

Surrogacy in India: Changing Dynamics of a Modern Society

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Abstract—Surrogacy has attained great attention of medico- legal luminaries ever since India had its first case of a girl child born in the year 1978 through Assisted Reproductive Technology. With the rapid emergence of fertility related issues in men and women, surrogacy has gained status of an easy breath alternative. Technology has also given humans various problems associated with it and therefore we see a sudden rise in cases of “surrogacy” in India. But several legal and social issues revolve around the concept. This paper attempts to raise certain issues and answer them with best possible solutions. Firstly, it discusses the Surrogacy Bill, 2019 and its key provisions, secondly we shall proceed to discuss the moral and legal impact of the law on our society with various issues surrounding surrogacy. Lastly I shall make certain recommendations for better implementation of the umbrella of laws on surrogacy.

Introduction

India has often been termed as the “surrogacy capital of the world”¹. When we google the term surrogacy the page gets flooded with advertisements of various private agencies providing highly successful surrogacy services at affordable rates. Surrogacy has now turned out to be a flourishing business in the country widening its scope for stake holders and the surrogates working for them. This is the new age India.

Many celebrities such as Karan Johar, Tusshar Kapoor, Shahrukh Khan, etc. have publically admitted of becoming parents with the help of surrogacy and are enjoying parenthood without getting married. Surrogacy is not just a way of parenting but is a mirror to the rapidly changing dynamics and principles which governed our society ever.

Surrogacy - meaning

The word ‘surrogate’ has its origin in Latin ‘surrogatus’, past participle of ‘surrogare’, meaning a substitute, that is, a person appointed to act in the place of another. Thus 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.²

According to the Black’s Law Dictionary, surrogacy means the process of carrying and delivering a child for another person. The New Encyclopaedia 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 is the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth³.

Key features of the Surrogacy (Regulation) Bill, 2019

The Bill tries to distinguish surrogacy as “commercial” and “altruistic”. Commercial surrogacy as we all know it has been practised ever since surrogacy started. It is based on a surrogacy contract through which the parties agree to specified terms and conditions related to the certain monetary compensation as well as nourishment of the surrogate mother in the entire period of pregnancy and thereafter the surrogate mother shall hand over the new born to the expected parents. These terms are clearly defined in clauses of the contract and are binding on the parties. Altruistic surrogacy on the other hand is when a woman does not receive monetary compensation and is a close relative of the intended parents.

Through the present Bill as passed by Lok Sabha, Surrogacy is permitted when it is: (i) for intending couples who suffer from proven infertility; (ii) altruistic; (iii) not for commercial purposes; (iv) not for producing children for sale, prostitution or other forms of exploitation; and (v) for any condition or disease specified through regulations⁴

The intending couple should have a ‘certificate of essentiality’ and a ‘certificate of eligibility’ issued by the appropriate authority.⁵ A certificate of essentiality will be issued upon

²Report no. 228, Law Commission Of India on Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy

³The Report of the Committee of Inquiry into Human Fertilization and Embryology or the Warnock Report (1984)

⁴Section 4, The Surrogacy (Regulation) Bill, 2019

⁵<https://www.prsindia.org/billtrack/surrogacy-regulation-bill-2019>

¹Chinmoy Pradip Sharma, Surrogacy Laws in India – Past Experiences and Emerging Facets, Bar & Bench

fulfilment of the conditions such as proven infertility and proven parentage, insurance coverage for a period of minimum 16 months for the surrogate mother. The certificate of eligibility to the intending couple is issued upon fulfilment of the conditions such as citizenship, age group 23-50 (women) and 26-55 (men), no surviving child prior to surrogacy except if he is physically challenged etc.

The surrogate mother has to be a 'close relative' of the intending couple and married woman having a child of her own and must be 25 to 35 years old. Further, the surrogate mother cannot provide her own gametes for surrogacy.

The central and state governments shall appoint one or more appropriate authorities within 90 days of the Bill becoming an Act. The appropriate authority shall grant, suspend or cancel registration of surrogacy clinics and enforce standards for surrogacy clinics and also carry necessary investigations.

