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RESEARCH PAPER

Surrogacy: A Societal Boon or a Curse

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Introduction

It takes someone of a strong nature and someone with selfless love to raise a child, we call them mothers. There is a famous quote about mothers, "God cannot be everywhere so he created mothers". It takes a lot to bring up a child, take lone 9 months of carrying the child in the womb. The body of women undergoes a number of changes each time she gets pregnant and to handle the stress of undergoing those changes is a huge responsibility.

To experience parenthood is a lovely experience but sometimes it happens so that a couple cannot conceive a child, reason being one or both of them are infertile. In such cases surrogacy plays a vital role in their life. Surrogacy is an arrangement in which a woman agrees to become pregnant, carry the pregnancy to due term, and give birth to a child or children; on behalfof another person or couple, who are or will ultimately become the parents of the new-born child or children. If we look from the psychological perspective people who come under a matrimonial bond tend to have a child to complete their family and to make their bond stronger. Birth of a child creates a strong bond between the spouses who is going through a stressful marriage.

The issue of being not able to reproduce has become a common societal problem nowadays due to poor health and increasing stress. In a survey it was found that a large percentage of couples in India are facing this issue. According to the report of Indian Society Assisted Reproduction 10-14 per cent of the Indian population suffer from infertility. Nearly 27.5 Million suffer from infertility.[3]

[3] S. Ganguly& S. Unisa, *Trends of Infertility and Childlessness in India: Findings from NFHS Data*, NATIONAL CENTRE FOR BIOTECHNOLOGY INFORMATION (Jan 17, 2019, 11:05 a.m.) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4188020/.

Definition of Surrogacy

According to Black law dictionary - *An agreement wherein a women agrees to be artificially inseminated with the semen of another woman's husband.*

According to medical parlance -*A method of reproduction in which woman agrees to become pregnant using her own eggs and carry a child for another individual or couple. And in some situation surrogate mother is paid for her services.*

According to Surrogacy regulation bill 2016 – *Section 2 (zb)* *defines surrogacy as a practice whereby a woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth.*

History of Surrogacy

If we throw light upon the history of surrogacy we need to turn pages back to 16th century and look up to the Old Testament where the practice of surrogacy was first recorded. In Chapter 16 of Old Testament, it tells the story of Sarah, wife of Abraham who was unable to give birth to children so in an attempt to give him a child she offered him her servant Hagar as the mother so in most of the cases, this actually happens.

The practice is not ending here yet, in the Summarian Mesopotamia there was a kind Hammurabi who codified the law dealing with surrogacy in the 18th century. There are many more accounts which focus on surrogacy and discuss the story similar to Abhram and Sarah, where the servants and slaves in the kingdom were helping their master to bear a child.

Surrogacy is one of the common practices in Egypt. The history of Egypt notes that many of the Egyptian rulers relied on their concubines to help them producing an offspring.

The western history also gives genesis about the surrogacy. Stories of Spanish monarch who relied upon surrogate mother, as the story tells about the king who used to have sexual relationships with several surrogate mothers and the one who offers baby boy will ask to be the nanny of the child and help in taking care of the child, later on, that child becomes the ruler of the throne.

Even Indian history mentions surrogacy, in ancient time several stories of Mahabharata also give the instance of surrogacy. Gandhari was unable to bear a child and she delivered a semi-solid material which was later divide into 100 pieces by Maharishi Vyas and planted and out of which 100 Kauravas were born, after thousands of year Lord Mahavir was also born through surrogacy where embryo was transferred from one woman to another.

World's Second baby born through the procedure of surrogacy, named Kanupriya ;also known as Durga, was born through IVF with the strong efforts of Dr. Mukherjee and two of his colleagues in Kolkata.

Types of Surrogacy

When it comes to the types of surrogacy, broadly there are two types one is traditional and the other is gestational, through these two ways an embryo can be created. Traditional surrogacy is also known as natural and partial surrogacy and gestational surrogacy is also known as full surrogacy. Commercial surrogacy and altruistic surrogacy are two more kinds of surrogacy.

- Traditional Surrogacy

Traditional Surrogacy is seen as one of the ancient methods and in this method, the woman can get pregnant through the methods like sexual intercourse, intrauterine insemination (IUI), In Vitro Fertilisation (IVF). This kind of surrogacy is also known as Partial surrogacy because there is a biological link of the mother with the child she carries in her womb. This genetic relationship lately creates a kind of emotional and legal connection. Since the insemination is done by the father or the donor or any other male person. After insemination, the surrogate will be the biological mother and therefore have parental rights and to avoid any such issue or contradiction contract is made between surrogate and parties seeking the child. For this legal procedure is required to terminate the parental rights.

- Gestational Surrogacy

In this kind of surrogacy, the surrogate mother acts as a carrier the surrogate mother is not genetically associated with the child, unlike the traditional method. In this method the intended parents provide with all the biological assistance which is needed to produce the embryo but the only requirement is of gestational surrogate. The overall child is created form the egg and the sperm of the intended parents.

