

Surrogacy Market in India: A Critical Analysis

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Abstract--- *There is Jewish proverb states that God could not be everywhere so he made mothers. Over a couple of centuries the desire to beget a child for an infertile couple was being satisfied by adoption. But modern sciences has provided new opportunities or options we can say to overcome adoption, that's surrogacy which has resulted as a boon for those childless couples who want their own child. Surrogacy is a practice whereby a woman agrees to become pregnant by implanted embryo or medically inseminated sperm and bear a child for another person or persons, to whom she intends to transfer the child's care at, or shortly after, birth and in return receives the compensation for carrying and delivering the child. The Paper is centred on "Surrogacy Market in India". The paper talks about the history of surrogacy, various moral and ethical issues, judicial response and law governing surrogacy in India.*

Index Terms--- *Surrogacy, Gestational Surrogacy, Genetic Surrogacy, Total Surrogacy, Egg Donor, Surrogate Mother, Gestational Mother Etc.*

I. INTRODUCTION

Women has been given a special right and a gift of god to give birth to a new lifeform. Every woman cherishes the experience of entering into motherhood and enjoying the feel of it. Right to reproduction is a god gifted natural right of an individual. It's a universal phenomenon for couple to desire for children. Entering into Parenthood is an eternally rewarding and life changing experience for a couple and if that dream is not fulfilled then the pain and agony immeasurable for that couple. The science of infertility treatment has moved forward and has advanced in every way. Institution of family has been given the primary importance among the world. New family comes into existence when two individuals enter into a matrimonial bond, and such family becomes complete with the birth of their children. From the ancient times, children are considered as an integral as a source of happiness and important for continuation of the family lineage and for the parent's old age days. Psychologists believe that birth of a child can bond the spouses which can help them to even go through stressful marriages to sustain in the long run.

It is however seen that due to various reasons, a large number of couple are unable to have their child. The statistics indicates that one in six couples have such problems. The absence of a child is considered as a stigma to the family which has led to matrimonial breakdown. In clinical term the inability to have a child is known as infertility which is an increasing global problem. According to the WHO Report the incidence of infertility across the globe including India is around 10-15 percent.¹ Many of these fertility problems are treatable but some of them which are not have found a simple way to deal with it known as surrogacy. Earlier the childless couple only had the option of adoption but no with the advancement of technology in the field of artificial human reproductive technologies (ART) has come to rescue of such individuals and provided them with various options to beget a genetically related child.

II. MEANING AND CONCEPT OF SURROGACY

Surrogacy, the new advancement in the medical science for reproduction with the usage of womb of a woman to reproduce child for another woman. One of the most effective and efficient methods to overcome the social stigma associated with the childless couple is "surrogacy". Surrogacy is the new opportunity to have a genetically related

¹ http://monh.nic.in/final_health_ministry_annual_report_2008_09, visited on 27th December 2019

child to the couples who are unable to reproduce through artificial reproduction. It has become an alternative and attractive option for individuals and couples who wish to bring a child who is biologically related to them. The concept of surrogacy has become widely recognized all over the world. Surrogate motherhood is considered as a blessing for the infertile couples as it is revolutionary hope for having a child.² According to Black's Law Dictionary, Surrogacy is defined as "an agreement wherein a woman agrees to be artificially inseminated with the semen of another woman's husband."

The word "surrogate" is derived from a Latin word "surrogatus" meaning a "substitute". Traditionally, surrogate motherhood is generally referred to as "an agreement between a married couple who is unable to have a child because of wife's infertility, and a fertile woman who agrees to conceive the husband's child through artificial insemination, carry it to term, and surrender all parental rights in the child."

III. TYPES OF SURROGACY

Surrogacy is generally divided into three Categories that are Genetic /partial surrogacy and Gustatory/Gestational surrogacy.

In Genetic/ Partial Surrogacy, woman's egg is fertilise through artificial insemination or natural intercourse by the sperm of the male partner of the childless couple. In this case the surrogate mother act as a genetic mother of the child and plays the role of legal and social mother. This type of surrogacy often known as Traditional Surrogacy or Partial Surrogacy.

