

A Legal Analysis of Surrogacy Mother in India

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Abstract

Surrogacy is a deal where a woman offers to bear a baby through pregnancy on behalf of a couple and then return the baby to the planned parent. This paper tries to clarify the meaning, related laws to surrogacy and the concept of surrogacy mother. Further, it focuses on problems and scope and of surrogacy mother. Surrogacy is twin processor in which both party have benefit either it receiver or donor. The main objective of this research paper is to explain the legal analysis, scope and problems of surrogacy mother. Secondary data is taken to fulfill the objective of the paper.

Key words- Surrogacy, Legal, Illegal, Traditional and Commercial

Introduction

The word "surrogate" has its origin in the Latin term "surrogates" meaning a substitute, a person appointed to act in place of another. It is the practice by which a woman becomes pregnant and gives birth to a baby to give it to someone who cannot have children. Nature has bestowed the capacity to procreate a life within women and every woman cherishes the experience of motherhood. But, growing cases of infertility and technological advances have led the world to turn its eyes on surrogacy. The conventional is to go for adoption and the unconventional is Assisted Reproductive Technology (ART) in which pregnancy is caused by artificial or partially artificial means. The feeling of motherhood is something incomparable with any other experience. It is considered to be a very important part of the human life. It makes the family life complete. Indeed, it is very difficult to understand the pain and emptiness of the couples who are not blessed with the boon of having a child of their own. Some women, due to various reasons, are unable to give birth to their own offspring. The desire for motherhood leads them to search for alternatives solutions, and surrogacy presents itself as the most viable alternative. Modern technological advancement such as Assisted Reproductive Technology (ART) is an offspring of technological revolution and medical advancement. Advances in assisted reproductive techniques such as In- Vitro Fertilization (IVF) and Intra Uterine Insemination (IUI) methods have revolutionized the reproductive environment, resulting in "Surrogacy", as the most desirable option. Surrogacy is a significant choice to complete the wish to have a child of the

couple for those couples to have a child for whom it is impossible to carry a baby on their own by physical or medical practices. Surrogacy comes as an important option to fulfill the desire to have a child of such couple for whom it is physically or medically impossible or undesirable to carry a baby to term on their own. Surrogacy is a blessing for infertile couples. Surrogacy is an arrangement where a woman offers to carry a baby through pregnancy on behalf of a couple and then return the baby to the intended parent(s) once it is born. In Surrogacy, an embryo is created using an egg and sperm produced by the intended couple and is transferred into the surrogate's uterus. The surrogate has no genetic link to the child. Her eggs cannot be used to conceive the child (Regulation Bill, 2019).

Review of literature

The first formal surrogate contract was arranged by Noel Keane, a Michigan attorney, in 1976. While numerous stories about surrogates have appeared in news magazines, television and radio broadcasts since that time. There is review of literature that focuses on the study of surrogate. Parker (1984) that have been conducted have assumed that the surrogate mother is unique from other mothers because she does not intend to keep her child. Since the 1970s, the number of infertile couples has increased (Winston & Bane, 1993). Foster (1987) states that many surrogate mothers face emotional problems after having to relinquish the child they carried. According to Radin (1996) surrogacy being baby selling. Nigam (2013) gives conclusion that surrogacy is a reproductive technology and like India need clear guidelines from legislature. The Iona Institute (2102) gives summary in their paper that commercial surrogacy is a very good activity and many countries are adopting it. Further Mukherjee (2011) concluded that right to reproduce is a fundamental right and also a human right. Surrogacy is the best way to overcome both biological and social infertility. Yale University (2014) stated that the practice of surrogacy is rapidly increasing day by day. Pilka (2009) concluded that public has shifted its opinion and recognized that surrogacy is an appropriate measure in the cases of the infertility.

Mythology of Surrogacy in India

Surrogacy is lucky thing for couples who are unable to conceive. India has been practicing surrogacy from the ancient times with the term Niyoya Dharma. In order to avoid the baby being killed, the seventh child of Vasudev and devki. Balram was transfer in the womb of Rohini who was Vasudev's first wife. Gandhari in Mahabharata after two years of long pregnancy delivered a mass. The Rishi Agyasa found that the mass contained 101 cells. These cells grown by Rishi

Agyasa out of the womb in a nutrient medium out of which 100 male children known as Kaurans and a female child known as Dushala were developed Kartikeya, the child of Shiva. The Ganga was also born out of surrogacy. He is also known as God of productiveness. It is clear that surrogacy existed in ancient times also so there is no variance between assisted imitation and socio religious background.

