious issue. The court took a serious stand that babies born out of surrogacy arrangements cannot be branded as illegitimate. The court looked into the surrogacy laws of countries like Ukraine, Japan, and the United States.

Balaz, the petitioner and the father of twin babies, agreed before the Supreme Court that he would be furnishing his passports before the Indian Consulate in Berlin. He also gave his agreement to the effect that that a NGO in Germany shall communicate back to India regarding the status of the

children. Finally, in May 2010, the Balaz twins were given access to their exit and entry documents which gave them the permission to leave for their home country. The parents agreed to adopt them in Germany according to the German law.

On 9<sup>th</sup> July, 2012, the Ministry of Home Affairs issued guidelines titled 'Instructions relating to foreign nationals intending to visit India for commissioning surrogacy'[30]. The primary purpose of these guidelines was to make it mandatory for foreign couples intending to visit India for commissioning surrogacy to take a medical visa, since it was observed that tourist visa was not an appropriate visa category for such couples. The guidelines also prescribe certain conditions on the grant of medical visa. The first condition is that the visa can be granted only to a couple married for not less than two years. This condition imposes a direct fetter on single parents to have an offspring through surrogacy. Furthermore, the couple would also be required to furnish a letter from the embassy of that country in India or the Foreign Ministry of that country stating that the country the couple belongs to recognizes surrogacy. This requirement again imposes a direct restriction on couples belonging to those countries which do not recognize surrogacy. These guidelines come after the ruling of the Supreme Court in Baby Manji's case, in which it was recognized that an intending parent can be a single male also. Moreover, prior to these guidelines, there was no provision mandating recognition of surrogacy by the home countries of the commissioning parents.

In March 2014, while considering changes to be introduced in the new ART Bill 2013, which is not yet out in the public domain, the Government of India proposed to restrict surrogacy to only "infertile Indian married couples" and it seeks to disallow foreigners from commissioning surrogacy in India unless he/she is married to an Indian citizen. Non-Resident Indians (NRIs), Persons of Indian Origin (PIOs) and Overseas Citizens of India (OCIs) shall still remain eligible. The purpose seems to prevent exploitation of women who are compelled to undertake bodily risks attached with surrogacy.[32] This is directly prejudicial to the right of reproductive autonomy of single as well as foreign parents.

## **VI. CONCLUSION AND SUGGESTIONS FOR FUTURE DISCOURSE**

By now it is quite clear that surrogacy is a very common method for reproduction for infertile couples, single sex couples and even those women who do not want to conceive due to personal reasons other than infertility. Given this backdrop at a global level and also the economic size it commands today in India, it is needless to say that there is an urgent need to regulate, control and

monitor the entire process of surrogacy from the insemination of a surrogate till the delivery of the child to the commissioning couple through an act passed by the parliament. Even the Law Commission Report has recognized the need of having legislation on surrogacy. Although surrogacy is not illegal in India and the much awaited Assisted Reproductive Technologies( Regulation) Bill, 2010 is in the pipeline, it is very important for our law-makers to consider the following issues while framing laws related to surrogacy:-

- A. Commercial surrogacy is an act which involves the offer of services of a physical nature by a woman who agrees to perform the role of a gestational carrier in return of remuneration. Seen from this context, it brings us close to the issue of 'commodification of women'. The lawmakers must make sure that the surrogate is not treated like an object or a commodity. Surrogacy must be regarded as a social service of a high regard in which a woman is extending a helping hand to a couple who is not able of a child of its own. Henceforth, the future law on surrogacy must incorporate important provisions which ensure the dignity of the individual engaged in surrogacy by giving her rights such as:-
  - a) Right to keep her privacy intact- This right should include the right of not being compelled to disclose identity to other couples who might contact the same doctor with whom the concerned surrogate is working with and also include the right of not be used as an object of advertisement for attracting other potential couples.
  - b) Right not to be financially and physically exploited by doctors and clinics(this is especially important in cases of poor women who are willing to act as surrogates for monetary reasons)- This right should include the right of being rightfully paid in time for the services rendered by her and also be entitled to the best of medical care and attention in case of any complication. This aspect of the relationship between the surrogate and the clinic has most often been ignored but it is indispensable to regulate even this aspect since it can become a potential source of exploitation of poor surrogates by the mightier strata of society.
- B. As already discussed above, the establishment of specialized surrogacy courts to cater to disputes arising solely out of surrogacy arrangements must be considered by the legislators.
- C. The apparent contradiction on whether to promote or to discourage commercial surrogacy between Law Commission's Report and the Draft bill must be resolved to the effect that commercial surrogacy must be promoted in India, albeit, with proper safeguards and clear legislation.

D. Since it is a well understood fact that the industry of surrogacy in India is mostly dependent upon foreign couples who seek the fulfillment of their wish of having a genetic child of their own, therefore, along with the surrogate, it is equally important to ensure a safe and proper execution of the treatment as well as delivery of the newborn child from the surrogate to the commissioning couple. Since it is not only their monetary interest which is vested in the agreement of surrogacy but most importantly it is their offspring whose birth in a healthy condition is the epicenter of the entire agreement, it is indeed very important to protect the rights of the commissioning couple such as:-

- a) Ensuring a high probability of successful completion of treatment by making laws mandating a strict criteria for maintaining and upkeeping the condition of machines, equipments and other apparatus required for successful commissioning of the treatment.
- b) In the draft bill, there is a clause which directs the surrendering of all parental rights over the newborn child by surrogate mother and delivery to the commissioning couple. The future law on surrogacy must strengthen this principle by creating a 'fast-track mechanism' to deal specifically with cases related, even partially with surrogacy only. For instance, if the situation faced by the intending parents in the Baby M case is repeated in India, would the new born child languish without any parental support in the initial years of his/her life? In order to prevent such a situation from taking place, as an offshoot of the idea of having specialized Surrogacy courts, there is also a need to have authorities assigned with the task of ensuring quickest possible custody of the newborn to the intending parents and ensuring after-birth care for the child.

The legal bottlenecks as described in aforementioned sections of this article coupled with the mammoth economic size it commands today afford a reason enough for such a mechanism which gives speedy justice to parties aggrieved out of an agreement of surrogacy.

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