



## AN ANALYSIS OF SURROGACY LAW IN INDIA- ISSUES AND CHALLENGES

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*Abstract-- Surrogacy means a women agrees to carry and gives birth to a child for the needy couple. It refers to a contract in which a women carries pregnancy for another couple, number of couples who are infertile may go for surrogacy to get their child through another women. There is a controversy in the method of surrogacy, because the question of surrogacy cherished the cultural beliefs and ideals regarding the child and mother relationship. It inevitably separates the surrogate mother and child the commercial surrogacy is legal when entered into by parents through a contract where certain legal issues which need to be observed by the appropriate Laws so to protect the rights and privileges of the surrogate mother, recipient parents and child and also to restrict the illegal practice of earning money by certain class of persons through surrogacy. The Law relating to surrogacy bill 2016 is introduced in the Lokasabha to laydown specific laws which restrict the practice of surrogacy by illegal methods.*

*Key words: Surrogacy, Surrogate mother, intended parents, commercial surrogacy, Legal issues, Surrogacy bill 2016.*

### INTRODUCTION

Surrogacy in the ordinary sense means hiring of womb for getting their own child by the recipient parents. Surrogate mother necessarily being a women who agrees to carry, deliver the child and hand over the child to the recipient parents for some consideration (remuneration) under a contract. Hence both the parties to the contract of surrogacy will be benefited. In India it was purely commercial in nature and it is recognized as legal in India. Though the practice of surrogacy in India is recognized and continuing in practice there is no specific Law to govern the practice of surrogacy<sup>1</sup>. India emerged as a leader in

1.en wikipedia.org/wiki/surrogacy.

international surrogacy and had simpler than the system of surrogacy in other countries of the world. Now the laws of contract are the only basis for the agreement of surrogacy between surrogate mother and recipient parents. The contract of surrogacy is valid and challenged before court of Law by either parties to the agreement. Therefore it requires the fulfilment of valid conditions required for an agreement.

Surrogacy is a method of creating pregnancy through medical technology, surrogate mother must undergo a medical treatment in a specified, recognised medical and scientific laboratory with expert and licenced medical practioner ,who is having a wider knowledge in this field. There may be different Laws and policies varied from country to country. In the international level the issues like nationality of child and immigration are the serious conflicts which affect the surrogacy Laws.

In India the Apex court has adjudged in many conflicting cases relating to surrogacy as legal. The surrogacy in India is a simple and easier process governed under the general principles of Contract. Surrogacy in India was a commercial one but surrogate mother were paid less that 1/10 of what they get in the US. The mushroom growth of I.V.F. clinics, not observing the regulatory frame work and there are poor women available in India to hire their wombs for very megre funds as remuneration which attracts the foreigners to seek child birth through surrogacy. This may led to the exploitation of surrogate motherin India. There is a need of safeguarding the rights of surrogate mother, child and also needy/recipient parents. In 2016 a bill on surrogacy introduced (Regulation) the Union cabinet/ both the houses of parliament in India with an object of curbing the unethical and commercial practices and preventing the exploitation of poor women as substitute mothers. This bill posses the narrow options for the needy parents to get child through surrogacy and shut out income earning capacity for women as surrogate mothers, and it restrict the surrogacy for fashion. The Law commission in India has reviewed the Law relating to surrogacy observing the fact that India is an International surrogacy destination<sup>2</sup>.



The surrogacy for commercial purpose is lessened in 2002 and banned in 2015. The surrogacy bill has some features and also restriction for surrogacy will be done.

2. Times of India .indiatimes.com/lite-style/relationship/man-woman/legal-and-ethical-to-doss.in surrogacy/articleshow/20212410.cms

### Methods of surrogacy

Two methods of surrogacy are found

#### i) Gestational/Full Surrogacy:

Here the egg and sperm of the recipient parents are used for fertilization and the fertilized embryo will be injected to the womb of surrogate mother, which is called in vitro fertilization (IVF), the baby is created with an ovum that come from another women other than the surrogate mother through In vitro fertilization. It is done by a trained medical staff.

#### ii) Partial/Traditional surrogacy:

Sperm of intended father and egg of the surrogate mother are taken and fertilization is done through intrauterine insemination (IMI) by a doctor. In both the methods the surrogate mother will be called as real mother of child after the birth and the child should be handed over to the recipient parents.