Modern Surrogacy in India

Surrogacy started around 30 years ago from a legal point of view. But in a retrospective view, the idea of surrogacy is seen widely among most cultures. In 1881, the first successful surrogacy with artificial insemination happened in an ethically questionable way. It has gained a lot of criticism and issues since then. There was no legal perspective till 1976 and that was when a lawyer drafted the first traditional surrogacy agreement. The surrogate mother didn't receive any monetary benefits. The first IVF (In Vitro fertilization) baby was born in the year 1978. There was no legal enforceability in any country. Surrogacy in India has its origin in history and evidence of being a century-old method. In 1978, surrogacy in India became successful with the birth of the world's second and India's first in vitro fertilization (IVF) baby Kanupriya alias Durga in Kolkata.

Types of Surrogacy

Traditional or Partial Surrogacy

The first type of surrogacy understanding is traditional surrogacy in which the eggs of the surrogate mother and the sperm of the donor, or the man who wish a child are used in fertilization. In this method, the child is genetically related to the surrogate and so the surrogate is practically considered as the biological mother. In the case of traditional surrogacy, it will be not easy for a mother to give away her child. It is an emotional sense of the surrogate mother. The surrogate mother argues over her parental rights to keep the baby.

Gestational Surrogacy

In this process, the wife is reproductively but unable of carrying a growing fetus, so the child is conceived by In Vitro fertilization (IVF). Using the wife's eggs and her husband's sperm, the obtained embryo is embedded in the surrogate mother's uterus. Gestational Surrogacy also called full surrogacy is where the surrogate mother will have less emotional, genetic connection with the baby.

Altruistic Surrogacy

Under this method the surrogate mother doesn't receive any compensatory benefit except medical expenses. This type of surrogacy is mostly common among family members or close friends or relatives.

Commercial Surrogacy

In this system commercialization of the service, where the surrogate mother receives benefits such as money in return.

Arguments in Support of Surrogacy

Arguments which are in support for the proper legalization of surrogacy by the legislatures are of the great significance imaginings. Surrogacy can allow the couples to have the child when they are incapable to produce by the gifts of nature due to come incapability or medical complexities of not achieving the pregnancy of the commissioning mother. They can have their child by the method of the adoption but then there will not be any genetic or biological connection between the parents and child which surrogacy provides easily. Surrogacy is good option for them as they can have a genetic linkage between their child and also where there is scarcity of the adoption of the children. Surrogacy provides the reproductive liberty to the persons. Some people had argued that the commissioning parents and the surrogate mothers cooperate for the medical facilities which are needed for the proper and the healthy birth of the child. Many women like the Altruistic type of surrogacy who believes this as a service to the couples for their joy Commercial surrogacy helps the poor, single or minority women as it provides the money for their womb taken on rent by the commissioning parents for their child. They also open the door of happiness to the families and adoptions of the child for establishment of their complete family.

Reasons Come to India for Surrogacy-

- The treatment is very expensive in own country.
- Mostly, foreign countries laws do not permit to be a surrogacy.
- There is no law to control it in India due to proper law.
- Technology is cheap as compare to other countries.
- Cheap medical facilities.

Commercialization of Surrogacy in India

It is hard to imagine the child as commerce. Babies, after all are the product of love, not money, a conception that occurs far away from any commercial activity. Poor parents across time

and place have viewed their children as potential economic assets, weighing their eventual economic contribution-in the rice field or factory or manor- against the costs of carrying them through childhood. Likewise, surrogacy has become a commercial business in countries like India, which has given rise to many questions leading to political debate. Feminists have argued over the alienability of woman's bodies; legal scholars have probed the contractual and jurisdictional issues. The market for surrogacy is large and is growing. There are thousands of potential parents across the world with both the desire and the wherewithal to hire another woman to bear their children. Commercial surrogacy, or "wombs for rent," is a growing business in India. have described the popularity of surrogacy arrangement in India as 'baby booming business', 'womb on hire', 'baby firm', 'parenthood by proxy'. Surrogacy has turned a normal biological function of a woman's body into a commercial contract. Surrogate services are advertised, surrogates are recruited and operating agencies make large profits. The commercialization of surrogacy raises fears of a black market and baby-selling, breeding farms, turning impoverished women into baby producers and the possibility of selective breeding at a price. In India surrogacy is becoming a booming industry due to the fact that surrogate mothers are easily available and the entire cost of this method is very less as compare to other.

Laws of Surrogacy in India

It was back in 2002 that India had legalized commercial surrogacy, which led to increased demands for surrogacy among couples who were infertile and were unable to produce their biological child. Due to high demand from national and the foreign couples, India became the surrogacy capital of the world due to lack of proper framework and legislation. The ICMR (Indian Council for Medical research) in 2005 drafted a set of guidelines. But the same didn't have any act to regulate and govern the same. In the case baby Manjhi Yamada vs union of India the matter related to "obtaining travel documents for a baby of Japanese parents who was conceived and born in India by means of commercial surrogacy."