- Commercial Surrogacy

In Commercial surrogacy the mother carries the child in her womb for some other party and after delivering the child in return the surrogate mother gets monetary value, the concept is also prevalent with the name "womb on rent". In 2002 commercial surrogacy was legalized in India and this legalization has fuelled the growth of surrogacy and a lot of foreign couples were attracted towards India who wished to seek help of this procedure.

- Altruistic Surrogacy

In this type of surrogacy, no formal contract is made between the parties or the couples the baby produced out of this kind of surrogacy is done by taking the help of close family or relative where no such monetary value plays any kind of role only the medical cost and a kind of reimbursement is provided to the surrogate mother so that she can start her life after delivering child and she should not bear any kind of monetary payment from her side in helping out of the another family.

Legislative aspect ofSurrogacy in India

India is immerging as a leader in international commercial surrogacy market. Surrogacy in India is much simpler and cost effective than anywhere else in the world. 'Surrogacy Agreement', is the only base which governs the parties to surrogacy. Therefore the commissioning parents are required to be attentive while signing the agreement, so that the surrogacy agreement is not held void in the court of law. Every agreement, should express purpose and situations, the need of surrogacy, free will of surrogate, details about the surrogate and the terms on which the surrogate agrees to gestate the child, etc. Assisted Reproductive Bill, 2010 was enacted considering the growing number of surrogacy cases in India and the challenges that the surrogacy would face in future, the government of India decided to come up with a law which would govern the surrogacy and ART in India. The highlights of the ART Bill have been mentioned below:

1. If a foreigner or a foreign couple seeks the surrogacy arrangement in India, then the child even though born in India shall not be an Indian citizen.

2. Section 34(3) legalised commercial surrogacy by providing that the surrogate mother may receive monetary compensation for carrying the child in addition to healthcare and treatment expenses during pregnancy.

3. The surrogate mother will abandon all parental rights over the child once the amount is transferred.

4. The Bill also prescribesthe age-limit for a surrogate mother i.e. between 21-35 years and further provides that no woman shall act as a surrogate mother for more than five successful live births in her life, including her own children.

5. The surrogacy agreement entered into, by both the couple or individual seeking surrogacy and the surrogate mother shall be legally enforceable.

6. If the foreign party seeking surrogacy fails to take delivery of the child born to the surrogate mother commissioned by the foreign party, the local guardian shall be legally bound to take the custody of the child.

7. It makes it obligatory to take delivery of the child and be free to hand the child over to an adoption agency, if the commissioned party or their legal representative fails to claim the child with Constitution of Authorities to regulate assisted reproductive technologies; establishment of National Advisory Board in one month of the birth of the child.

8. The Bill further provides the Constitution of Authorities to regulate assisted reproductive technologies; establishment of National Advisory Board.

9. The ART Bill provides Rights and duties of patients, donors, surrogates and children.

10. Offences and Penalties for violation of the rules of this Act.

The importance of the ART Bill can be understood by the fact that a committee led by Prof. Ram GopalYadav (M.P.,RajyaSabha) strongly recommended in its report to RajyaSabha that the ART Bill be brought before the Surrogacy Bill.[4]

In the year 2002 commercial surrogacy was made legal in India and it became a hub of people of surrogacy for the people from outside India and this popularised surrogacy popular in females coming from a poor background, who were renting out there womb and made this as their main source of income. As a consequencethe females were treated as an object for bearing up the child and facedexploitation.Presently, there are no laws governing surrogacy such as to protect the rights of the surrogate mothers, the child and the parents.People pay them a handsome amount and take the child but on the other side no protection and care is provided to the women for the health and mental condition who is undergoing changes in her body and the metal stress which she is facing just to earn few chunks of money. Children are a result of love and affection but due to boom in commercial surrogacy in India they are treated in terms of monetary value.

In 2005, the Indian Council of Medical Research (ICMR) issued guidelines to regulate surrogacy arrangements.[5] The guidelines stated that the surrogate mother would be entitled to monetary compensation,the value of the same shall be decided by the couple and the surrogate mother. The guidelines also specified that the surrogate mother cannot donate her own egg for the surrogacy and that she must relinquish from all the parental rights related to the surrogate child.

[4] RajyaSabha Secretariat, 102ndreport on The Surrogacy Regulation Bill(2017).
[5] Indian Council of Medical Research,National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, (2005).

In 2008, in the case of Baby Manji Yamada; the Supreme Court of India highlighted the lack of regulation for surrogacy in India.[6] In the year 2009, the Law Commission of India in its report observed that surrogacy arrangements in India were being exploited by foreign nationals, and the lack of a comprehensive legal framework addressing surrogacy could lead to exploitation of poor women acting as surrogate mothers.[7] Further, the Law Commission recommended prohibiting commercial surrogacy, allowing altruistic surrogacy and enacting a law to regulate matters related to surrogacy. In 2015, a government notification prohibited surrogacy for foreign nationals.[8] A committee of experts was setup and the said committee drafted "The Surrogacy (Regulations) Bill, 2016". The said bill was passed by the LokSabha in December, 2018 and is yet to be passed by the RajyaSabha.

