

## **SURROGACY: A SOCIO LEGAL ISSUE AND CONTROVERSIES INVOLVED**

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### **ABSTRACT**

Surrogacy: It is an agreement whereby a woman agrees to give birth to a child which biologically belongs to the intended parents with whom the contract has been signed. The surrogate mother here agrees to become pregnant and give birth to the child. This practice is usually practiced when there is no probability of getting a baby due to pregnancy risk or when it is medically impossible for the intended couple to have a traditional delivery. The surrogacy (regulation) bill 2019 defines surrogacy as “where a woman gives birth to a child for intending couple with the intention to hand over the child after the birth to the intended couple”. In Indian scenario where having young ones are considered as a kind of assurance in old age by the parents, this practice grew up. On 3<sup>rd</sup> October 1978 India saw its first child through IVF technology (In Vitro Fertilization) name Kanupriya (Durga) in Kolkata. WHO described “infertility” as inability to conceive a child? In Indian context surrogacy also prevails due to lack of information, poverty, lack of education, contents in movies, advertisements etc. The author in this case would bring on some law commission reports and same technicalities involved in socio legal aspect, further the 2019 bill passed bans all types of international surrogacy and prohibits commercial surrogacy, but allows altruistic surrogacy in which in no monetary compensation is involved. However, surrogacy is only permitted just in case if there is proven infertility or in any other extreme circumstances as stated within the bill the bill. This paper aims to throw light on the historical aspects of surrogacy in brief especially the Manji case of 2008, show interlink age between human rights and surrogacy the ethical and moral aspects with support of appropriate case laws and a comparative study of states around the globe. Further, this paper will specifically focus on the legal aspects of surrogacy related to provisions related to Constitution, Indian Contract Act 1872, and therefore discrepancies involved.

**Keywords:** Surrogacy, Intended Parents, Surrogacy (Regulation) Bill 2019, Assisted Reproductive Technology, Infertility, Surrogacy Contract, Manji case 2008, In Vitro Fertilization.

## INTRODUCTION

*“He is my son’; ‘No he is mine’. After hearing both the ladies, the King delivered his judgment. ‘Divide the living child into two, and give half to one and half to the other’”<sup>i</sup>*

Surrogacy in past times has become a blessing for childless parents to have their own children. In the Indian context, women who haven’t been able to conceive a child have been stigmatized which ultimately resulted in isolation and at times they are victim of domestic violence. As Indian society has its roots entwined with patriarchy, where for every mistake woman are held responsible. In surrogacy cases my times has been seen that men suffer from infertility and the women is often blamed of. The government in light of the same on getting repeated complaints on this specific issue has made an attempt to pass Surrogacy (regulation) Bill 2019, which was further referred to a select committee to look upon. The 2019 bill, which bans commercial surrogacy and surrogacy for foreign national defines altruistic surrogacy which “involves no monetary compensation to the surrogate mother other than the medical expenses and insurance coverage during the pregnancy”<sup>ii</sup>.

This step is by the authority is taken as a result a famous dispute that led to many debates and discussion on the Baby Manji case<sup>iii</sup>. A Japanese couple who resorted to surrogacy as a result of not being able to conceive, divorced before the child, as a result both the parties were not in a position to conceive the child, this led to a dilemma in minds of the regulating authorities. The understanding of a common man is not sufficient enough to understand this complicated issue and intricacies involved in it, even after having a broader definition which is given. Beside these issues, exploitation cases are being frequently reported of poor women which makes the government to modify the existing laws and work upon it. The author in this paper would like to highlight the drawbacks in the existing system and also would like to focus deeply on the issues faced by women after the surrogacy tenure is over, as it is extremely difficult for women

to maintain her health for a low economic background. There are still many questions of concern related to women and their protection against surrogacy. The lack of awareness related to surrogacy rights is a huge issue in Indian scenario. The governments have tried spreading awareness through various campaigns but the paper will illustrate to what extent this has been successful to its fullest. For many people in the world surrogacy is like a noble process for getting a child which is true but it is inconsistent with human dignity as women use their womb for financial profits just to meet their daily needs and offers her womb as an incubator for someone else child. The prevailing situation which is already quite dull also holds the potential to create major problems in future. The author by this statement nowhere is against surrogacy but is just trying to highlight the position of women in the society. Recently in February 2020 the Parliament has approved the select committee suggestions and passed the Surrogacy (Regulation) Bill 2020.<sup>iv</sup>

