

LEGALFOXES LAW TIMES

LEGAL & POLICY CHALLENGES TO SURROGACY IN INDIA

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Abstract: Surrogacy is a topic of debate from a very longer period of time in the fields like legal, ethical, social and many other fields. This concept is evolving around the world rapidly. It contains very paradoxical situations because some people favour it and some opposes it. The legislation of surrogacy varies from country to country. Various countries like United Kingdom, Ireland, Denmark, Belgium, some US states, India, Russia and Ukraine allow the surrogacy in different or the other manner. In India, the legislation has not done anything on it from the point of legal context. The people who are not blessed with a child go with this concept but many other people criticize it. The people, who favour it, want to legalise it so that everyone can have the happiness of getting a child for the future development of family and nation. Researcher had gone through a lot of articles and cases and found that from history till date today some or the other person has supported surrogacy.

Keywords: Altruistic, Transplantation, Gestational, Fertility Tourism, Conceive.

Introduction: It is the birth right of every women to conceive & cherish the feeling of motherhood. Infertility of a couple deprives them the opportunity of experiencing this pleasure. But new, donor egg transplantation and surrogacy have given them hope to procreate. The word 'surrogate' has originated from the Latin word 'surrogatus' which means 'to substitute' or a person serving in the place of another. According to the Major Law Lexicon, 'surrogacy means the process of carrying and delivering a child for another person'. Surrogacy is a "form of third

party reproduction in which a woman agrees to create and / or maintain a pregnancy for another person or couple, typically for monetary compensation”

Surrogacy can either be ‘altruistic’ or ‘commercial’. The term ‘altruistic surrogacy’ refers to surrogacy arrangements in which the surrogate is not paid for her services and is motivated mainly by a desire to help an infertile couple to have a child of their own. Altruistic surrogacy is a situation where the surrogacy receives no financial reward for her pregnancy or the relinquishment of child. The arrangement of altruistic surrogacy is generally seen when surrogates are close friends or relatives to the parents.

The main problem with commercial surrogacy revolves around the monetary transaction entered on the ‘buying’ & ‘selling’ of the child. Commercial surrogacy is form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb & is usually resorted to by well off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand & ready availability of poor surrogates it is reaching industry proportions.

Commercial surrogacy is sometimes referred to by the emotionally charged & potentially offensive term ‘womb for rent’, ‘outsourced pregnancies’ or ‘baby farms’. In 2008, however the Supreme Court of India released a definitive decision in favour of surrogacy in the case *Baby Manji Yamada vs. Union of India*, which shed light on the matters of surrogacy. After years of intense debate on the legality of surrogacy in India, a bill passed by parliament in December 2011 declared commercial surrogacy as an illegal act & permit the practice of altruistic surrogacy for the intended Indian couple. Laws regarding surrogacy are vague in India. Currently, it is illegal for foreign interested parents to perform surrogacy in India as foreigners fly to India for the sole purpose of having babies due to low costs of the procedure when compared to other countries. This has been made illegal because practices like human trafficking, exploitation of women, producing children for prostitution & other immoral & illegal activities are the possible aftermath.

India presently tops the list in the most harboured places for fertility tourism. ‘Fertility tourism’ means an act of travelling abroad to take advantage of assisted reproductive technologies. This is

mainly because in India surrogacy is legal & provides for high quality health care well trained doctors at very minimum rates compared to other western countries where surrogacy is legal.

TYPES OF SURROGCY

There are two types of surrogacy that are recognized today. They are;

- A. Traditional Surrogacy: It is also known as ‘complete surrogacy’. In this type of surrogacy the eggs of the surrogate mother and the sperm of the commission husband are used in conception of the child making her the genetic and biological mother of the child.
- B. Gestational Surrogacy: Gestational surrogacy is the second type of surrogacy. In this type of surrogacy an embryo created in vitro is transferred into uterus of a woman who does not contribute the egg.

These two types of surrogacy re considered to be commercial when the surrogate mother is paid in monetary terms not only for the period of her pregnancy but also for providing her services as surrogate.

- C. Altruistic Surrogacy/Non-Commercial Surrogacy: In altruistic surrogacy, the surrogate does not gain any kind of financial advantage post and pre-birth medical expenses are provided by commissioning parents in monetary terms as compensation. This technique is preferable by most of the countries as it restricts surrogacy to medicinal practice prohibiting it from turning into a business.
- D. Commercial Surrogacy: The surrogate in this form of surrogacy enjoys monetary compensation for her womb provided on rent. This method is famously known as “baby farming” or “out sourced pregnancy”. There are usually financial arrangements in addition to ancillary expenses, loss of wages etc. The birth mother agrees to undertake behavior changes. The commissioning couple and the birth mother are often unknown to each other.

SURROGCY – INTERNATIONAL PRACTICE

Laws relating to surrogacy differ from country to country. In many countries like Sweden, Spain and France and Germany surrogacy arrangements have been made absolutely illegal, since it is against their public policy and in few other countries only altruistic surrogacy has been made legal.