Surrogacy clinics cannot undertake surrogacy related procedures unless they are registered by the appropriate authority. Clinics must apply for registration within a period of 60 days from the date of appointment of the appropriate authority.

The central and the state governments shall constitute the National Surrogacy Board (NSB) and the State Surrogacy Boards (SSB), respectively for purpose of laying down policies and supervision.

Position in India

Around 2000-3000 surrogacy clinics are running illegally in India and a few thousand foreign couples resort to surrogacy practice. Thus it may be said, that the whole issue is thoroughly unregulated. There have been reports concerning unethical practices such as abandonment of children born out of surrogacy arrangements and exploitation of surrogates mothers and rackets involving intermediaries who are buying or selling human embryos and gametes.

The Law Commission of India had recommended in its 228th Report that there is a need to enact a legislation to ensure practice of altruistic surrogacy in a systematic and channelized way. A PIL was filed in the Supreme Court in 2015 by Ms. Jayshree Wad, an Advocate on Record, Supreme Court of India seeking to ban commercial surrogacy alleging that lax laws had allowed rampant commercialization of motherhood, exploiting poor women to turn India into the world's surrogacy capital.

Problems surrounding Surrogacy law were multiple. Firstly, the ART Bill, 2005 was drafted and was to be tabled before the parliament for passing but could not be placed. It underwent amendments in the years 2008, 2010, 2013 and 2014 but still could not find a breakthrough. Subsequently the Surrogacy Bill was drafted which makes subtle resemblance to the ART Bill. However, it took a more holistic view of the problem with a target to ban commercial surrogacy totally which ART Bill did not. In fact, it may be argued that both the

Bills are serving different purpose and could have accompanied each other as one is banning and regulating altruistic surrogacy and the other is channelizing the surrogacy clinics, practitioners and technological procedures. But the ART Bill, did not address the ethical and social harm that the problem of surrogacy was causing.

Concern from civil society was more about permissive guidelines and absent regulations that led to exploitation of Indian surrogates by economically advantaged global commissioning clients in cross-border, third-party reproduction. Not all of these clients were infertile, and many used the unregulated surrogacy market for their aspirational needs. Objections were not against the reproductive technology itself but its commercialisation and resultant harms. India suddenly found itself part of the very small group of nations that allow commercial surrogacy. The reputation of being a surrogacy destination was internationally embarrassing for India, especially alongside the criticism it currently faces for human rights violations.⁶

The Surrogacy Bill raised few objections and criticism too. For instance, the Bill allows a "close relative" to become a surrogate for the intending couple. The definition per se explains no further what exactly refers to a "close relative". It is again subject to one's personal interpretation as one may or may not consider a woman as a close relative whether she is in blood relation or otherwise.

The Bill through its provisions establishes National Surrogacy Board and State Surrogacy Board but does not provide of the interrelation between the two so that coordination may be established. The Authority shall implement the grass root functioning such as carry on investigations of granting permission, preparation of certificates, ensuring medical compliance. The Bill allows only a couple who is married for a minimum period of 5 years as the eligibility criteria for proceeding with surrogacy to become parents which is has no scientific reason as it is scientifically proven that whether a couple is infertile or not can be ascertained through tests and therefore the logic behind a wait as long as 5 years is illogical. It has excluded the community of transgender, lesbians, gays and bisexuals from entering into surrogacy. The liberals argue this to be a discriminatory move and hence a human right violation. However, the government argues that the LGBT community has got its well-deserved position in our society however, homosexuality is decriminalized and not legalised due to which this exclusion has been made. Another observation has been made regarding Section 4 (e) of the Surrogacy Bill, 2018 as per which the term "other disease" remains to be open ended and subject to interpretation at the liberty of the Board.

It has been further argued that the Bill violates the Constitution of India Fundamental rights under Article 14 and

⁶(Olinda Timms, Report of the Parliamentary Standing Committee on the Surrogacy (Regulation) Bill, 2016: A commentary, (2018)

21. We need to understand the intent behind enacting this piece of legislation. As such, equal opportunity has been given to an infertile couple to make a family at their own accord. Thus the Bill does not prima facie violate fundamental rights.