In case of Gustatory/Gestational Surrogacy, both the semen and egg are obtained from the couple or from anonymous donors, and the resultant embryo is subsequently implanted into the carrying or surrogate mother. In this kind of surrogacy the surrogate mother has no genetic link with the child. This kind of surrogacy can also be known as the Full Surrogacy.

The Surrogacy is then also further divided into two kinds based on financial compensation. First is Commercial Surrogacy and secondly Altruistic Surrogacy. In Commercial surrogacy the surrogate is usually compensated in term of money that is paid by the couple. In Altruistic Surrogacy surrogate is not financially compensated as this type of surrogacy is often practised among close friends or family members out of love and not for compensation or personal gains.

IV. HISTORICAL BACKGROUND OF SURROGACY

There are various instances that can be seen in Hindu mythology that reflect how the practice of surrogacy was conducted in ancient times. In the mythological story of Mahabharat, Gandhari who wished 100 child for her family legacy did not deliver even a single child rather delivered a semi solid material which was divided by Maharishi Vyas into 100 pieces and planted them in different pans in order to fulfil the wish of gandhari thus, the 100 Kauravas were born. The instances are also present in Bhagavata Purana, where Vishnu heard Vasudev's prayers beseeching Kansa not to kill all sons being born out of their marriage. Vishnu heard these prayers and transferred an embryo from Devaki's womb to Rohini, another wife of Vasudev. Rohini gave birth to the baby Balaram, brother of Krishna, and secretly raised the child while Vasudev and Devki told Kansa that the child was born dead.³

Similarly, Maharishi Bhardwaj who saw a divine nymph coming out of water after a bath and seeing such a beautiful woman, he felt discern and deposited his semen in pot used for yagna called Darona. This is from where Dronacharya was born and named after the vessel. Thousands of years after the biblical events in 599 AD, the 24th Trithankar, Mahavira, was born after an embryo had been transferred from one women's womb to another one's. He is one of the

² Kusum Jain, 'Surrogate Motherhood : Some Legal and Moral Problems in Bio Ethics', Vol 25 Issue 4, 1983 Journal of Indian Law Institute(546 to 558) at 547.

³ Jasdeep Kaur, "Surrogacy: A Paradox regarding Motherhood rights with Special Reference to India";, Vol. II No.1, 2012 The Legal Analyst (113 to 121) at 114.

key figures of the Jain Mythology. Devananda, wife of a Brahmin named Rishabdeva conceived him. The gods, ingeniously, transferred the embryo to the womb of Trishala.⁴

The world's second and India's first IVF baby, Kanupriya, alias Durga, was born 67 days later on October 3, 1978, through the efforts of Dr. Subhas Mukherjee and his two colleagues in Kolkata. The birth of baby Kanupriya (also known as Durga), through the novel procedure was marked by tremendous controversy.

Louise Brown, the world's first IVF baby, who was born on July 25, 1978, in the UK through the efforts of Dr. Patrick Steptoe and Dr. Robert G. Edwards. Kanupriya the world's second and India's first IVF baby, was born 67 days later on October 3, 1978 through the efforts of Dr. Subhas Mukherjee and his two colleagues in Kolkata.

V. COMERCIALIZATION OF SURROGACY IN INDIA

Reproduction is the gift of god and instead of embracing it he people are now commercialising it and making money out of it. It is hard to imagine the child as commerce but the hard reality is that the surrogacy among poor is seen as a mode of income. Babies are associated as the product of love, not money, a conception that occurs far away from any commercial activity. Across time there are instances when underprivileged parents of the society has viewed their children as potential economic assets and way of income. Likewise, the harsh reality is that the surrogacy has become a commercial business in countries like India, which is giving rise to many questions leading to political debate.

Commercial surrogacy, or "wombs for rent," is a growing business in India.⁵ In India Surrogacy because of its commercialisation is often referred by "parenthood by proxy", "womb on hire", "baby booming business", "baby firm"⁶. Surrogacy in recent times has turned a biological function of a woman's body into a money earning machine. Surrogate in countries like India are recruited by the operating agencies to make large profits. The commercialization of surrogacy is raising fears of a black market of baby-selling and turning it into a breeding farms, In India surrogacy is becoming a booming business for the underprivileged sections and to the surrogate operating firms due to the fact that surrogate mothers are easily available and the entire cost of this method is way to less as compared to other countries.