#### Necessity of availing surrogacy :

*During the recent years the people are opting for surrogacy on the following reasons:*

i) The infertility for bearing child, those who cannot conceive the children in the natural way and women is missing uterus by birth or removed and also suffered miscarriage, or when failed repeated IVF attempts for unexplained reasons.

ii) Mal formation in the womb, Single parent, Homosexuals, gay couple and Lesbian couple.

iii) Women who don't want to undergo pregnancy due to numerous reasons, like models or celebrities who focused on their carriers<sup>3</sup>.

#### *Legal status of surrogacy in the world :*

There are laws in some countries which may restrict and regulate illegal methods of surrogacy and the consequences of surrogacy some of the couples belongs to our country when Law of surrogacy is not allowed may go to another country which had recognized it.

Many developments in the field of medicine, social customs and the legal proceedings worldwide are the reasons for the modernization of surrogacy.

3. <https://www.googleweblight.com>

In 1936 the United nation's Pharmaceuticals started the production of Estrogens and in 1944 Harvard medical school professor conducted the process of fertilization of human ovum outside the uterus, in 1971 sperm bank opened in New York, in 1978 First test tube baby was produced by IVF procedure in 1980 Michigan lawyer wrote the first contract relating to surrogacy through a infertility centre. During 1999 in California the surrogate mother refused to gave the child to the recipient parents. The parents sued for custody, the court upheld the parental rights.



In 1994 the Latin American fertility specialist observed the ethical and legal status of surrogate mother. In 2009 the Chinese Government banned and increased the enforcement of Gestational surrogacy ban and surrogate motherhood in China coming forth for forced abortions.

Apart from these there are various kinds of disputes and differences between surrogate mother and recipient parents. For instance the recipient parents may ask surrogate mother to go for abortion, when there is a complication in the birth of child then the surrogate mother may oppose for carrying the child.

The legal aspects relating to surrogacy are numerous, diverse and unsettled in most of the countries in the world, normally. The woman giving birth to a child is considered as legal mother. But however in case of many countries when surrogacy is recognized, the intended or recipient parents are recognized as legal parents after the birth of child by the virtue of the fact that the contract is established to give birth to a child by surrogate mother to the recipient parents. In many states the issue of birth orders through the court placing the names of recipient parents on birth certificates from the other countries and there is possibility of prohibition non recognition of surrogacy. In 2009 the Chinese Government banned and increased enforcement of Gestational Surrogacy ban and surrogate mother in China coming forth for forced abortions.

Apart from there are various kinds of disputes and differences between surrogate mother and recipient parents for instance the recipient parents may ask surrogate mother to go for abortion when there is a complication for the birth of child then the surrogate mother may approve for it.

The legal aspects relating to surrogacy are numerous, diverse and even settled in most of the countries in the world. Normally the woman giving birth to a child is considered as legal mother. But, however in case of many countries when surrogacy is recognised, the intended or recipient parents are recognised as legal parents after the birth of child by the virtue of the fact that the contract is established to give birth to a child by surrogate mother to the recipient parents. In many states the issue of birth or deny through the courts placing the names of recipient parents on birth certificates from the start. In other countries there is possibility of surrogacy contracts are prohibited or not recognised.

### *Legal Issues of Surrogacy :*

Poor remuneration – the surrogate will be paid less remuneration and the clinic collects large share by intended parents. The surrogate mother is bound to give birth to a child as an obligation of the contract if there is a life risk to surrogate mother. The gender selection is involved in surrogacy which is illegal in India and surrogate mother may be forced for abortion and paid less remuneration if the child is female and there may be chances of running sex determination process by ART clinics.

### *There are certain legal loop holes in the practice of surrogacy :*

There is no specific laws in India to regulate surrogacy and related issues. It is a purely a contract in nature and also governed by the judgements of Supreme court. There is no such law under which the surrogate mother may claim her rights in the court of law.

### *Issues of problems in health of surrogate mother :*

In India the ART clinics have not taken the care on health of surrogate mother, the health got little importance, generally ignores regular medical check-ups. Risk to baby's health there may be chance of genetically disorder, low birth weight or membrane damage etc, in case of disability of baby found after birth then the intended parents may reject to have child. It will become orphan for no fault of the child and lead the life like an orphan without having either surrogate mother or intended parents.

If the surrogate also give birth to a child of foreign country, in the actual sense the child taken birth without citizenship because the surrogate mother is not a legal parent of child<sup>4</sup>.