In the year 2018,the Indian Government, through a notification; banned commercial surrogacy in the country because of the exploitationfaced by the woman. The only alternative left with the people was of altruistic surrogacy (a process where the surrogacy can be done by the close relative or close friends of family and no contract and monetary value is exchanged except for the nominal amount of expenses of bearing up the child).

2016 bill brought changes in terms of surrogacy, altruistic surrogacy was allowed to the couples who are married for 5 years and are still having issues in bearing up a child, this bill also results in setting up of the national and state board related to surrogacy and appropriate authorities were set up to look after the practice of surrogacy. These boards also provide a certificate to the intended parties.

Recommendations

The Surrogacy Bill, 2016 misses out on certain points and we would like to highlight those along with certain recommendations. Firstly, the Bill only covers the Surrogacy clinics. It's worth noting here that, there are no separate surrogacy clinics as such and cases of surrogacy are generally monitored by the IVF clinics which have been kept out of the purview of the Bill and hence it would make it difficult to monitor the cases of surrogacy. In this regards the recommendation of the committee in the 102nd report to the RajyaSabha that the ART Bill be brought before the surrogacy Bill must be strongly considered.

[6] Baby Manji Yamada vs. Union of India and Another; (2008) 13 SCC 518.
[7] Law Commission of India, Report No. 228:Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy (2009).
[8] Ministry of Health and Family Welfare,Instructions regarding commissioning of surrogacy (2015).

Secondly, the "right to seek abortion or medical termination of pregnancy" is a right of every Indian woman ensured by the Medical Termination of Pregnancy Act. Therefore, the condition of authorization for same from appropriate authority before performing abortion is unnecessary and unreasonable.

Thirdly, the restriction on legally married couples to be married for minimum five years before seeking the methods of surrogacy to have child is unreasonable and humiliating. Once it is confirmed that either one or both of the spouses is incapable of fertility then it is absolutely unreasonable to restrict them for five years or so before they can finally have a child.

Fourthly, the bill bans commercial surrogacy for a number of classes. The bill aims to control exploitation and safeguard interests of poor women who become surrogates for money, but the potential for exploitation is linked to lack of regulatory oversight and legal protection to these women. In that case, the legislation should provide for better regulations and legal protection to the women instead of a complete ban on the commercial surrogacy. The government's decision to regulate surrogacy by restricting it toaltruism within the family of the couple exploringthe option is unreasonable. The commercial surrogacy shall be regulated in a better way to stop exploitation of the women. The Bill only arbitrarily exploits them by pulling out the only source of income for those women engaged in such surrogacy arrangements. "Permitting women to provide reproductive labour for free to another person but preventing them from being paid for their reproductive labour is grossly unfair and arbitrary," the report stated.

Fifthly, after the ruling in the LGBT case was given by the apex court of India it has changed the lives of millions of individuals who were treated differently by the Indian society. Still the LGBT couples have been abridged fromthe right to have a child through surrogacy, the Surrogacy regulation 2016 bill still discriminates against the LGBT couples. On 6th September 2018, five judges bench passed the judgment and Justice InduMalhotra, one amongst reading the verdict said: *"history owes an apology to the members ofthis (LGBTQIA) community". Even* after this judgment, the surrogacy regulation has brought no amendment for the LGBT couples, before passing the legislation. It is to be kept in mind that process like adoption and surrogacy are few last options in the hands of the aspiring parents from the community and now when the apex court has provided them with a legal recognition then the bill should also give them a place. In this case the Bill violates Article 14 ensured to the LGBT community like any other person in India. Hence, this needs a correction through an immediate amendment in the Bill before being passed by the parliament.

Conclusion

Surrogacy has been a method of begetting a child since the ancient times. With the development of science and technology it has become only easier to perform the procedure. With time, it is being used by anyone who wishes to have a child and not just the ones facing the issue of infertility. As a result the increasing use of the procedure has raised certain legal, ethical and moral concerns, the exploitation of the surrogate mother being one of the primary concerns in the commercial surrogacy procedure. India legalised commercial surrogacy in 2002 and after a really short span of time in 2018 it has banned the commercialisation of the procedure and only allows altruistic procedure.This ban is a humiliating step for those women who relied on surrogacy as their primary source of income. This ban comes as a surprising step in a country where prostitution is a legal practice.This step only creates room for denial of legitimate compensation to the women for their reproductive labour. The exclusion of the LGBT community from the purview of the Surrogacy Bill raises constitutional concerns.In the light of the Supreme Court's verdict on homosexuality the surrogacy bill must have made certain special provisions concerning the LGBT community. The Surrogacy Bill is a substantial step in the field and the legislation should be kept in line with the present needs. Surrogacy has both positive and negative effects. If wisely regulated, it can bring happiness to millions of couples.

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