Most Indian surrogate in India are paid in instalments over a period of 9 months and rest after the delivery of baby. If they are unable to conceive they are often not paid at all and sometimes they must forfeit a portion of their fee if they face miscarriage. The hot places to find surrogate in India are Indore city in Madhya Pradesh, Mumbai in Maharashtra State, Pune, Anand town in Gujarat State, Thiruvananthapuram, Delhi and Kolkata. Many Private clinics in city of Pune, Indore, Anand and Surat have witnessed mushrooming growth. These clinics act as middlemen between the foreign couples and the willing surrogate mothers.

VI. MORAL AND EHTICAL ISSUES RELATNG TO SURROGACY

The idea behind surrogacy is a noble one as it is based on the altruistic principle of doing good to others one woman helping another woman but with the changing scenario and its commercialisation the whole idea is now moulded into business. Some of the moral and ethical issues relating to surrogacy are as follows:

- VI.I. **Complicated procedure-** Most of the women act as surrogate mothers because of the economic necessity or poverty. But do not realise the fact that the procedure of surrogacy involve complicated procedure that can cause harm to the health and life of the surrogate which can be irreparable in nature.
- VI.II. **Interest of the Child-** Surrogacy procedure often involve transfer of money to the surrogate as well as the clinic for many procedure which leads to the selection of the child on the basis of sex or traits that are provided to them on payment of certain amount of money. This often leads to the treatment of child as a product which is morally wrong and unethical in nature. The treatment often involve various issues like birth of triplets or quadruplets. Which often harm the interest of the child, as the parents may not be in a

⁴ http://www.indiaparenting.com/infertility-treatments-and-solutions/479_4466/surrogacy-the-history-and-today.html, visited on 27th December 2019

⁵ <http://www.stanford.edu/group/womenscourage/Surrogacy> , visited on 27th December 2019

⁶ Yashomati Ghosh, "Surrogacy and Law: An Affirmative Approach to Deal with the Ethical and Legal Dilemma", Vol. II.Issue 1, 2011 Journal of Law Teachers of India (83 to 92) at 84.

position to look after such number of children born against their wish. Further, surrogate children may be born with defects because of the procedure and the couple often denies the custody of child.

- VI.III. Surrogacy Degrades the Dignity of Woman-** Dignity is something that everyone cherished it's one of the basic human right. It is often argued that surrogacy degrades the inherent dignity of a woman. As it involves the use of a woman's gift of reproduction for money. They often give birth to baby which is handed over to the commissioning parents after the delivery. During the term of pregnancy, the surrogate is usually bounded by the contract signed between the parties therefore the often has no right to take any decision affecting her body and child. Moreover the surrogacy is seen as a commercial transaction because of which the surrogates tries to develop the special bond with the child during the pregnancy thus the natural mother-child bond is either absent or suppressed and the entire process
- VI.IV. Surrogacy has been equated with Prostitution-** Many people often have criticized the practise of surrogacy and associate it with the prostitution, as it involves selling of the reproductive capacity of a woman and the use of her body in return for payment of money. Further it is argued that similar to a prostitute who has no choice and control before a customer who has solicited her favour and paid money; the surrogate mother also has no choice and has to abide by all the terms and conditions put forward by the commissioning parents. In both cases one's physical services is being offered, in both cases material compensation is offered for the physical services provided.⁷
- VI.V. Exploitation of Poor Women-** Women with limited economic means in India are attracted to the quick earning ways without even realising the issues involved in it in order to fulfil the needs of their families. The presence of world class medical care facilities and cheap surrogate mothers have placed India at the forefront as the outsourcing destination for surrogacy. This practice has been subject of great criticism raising issues like "exploitation of poor women" "neo-colonialism" and "slavery of women" etc.