### *Ethical Issues :*

If the intended parents should be rich or having larger wealth to get child through



4.surrogacy: ethical and legal issues,Indian J community .2012med Oct-Dec: 37(4):211-213

surrogacy other wise ,the surrogacy is not possible. So to what extent it is a right of women in practice and can make contract regarding the use of her body ?

In the contract of surrogacy the one party namely intended parents will be benefitted more than the surrogate mother should the law of contract be able to force a women to carry out “special performance” of her contract even she has a life risk need to be get aborted to save her own life and it leads to exploitation of poor women in developing countries.

The surrogacy vanishes the very meaning of mother hood it breaks between the mother and child. And also what is the relationship of the right to know the identity of surrogate mother

#### *Religious issue*

Many religion do not allow surrogacy in case of IVF like catholicism, unnatural means are gravely immoral. But in India the major religion like Hinduism there is little or no restriction on surrogacy but it is not a common usual practice among Hindus it is only rarely used by Hindus.

#### *Surrogacy in India :*

India is emerged as a country which has a leading role in the practice of surrogacy in international level.

The commercial surrogacy was recognised and was legal during 2002 in India. The intended parents not only belongs to India but also from foreign countries intended parents also seeking child from surrogate mother lower cost, the Indian surrogates became very popular. The clinics in India at the same time became more competitive, not just in pricing, but in the hiring and providing Indian surrogates. The charges for surrogate procedure were collected by the Indian clinics were roughly 1/3 price of the procedure in U.K.

As the surrogacy in India earlier is available at lower cost and also the legally had the favourable environment. In the case of Manji’s case (Japanese seeking baby by Indian Surrogate). The supreme court of India held that the commercial surrogacy is permitted in India with a direction to the legislative to enact proper and appropriate laws governing surrogacy in India. As a result the parliament has enacted ART bill 2008 (Assisted reproductive technique bill) which in still pending and expected to come in to force shortly.

As India is known for the international surrogacy destination involves issues like the law relating to surrogacy of both the countries have at par and uniform otherwise, the concern and interests of parties involved will remain unsolved. Thus giving due regard to the concern and in order to prevent the commercialisation of human reproductive system and exploitation of women ,the law commission has submitted its report with suggestions.

#### *Risk of surrogacy and Conditions in India :*

According to The Guardian, there was a mother who died because she didn’t get the proper medical attention. Conservatives estimates show that in India every year more than 25,000 children are now being born through surrogates in an industry worth \$2 billion. Domestic demand is increasing, but as fertility levels are lowering elsewhere, at least 50% of these are “commissioned” by overseas, mainly western couples. India’s medical research drafted the regulations more than two years ago, yet they still await presentation in parliament, leaving the surrogates and baby factories open to abuse. According to Dr. Manish Banker, from the Pulse Women’s Hospital, reported to come back on a patient, a women patient suddenly had a convulsion and fell on the floor, he said, that he was treated immediately Since she was showing signs of distress, inevitably they conducted an emergency cesarean section delivery.”

The legal aspects of surrogacy are complex, diverse and mostly unsettled. In most of the countries in the world, the woman giving birth to a child is considered as the Child’s legal mother. However, in very few countries, the Intended Parents are to be recognized as the legal parents from birth by the virtue of the fact that the Surrogate has contracted to give birth to the Child for the recipients Parents. India is one of the country amongst the few,



which recognize the Intended/ recipient Parents as the legal parents. Many states now issue pre-birth orders through the courts placing the name(s) of the intended parent(s) on the birth certificate from the start. In others, the possibility of surrogacy is either not recognized or is prohibited.

Commercial surrogacy has been legal in India since 2002. India is emerging as a leader in international surrogacy and a sought after destination in surrogacy-related fertility tourism. Indian surrogates have been increasingly popular with fertile couples in industrialized 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. Surrogacy in India is relatively low cost and the legal environment is favourable. In 2008, the Supreme Court of India in the Manji's case (Japanese Baby) has held that commercial surrogacy is permitted in India with a direction to the Legislature to pass an appropriate Law governing Surrogacy in India. At present, the Surrogacy Contract between the parties and the Assisted Reproductive Technique (ART) Clinics guidelines are the guiding force. As a due regard to the apex court directions, the Legislature has enacted ART BILL, 2008 which is still pending and is expected to come in force somewhere in the next coming year. The law commission of India has specifically reviewed the Surrogacy Law keeping in mind that India is a Surrogacy destination. In order to prevent the commercialization of the surrogacy which exploits women, the law commission has submitted its report with the relevant suggestions.