The bill proposes the following things:

- 1) The bill allows a woman who is willing to become surrogate mother that would benefit widows and divorced women besides infertile Indian couple.
- 2) Intending couple should not abandon the child born out of surrogacy under any condition.
- 3) The child born should be entitled all rights and privileges that a normal child is entitled to.
- 4) The bill seeks to regulate the functioning of the infertility clinics.

The bill however seeks to solve majority of the problems but still lacks on the moral, ethical and religious fronts. The approach through which the law tries to deal with the rights of surrogates are ambiguous nature and do not exactly establish the rights these surrogates as there is no specific legislation in relation with the same.

## **HISTORICAL ASPECTS OF SURROGACY**

In India, having children has always been a blessing to couples since ages and continuity of the family has been a major concern in Hindu culture<sup>v</sup>. If we take a close look at our history man has always suffered from infertility “Women were created to be mothers and man to be fathers (MANU)<sup>vi</sup>. Manu says “the perfect man consists of his wife, himself and his off-spring”.

Surrogacy has been practiced (method unknown) since Ramayana and ancient times. At times when the male member suffered from some defects, in those days another member of the family would act on his behalf and when female suffered there was always a chance of bringing another wife<sup>vii</sup>. There were many such problems faced by people in history also where children were either adopted or satisfied his needs by resorting to Niyoga.<sup>viii</sup> Example being, the birth lord Krishna. In biblical times the first mention of surrogacy is in “The Book of Genesis” in the story of Sarah and Abraham<sup>ix</sup>. Sarah and Abraham were a married couple but could not conceive their own, child, so Sarah turned to her servant Hagar to be the mother of Abraham’s child. This is a case of traditional surrogacy, where the surrogate uses her own egg in the child she’s carrying for intended parents. So, the desire of having children for the formation of family lineage is the main reason, for what the artificial means for procreation was invented.

### **THE ASSISTED REPRODUCTIVE TECHNOLOGY (ART)**

As per definition given by the Centre for disease control and prevention (CDS) ART includes all fertility treatments in which both egg and embryos are handled. In general terms it involves surgically removing eggs and fusing it with male gemmate in lab and then putting it back in women’s body. There are many concerns and question that needs to be answered. In light of the same the present government has passed ART (Regulation) Bill 2020. The bill aims to benefit and regulate practices related to the technology and gives a sense of security to the couple who are opting for it. The bill makes provisions for safe and ethical practice of assisted reproductive technology services in the country. Through the bill, the National Board, the State Boards, the National Registry and the State Registration Authorities respectively will regulate and supervise assisted reproductive technology clinics and assisted reproductive technology banks<sup>x</sup>. The main highlighting difference between ART and Surrogacy is, ART include both removing eggs and sperms from their respective bodies and then are fused outside the body to make embryo, which are again implanted in women’s body. While in surrogacy male sperm is implanted in female body.

Although with this specific bill the government has also in its recent bills passed Medical Termination of Pregnancy Bill 2020 which will discussed shortly.

***Key features of Assisted Reproductive Technology Bill 2020<sup>xi</sup>.***

The bill makes provision for ethical practices, ensures confidentiality and protect rights of women and child.

A National Board will be set which will give the code of conduct to the ART clinics working in the country. The Board will also formulate minimum standards for laboratory and diagnostic equipment and practices to be followed.

Regulatory boards to be set up at state level which will regulate and monitor the working of these clinics.

A national registry and registration authority, which will maintain a database to assist the national Board to perform its functions.

The bill also lays down certain punishments for those practicing sales of human embryo, sex selection.