Indian cases

Baby Manji Yamada v. Union of India⁷

This case concerned production/custody of a child Manji Yamada given birth by a surrogate mother in Anand, Gujarat under a surrogacy agreement with her entered into by Dr Yuki Yamada and Dr Ikufumi Yamada of Japan. The sperm had come from Dr Ikufumi Yamada, but egg from a donor, not from Dr Yuki Yamada. There were matrimonial discords between the commissioning parents. The genetic father Dr Ikufumi Yamada desired to take custody of the child, but he had to return to Japan due to expiration of his visa. The Municipality at Anand issued a birth certificate indicating the name of the genetic father.

The grandmother of the baby Manji, filed a petition in the Supreme Court under article 32 of the Constitution. The Court relegated her to the National Commission for Protection of Child Rights constituted under the Commissions for Protection of Child Rights Act 2005. Ultimately, baby Manji left for Japan in the care of her genetic father and grandmother.

Israeli gay couple's case

Thereafter was in the news the Israeli gay couple's case.⁸ The gay couple Yonathan and Omer could not in Israel adopt or have a surrogate mother. They came to Mumbai. Yonathan donated his sperm. They selected a surrogate. Baby Evyatar was born. The gay couple took son Evyatar to Israel. Israeli government had required them to do a DNA test to prove their paternity before the baby's passport and other documents were prepared.

In 2012, Justice Puttuswamy in a landmark judgment⁹ had recognised the constitutional right of a woman to make reproductive choices citing personal liberty under Article 21 of the Constitution of India.

Present position

The Surrogacy Bill got passed in Lok Sabha on Aug 05, 2019. The provisions of the Bill were criticized on basis of being loose and arbitrary in their interpretation. The Rajya Sabha Select Committee on Surrogacy (Regulation) Bill, 2019 has made recommendations that a surrogate mother need not be a "close relative", which also advocated omission of the five-year time limit before seeking surrogacy.

The other major changes recommended by the Committee include allowing single women (widow or a divorcee and Persons of Indian Origin) to avail of surrogacy, and increasing insurance cover for the surrogate mother from the 16 months proposed in the Bill to 36 months.

The Report also stated that requiring the surrogate mother to be a "close relative" potentially restricts the availability of surrogate mothers, affecting genuinely needy persons, the Committee has recommended the removal of this requirement from the Bill. A willing woman shall act as surrogate mother and be permitted to undergo surrogacy procedures as per the provisions of this Act.

The other major recommendation concerns deleting the definition of "infertility" as "the inability to conceive after five years of unprotected intercourse" on grounds that it was too long a period for a couple to wait for a child.

Meanwhile, in order to protect the interests of the child born through surrogacy, the Committee recommended that the order regarding the parentage and custody of the child, issued by a Magistrate, shall be the birth affidavit for the surrogate child.

As a general recommendation, the Select Committee said that the Assisted Reproductive Technologies (Regulation) Bill (ART), which is awaiting Cabinet approval, may be taken up before the Surrogacy (Regulation) Bill, since the ART Bill primarily deals with technical, scientific and medical aspects, including the storage of embryos, gametes, oocytes, etc. as contained in the Surrogacy Bill.

Conclusion

Most nations all over the world have banned commercial surrogacy and have recognised the damage they are likely to cause on the civil society. India as a nation has embarrassed itself by being termed as the "surrogacy capital" of the world as it amounts to violation of human rights not just in domestic laws but also international laws such as UDHR. It was high time the Indian government took necessary action.

The changes made in the Bill by the Select Committee of the Rajya Sabha are much sought after suggestions and are likely to be incorporated in the draft. Further, it is observed that the ART Bill should simultaneously be enacted and also such Rules that lay down the procedures as specified in the main Act should accompany the Act so as to create an umbrella of laws bringing out proper regulation with respect to surrogacy with least possibility of any conflict.

The Surrogacy Bill shall lay down a definitive structure of banning commercial surrogacy. Through the discussion in this paper we may conclude that for surrogacy to be banned a lot of checks and balances need to be placed and recommendations as laid down in 228th Law Commission Report must also be taken into consideration.

⁷(AIR 2009 SC Page 84)

⁸Report no. 228, Law Commission Of India on Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy

⁹Puttuswamy v. UOI (2018)

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