*Analysis of the surrogacy bill of 2016:*

History of Bill:

The concept of surrogacy is not new. Renting womb or commercial surrogacy is a growing business in India. In India it is hard to tell that the women are coming for surrogacy voluntarily or by the Husband's or Mother in law's desire to fulfil material and financial needs. The opponents says that the surrogacy is equitant to the prostitution and it is disallowed on moral grounds. Apart from their opposition and restriction, India is considered as a major destination for foreigners for services of surrogacy practices. India had well established surrogacy business with billion of dollars turnover. And also it is strange that the surrogacy practices in India largely has no specific regulations. However the law commission of India recommends and the Health Minister has recently introduced surrogacy bill of 2016 in Parliament placed a proposal in its report to ban a commercial surrogacy in India.

The Surrogacy bill 2016 has focussed mainly on the prevention of practice of commercial surrogacy in India, exploitation of surrogate mother and regulate the practice of child birth through surrogacy. It also provides regulations for ART clinics. However the Bill raises several questions as under<sup>5</sup>.

The Law Commission of India has submitted the report on "Need for legislation to Assisted Reproductive Technology Clinics as well as rights and obligation of parties to a surrogacy" with some observations.

- a) Surrogacy is governed by contract between the surrogate mother and intended/recipient parents which contains consent of surrogate mother to bear a child with medical procedure of artificial insemination, reimbursement of all expenses for

-----5. surrogacy bill  
2016.<https://www.firstpost.com>

carrying child full term, willingness to hand over the child to the recipient parents but such arrangement should not be for commercial purposes.

- b) Surrogacy should be provided the financial support for surrogate child in the event of death of the intended couple or individual before delivering child or divorce between the intended parents and subsequent willingness of none to take delivery of child.

- c) In the surrogacy contract there should be insurance coverage of surrogate mother.

- d) One of the intended parents must be the donor as well because the bond of love and affection with a child primarily emanates from biological relationship, various kinds of child abuses, which have been noticed in cases of adoption will be reduced in case of single parents, he or she should be able to be a donor for getting child through surrogacy.



- e) The legislation should recognise the surrogate child as a legitimate child of the intended or recipient parents without any need of adoption of child by them.
- f) In the birth certificate of child should contain the names of intended parents.
- g) Right of privacy of donor and surrogate mother should be protected.
- h) Sex selective surrogacy should be prohibited.
- i) The abortions are allowed under the medical termination of pregnancy act of 1971.

The report of law commission highlighted the proper way of operating surrogacy in India. Another major problem of surrogacy which creates problem to women's protection in exploitation of less payment. Therefore the law commission strongly recommended for the ban of commercial surrogacy. This is a bold step required for the existing situation apart from then it proposed for the restriction as international surrogacy, limiting surrogacy only to Indian citizens. The bill also specifies that only close relative of intended couple can act as a surrogate mother but this may lead to the problems at latter stage between the surrogate mother child. It may cause family problems at large stay between child and surrogate mother.

The bill proposed but silent to fix for the waiting period of five years to conceive child after the birth of child to surrogate mother. Maternity relief, designer babies certificate of eligibility, rights of intended couple. The bill does not make any references on these issues.

#### *Conclusion:*

In the country like India which has much concern about the improper and in appropriate use of commercial surrogacy which are provided by un recognised fertility clinics in India because of poverty the women may go for surrogacy for getting some monetary benefit, either voluntarily or by the force of husband or father in law or mother in law. And the breach of surrogacy contract either by the intended parents or by surrogate mother the right to claim damages for the breach of contract are to be provided to both. Proper guidelines are to be laid down to control the issues like, refusal to hand over the child to the intended parents, welfare of the surrogate mother, child which is at stake. And another major confusions is the contract of surrogacy does amounts to selling of child like goods. And who has to compensate the surrogate mothers in health issues which is connected to the pregnancy and delivery of child after handing over the child to intended parents? And also what is the remedy if the surrogate mother refuses to give the child? The Union Ministry of Women and Child Department has to look after in providing monetary compensation to the surrogate mother. It is a right time to pass a law in India otherwise it will become a tourism hub for surrogacy. The Human Rights of Surrogate Mothers are being violated on the reason that the surrogate women are kept in isolation because of social stigma in the society, which is against the human rights. Hence there are many issues like legal, social, ethical, religious, social and psychological issues associated with surrogacy. Therefore there is a urgent need of framing and implementing the Surrogacy law to protect the rights of surrogate mother, intended parents, right of child and also to cover the loopholes in surrogacy.

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