As per the Supreme Court commercial surrogacy is legal in India. This judgment coincided with the "Assisted reproductive technology bill" 2008. But no steps were taken to formulate it hence, promoted the "Law Commission of India to rise up the issue of surrogacy" for further research. Then in the year 2009 law commission of India submitted the report on legislation for survey and solving the issue pertaining the same. ICMR revise the guidelines in

the year 2010 and put forward the agreement between the surrogate mother and the proposed parents and ART before the start of the surrogacy process. Further suggestions were been submitted by the health and family welfare to revise the draft of the bill. In 2012, a study which was conducted by UN revealed “the economic scale of the Indian surrogacy industry which came out to be 400 million dollars a year with more than 3000 fertility clinics all over the country.”

In 2015 there was complete ban on commercial surrogacy was put by government of India and also foreign nationals were also barred from participation. “The union cabinet approved the surrogacy regulation bill in 2016.” Which allowed Indian married infertile couples to avail surrogacy facilities? Which was passed in 2016 was very different from the bill passed in 2014. On the other hand, it still wasn't introduced in Rajya Sabha. Later, an exact replica in Lok Sabha introduced in 2019 termed Surrogacy (regulation) bill, 2019 and union cabinet passed it to safeguard women's who becomes pray due to their weak financial position. It was passed in Lok Sabha. In Rajya Sabha it was, the bill referred to the selected committee for examination and consultation on 21st November 2019. The amended bill i.e., surrogacy regulation bill passed in 2020.

The Surrogacy (Regulation) Act, 2021

The Surrogacy (Regulation) Act was enacted on 25 December 2021 after it got agree of Honorable President Shri Ramnath Kovind. In this Act, commercial surrogacy is termed as the buying and selling of human embryos i.e., commercial surrogacy is banned in the whole nation. The Act formed new regulations for surrogacy and a single man or woman can't choose for surrogacy. The Act mandates everyone to not print or air advertisements of commercial surrogacy or any kind of advertisement. The Act allows Altruistic surrogacy as an act of kindness between lock relatives with a contract between them for the same. The planned couple must be 25 to 35 years old. The act made mandatory for the eligibility certificate and the proof on infertility of either of the husband or the wife or both. The couple must get the order regarding the parentage from the Magistrate of first-class or above.

Surrogacy Laws by Countries

There are many rules related to surrogacy issues or matter. Some countries have positive thinking about the surrogacy but on the other hand some have restriction. Following are the descriptions of rule and regulation about the surrogacy as per the countries-

USA- While in many states of the USA only altruistic surrogacy is allowed.

Canada- The assisted human reproduction act (AHRC) of Canada has banned commercial surrogacy. In Canada only altruistic surrogacy is permitted but payments are only gestational carriers may be reimbursed and any other consideration for surrogacy is illegal.

France- In France any kind of surrogacy whether it is commercial or altruistic, has been prohibited in France since 1994.

Iran- All surrogacy arrangements whether it is commercial surrogacy or altruistic surrogacy, it is legal in Iran and also popular as well due to legal easiness people from middle east do surrogacy in Iran.

Japan- The science council of Japan banned surrogacy from march 2008 and said that any doctor, agent or their client found to be indulged in surrogacy will be punished.

Saudi Arabi- Saudi Arabia does not allow any type of surrogacy due to religious authorities; instead it suggests restoring the ability to deliver and fertility by any medical procedures.

Neither Land- Only altruistic surrogacy neither is legal nor is is commercial surrogacy illegal even though altruistic surrogacy is legal only one hospital allowed performing surrogacy so it's difficult for couples to get their number so mostly peoples prefer to go and take treatment outside.

Russia- Surrogacy is regulated by law in a clear and detailed manner, both in its commercial and altruistic version.

Greece- Surrogacy has been legal in Greece for some years. Originally, only Greeks could use this means of assisted reproduction, but now the process is also open to foreigners.

Thailand- This country has vetoed surrogacy, making the involvement of intermediaries, clinics, and individuals who carry out or participate in the process a criminal offence.

Commercial surrogacy is legal in Georgia, Israel, Iran, Ukraine, Russia, India and California.

Conclusion

Surrogacy is a significant choice to complete the wish to have a child of the couple for those couples to have a child for whom it is impossible to carry a baby on their own by physical or medical practices. Surrogacy comes as an important option to fulfill the desire to have a child of such couple for whom it is physically or medically impossible or undesirable to carry a baby to term on their own. Monetary compensation may or may not be involved in these arrangements. It depends on the different condition of surrogacy mother. Modern technological advancement such as Assisted Reproductive Technology (ART) is an offspring of technological revolution and

medical advancement. Advances in assisted reproductive techniques such as In- Vitro Fertilization (IVF) and Intra Uterine Insemination (IUI) methods have revolutionized the reproductive environment, resulting in surrogacy, as the most desirable option.

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