United Kingdom

Surrogacy in United Kingdom is illegal. The surrogacy contracts are not enforceable even if the contract has been signed with the intended parents and they have paid for any expenses within the legal framework of UK law, surrogate mothers are considered to be the legal mother of any child they carry unless they sign a parental order after they give birth transferring their to the intended parents.

United States of America

In USA the law on surrogacy varies from State to State. It ranges from banning surrogacy contracts to enforcing them. The Assisted Human Reproduction Act 2004 in Canada permits altruistic surrogacy mother to be made good only the expenses she has incurred as a result of pregnancy. Also those who are found guilty of breaking the law is punished with a sentence of 10 years of jail and a fine up to \$5000,000.

South Africa

In South Africa the surrogacy agreement is governed by the South Africa Children's Act of 2005. Under this Act, to make the agreement valid, it is required to be confirmed by the High Court before fertilization. Section 301 of this Act permits the commissioning parents to compensate a surrogate mother for the expenses that directly relates to the artificial fertilization and pregnancy of the surrogate mother for the birth of the child and the confirmation of the surrogate motherhood; loss of earnings suffered by the surrogate mother as result of the surrogate motherhood agreement; or insurance to cover the surrogate mother for anything that may lead to death or disability brought about by the pregnancy.

Surrogacy in India

Though the concept of surrogacy is considered as a new aspect of reproductive technologies, for India it is actually an old concept which has its mention in the scripts of ancient Hindu mythology. Further, they also reveal that even during those days the practice of surrogacy was done in secrecy. Illustrations of surrogacy can be seen in the BhagvatPurana, on hearing to the prayers of Vasudev, appealing to Kansa not to kill all sons born to him, Vishnu transplanted the embryo from Devaki's womb to the womb of Rohini, another wife of Vasudev, who later gave birth to Balaram, Krishna's brother and raised him in secrecy while Vasudev and Devaki told Kansa that the child was born dead.

With the increase in the global market for surrogacy, the surrogacy industry of India has grown enormously. India's commercial surrogacy industry accounts for about \$2.5 billion. It is predicted that market for surrogacy shall be concentrated in India, which provides access to contemporary technology, skilled doctors at very low rates as compared to developed nations which have legalized surrogacy like United States of America.

As the market for commercial surrogacy is increasing, both the doctors and surrogate mothers are engaging in the profiteering activity. Newspapers have accounted few instances where the families have actually encouraged the surrogate mothers to take up surrogacy because that would help them to build a better life for themselves and the family. Commercial surrogacy in India has raised many ethical and moral questions which requires to be answered: Whether it is morally correct for a women to give birth and sell the child for sum? Whether it is ethically correct for married women to get into surrogacy in order to fulfil their household needs? Will it lead to exploitation of women by her family members? Further surrogacy arrangements involve intricate health issues concerning the surrogate mother, and ethics of medical professions that are to be addressed.

THE SURROGACY REGULATION BILL (2016)

Surrogacy for Foreign nationals was prohibited in a notification given by the government in 2015.

Key Features Of The Bill: The Bill prohibits commercial surrogacy, and allows altruistic surrogacy. The Bill permits surrogacy when it is:

- (i) for proven infertility of the intending couples;
- (ii) altruistic;
- (iii) not for commercial purposes;
- (iv) not for production of children for sale, prostitution or other forms of exploitation; and
- (v) For any other condition specified through regulations.

Eligibility Criteria of the Intending Couple

A. The surrogate mother should receive a 'certificate of eligibility'. A 'certificate of essentiality' and a 'certificate of eligibility' is to be issued to the intending couples by Authorities.

B. A certificate of essentiality will be issued to the intending couple upon fulfilment of the following conditions:

- a. A certificate of proven infertility of either or both of them;
- b. An order passed by a Magistrate's court on the parentage and custody of the surrogate child; and
- c. Insurance coverage for the surrogate mother.

C. The certificate of eligibility to the intending couple is issued based on the following conditions:

- a. The couple being Indian citizens and married for at least five years;
- b. Wife's age must be 23 to 50 years old and Husband's age must be 26 to 55 years old;

- c. The couple do not have any surviving child- biological, adopted or surrogate (except if the child is mentally or physically challenged or suffers from a life-threatening disorder); and
 - d. Such other conditions specified through regulations.
- D. To obtain a certificate of eligibility from the appropriate authority, the surrogate mother should comply these conditions:
- a. She should be a close relative of the intending couple;
 - b. Should be an ever-married woman having a child of her own;
 - c. Must be 25 to 35 years old;
 - d. Must not have been a surrogate mother before; and
 - e. And have a certificate of medical and psychological fitness.
- E. Offenses and penalties The Bill creates certain offenses which include:
- (i) Advertising or undertaking commercial surrogacy;
 - (ii) Exploitation of the surrogate mother; and
 - (iii) Sale or import of human embryo or gametes for surrogacy. These offenses will attract a penalty of 10 years and a fine of up to 10 lakh rupees.
- F. Surrogacy Boards at the national and state/UT levels, appointment of appropriate authorities for regulating the practice and process of surrogacy is proposed by the bill.
- G. It provides for mandatory registration of surrogacy clinics - those conducting surrogacy procedure in any form.