VII. THE SURROGACY (REGULATION) BILL, 2019

The Surrogacy (Regulation) Bill, 2019 was introduced by Dr. Harsh Vardhan in Lok Sabha on July 15, 2019. This Bill discuss about various aspects of surrogacy involving Regulation of surrogacy, Eligibility criteria for intending couple, Eligibility criteria for surrogate mother, National and State Surrogacy Boards etc. The Bill prohibits commercial surrogacy, and only allows altruistic surrogacy. This kind of surrogacy involves no monetary compensation to the surrogate mother other than the medical expenses and insurance coverage during the pregnancy. The intending couple for the surrogacy should have a 'certificate of essentiality' and a 'certificate of eligibility' issued by the appropriate authority. Which will only be accepted upon fulfilment of the certificate of proven infertility of one or both members of the intending couple from a District Medical Board, an order of parentage and custody of the surrogate child passed by a Magistrate's court and insurance coverage for a period of 16 months covering postpartum delivery complications for the surrogate.⁸

VIII. JUDICIAL RESPONSE TO SURROGACY IN INDIA

The substantial issue of surrogate arrangement was presented before the Supreme Court of India in *Baby Manji Yamada's* case, where a Japanese couple entered surrogacy contract pursuant to which Baby Manji was born to the Indian surrogate mother Mr. Yamada commissioning father of the child tried to secure travelling document to take the baby to Japan. But the Japanese Embassy in India refused to grant Maniji a Japanese passport or visa as the Japanese Civil code did not recognize surrogate children. Mr. Yamada then tried to file for an Indian passport for Maniji, under Indian law for a birth certificate requires the names of both mother and father. In the present case facts, Mr. Yamada was genetic father but ambiguity for authorities arose in case of mother's name because Baby Maniji had three mothers- commissioning mother, the anonymous egg donor, and the surrogate. Consequently, even the Indian passport was refused The Apex Court directed that the National Commission for Protection of Child Rights was the apt body to deal with this issue. Justice Mukundakan Sharma and Justice Arijit Pasayat of the Supreme Court held that the father was the genetic father of the child and was given custodial rights of the child. The Government issued the passport to

⁷ Anesh V. Pillai, "Surrogate Mother and its Challenges to the Indian Legal System", Vol.1 No.2, 2011 The Legal Analyst (89 to 93) at 92.

⁸ <http://prsindia.org/billtrack/surrogacy-regulation-bill-2019>, visited on 27th December 2019

Manaji Yamada and she returned with her grandmother. Most importantly, the Supreme Court held the validity of Surrogacy Agreement in India.

In the matter of *Jan Balaz v. Anand Municipality*, a German couple who entered into a contract with a surrogate out of which the twin children were born. Since their citizenship was being litigated in the courts the passport authorities withheld the passports. Germany does not recognize surrogacy. Therefore the Supreme Court denied the passports but granted an exit permit to the children. The German authorities finally decided to give the couple an opportunity to fight for their and their children rights. The Supreme Court of India also recommended the emergent legislation of a law on surrogacy. The Bench said that no surrogate child should undergo the difficulties faced by Leonard and Nicolas who were already two years of age by the time this decision was made and had still not been granted citizenship in any country.

IX. CONCLUSION

Surrogacy has found its place in ancient as well as in modern time, instances from Mahabharata to Bhagwat puran to other religious text can be drawn to understand the underlying concept of surrogacy. With the modern time and development of technology the meaning of surrogacy have also changed. Surrogacy is now seen as a commercial transaction between the two parties and child as a product. The changing scenario of surrogacy is bring new issues in light being, Exploitation of Women, Interest of the Child, Dignity of Woman etc. As India is becoming a booming industry for surrogacy there is a need to adopt a specific legislation for the regulation of surrogacy and protection of surrogate mothers along with the interest of the baby child born out of surrogacy from exploitation in India. Due to lack of proper legislation, both surrogate mothers and intended parents are somehow exploited and the profit is earned by middlemen and commercial agencies. Though Surrogacy bill of 2019 is being at lok Shaba but the Indian judiciary should also draft some guidelines with respect to the surrogacy till the time proper laws are not drafted.

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