Changes Made in the 2016 Bill and reintroduced as Surrogacy Regulation Bill, 2019:

1. Insurance coverage for a period of 16 months covering postpartum delivery complications for the surrogate.
2. Addition of offence of abandoning, exploiting or disowning a surrogate child. This Bill was promptly passed by Lok Sabha.

Issues regarding 2016 Bill and Parliamentary Panel suggestions:

1. Under the Bill, 'infertility' is a condition that has to be proven by an intending couple, in order to be eligible to commission a surrogacy procedure. Infertility according to the Bill is defined as the inability to conceive after five years of unprotected coitus or other medical condition preventing a couple from conception. This definition does not include all cases in which a couple is unable to bear a child.
 - The panel also objected to limiting surrogacy to only legally married couples and requiring them to be certified as infertile. Calling the credential or certificate unnecessary, limiting it to legally married couples meant imposing a prohibition on widows, divorced women, live-in partners, which was not fair given the stigma of infertile women.
2. The Bill specifies the purposes for which a surrogacy procedure may be undertaken. It also specifies "any other condition" for surrogacy procedure. It is unclear what is implied by 'any other condition' i.e., whether it relates to only a medical condition or would be of any other nature.
3. The Bill which says that the surrogate mother must be a close relative does not define 'close relative' properly. It can be a relative or a near-relative.
 - The Panel held that limiting to 'close relative' (which has not been defined) would not only cause acute dearth and unavailability of women but also had no connection with the objective of stopping the abuse of surrogates and should therefore be required for both related and unrelated women. It questioned limiting eligibility for surrogacy in the definition of 'infertility' to those unable to conceive for 'five years', with a provision to add eligibility conditions on

some future date, while the WHO and the ART Bill of 2014 suggested a period of 'one year'.

- Such limitation would not only impair chances of parenthood to many, as people get married late these days with their biological clock ticking, but also violate their reproductive rights

4. If a surrogate mother is a close relative of the male member of the intending couple (e.g., his sister), and is allowed to donate her egg for the surrogacy, it may result in congenital anomalies for the surrogate child.

5. If a surrogate mother renders surrogacy services other than those permitted under the Bill, it shall be presumed that she was compelled to do so by: (i) her husband; (ii) the intending couple; or (iii) any other relative.

They will be held liable for abetting the offence of initiating commercial surrogacy. The burden of proof is not on the surrogate mother but on these parties to establish that they did not compel the surrogate mother. Furthermore, for this reason the Bill does not describe a 'relative.' It is unclear why the Bill seeks to reverse the burden of proof from the prosecution to the defendants.

6. The Bill prohibits storage of embryos and gametes (unfertilized egg and sperm) for the purpose of surrogacy. ICMR guidelines (2005) differs because it allows the storage of embryos for five years. There are severe health implications for the intending mother due to the prohibition on storage of egg or sperm. The Rajya Sabha in 2019, adopted a motion to refer the bill to a Selected Committee.

THE SURROGACY REGULATION BILL, 2020

Changes made to the 2019 bill by the appointed committee:

- It makes it possible for any “willing” woman to be a surrogate mother.
- The definition of “infertility” as the inability to conceive after five years of unprotected-intercourse was deleted on the ground that it was too long a period for a couple to wait for a child.
- Proposes for regulation of surrogacy by establishing a National Surrogacy Board at the central level and State Surrogacy Board and appropriate authorities in states and Union Territories respectively.
- The proposed insurance cover for surrogate mothers has been increased to 36 months from 16 months.
- Commercial surrogacy is prohibited including trading of human embryo and gametes.
- Only ethical surrogacy provided to Indian married couples, Indian-origin married couples and Indian single woman (only widow or divorcee between the age of 35 and 45 years) will be allowed on fulfillment of certain conditions.

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CONCLUSION: Considering the economic backwardness in India, surrogacy has actually come as rescue to many poor families. The Indian women belonging to the poor strata actually consider it as boon since it fetches them income that is equal to lifelong earnings without compromising on regarded as blessings, the legal complications, and lifelong injuries that might result in cannot be negated. On one hand, surrogacy is a better option when compared to adoption because it is less time-consuming, avoids complicated paper work, and parents get to have at least one of their genes passed on to the child. Parenthood is a blessing in societal life and this method is more socially acceptable. It fulfills the desire of many childless couples to complete their family. But on the other hand, there are chances that surrogacy can be made into a prostitution and human trafficking business. Most vulnerable sections of the society especially women are actually exploited here. It may be driven by profit motive rather than a service motive.