**NEED FOR LEGISLATIONS IN INDIA**

In recent times we have seen many legislations coming on women protection, child abuse protection against minorities. One of the reasons in current scenario is the political situation of the suppressed classes in the country, so in order to protect their rights and put them in safe situation in other words save them for exploitation these legislations are passed. There has been an exponential growth in ART in past few years in India. India being one of the prime centres of ART and fertilization it is very much necessary for women and more specifically the rights of children needs to be taken care of. Moreover in India it has been many times seen due to lack of rules and regulation the surrogates have been constantly harassed as most of the women working in surrogacy industry and some who work for infertility clinics are victims of poverty, lack of education, lack of knowledge, socially backward classes and etc. In many households it has been seen that the male (husband) is unemployed or underemployed so in order to pay of loans or debt women are seen risking their lives and working, however a legislation says that a surrogate is only allowed to take 4-5 cases including her own children. Although, India has become a star in fertilization world, yet there are no rigid and specific legislations in the country. It has been constantly seen over a period of time legislations in India on this topic has been constantly delayed or neglected as this bill passed hasn't become an act since 2016. The

only step taken is banning commercial surrogacy and nothing else. The regulation bill of 2019, although banning commercial but allowing altruistic surrogacy in which the provision is only a close relative can only be a surrogate without any monetary compensation but only entitled to get medical expenses would not serve any purpose as people will find out some or the other way. However, the definition of close relative has not defined anywhere in bill which led to many ambiguities in minds of people. The select committee has precisely justified the provision related to close relative as proposed in the bill relying upon the provision under Transplantation of Human Organs and Tissues Act 1994<sup>xii</sup>.

## **LEGAL ISSUES RELATED TO SURROGACY IN INDIA**

This section of the paper aims to provide a introduction of legal dimension of surrogacy in India. The author attempts to strike a balance between social need of surrogacy and legal aspects of surrogacy. For the same we shall look into The Constitution of India, Indian Contracts Act 1872, Medical Termination of Pregnancy (Bill) 2020. Various law commission reports also has a say about surrogacy in India. Law commission in its 228<sup>th</sup> report gave certain suggestion but failed to give explanation on the same. The report that was given was highly on superficial level and did not answer any major question related to the topic, in current situation where both commercial as well as international surrogacy are banned the policy drafters are demanded to look deeper into condition of women and children born out of surrogacy recent times. In 1978 since the 2<sup>nd</sup> child through IVF was born in India the question is unanswered by the authorities. A major issue in this particular area of research is pregnancy during divorce what if the child is in the womb of a surrogate and the intended couple get divorce, then who will take the burden of the child born.

Transfer of Property, Section 13 talks about Transfer for benefit of unborn person “where on the transfer of property, an interest therein is created for benefit of a person not in existence at the date of transfer”. The intended parents must transfer all their property in the name of the child in the womb of surrogate to satisfy the objective and means of contract. Transfer of property means “by act which a living person conveys property, in present or in future , to one or more other living person.”<sup>xiii</sup>

## CONTRACTUAL ASPECTS RELATED TO SURROGACY

Surrogacy agreements are made by a contract between two parties as there is no specific law related to surrogacy. According to 228<sup>th</sup> law commission report on surrogacy stated that surrogacy agreements are to be done under Indian Contract Act 1872<sup>xiv</sup>. Section 23 of ICA States, “what considerations and objects are unlawful and what not, the consideration or object of an agreement is lawful, unless it is Forbidden by law; or is of such nature, that if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; the court regards it as Immoral, or opposed to public policy”.<sup>xv</sup> Surrogacy agreements under the same section can be declared void if the consideration is opposed to public policy. The most convenient way to a make a contract is a proposal that has to be made by one party followed by the acceptance by another contracting party. Chapter II Section 10 of Indian Contract Act lay down the essentials of contract. All agreements in the contract should be by free consent of parties, for a lawful consideration and with a lawful object and should not be expressly declared void.

Surrogacy contracts can be defined under private contract, based on which a surrogate (married or unmarried) has to deliver a child by any of the technologies and give the baby back to the intended parents. Most of the times the contract is between the surrogate and intended parents, which in a rational thinker’s mind would not fit. As the contract should be between three parties involving infertility clinic, surrogate, intended parents. This would give a sense of security to the surrogate and also would have a backup in case of any emergency or if the parents turn over. The objective behind any contract is two mainly to define the rights and duties of both parties, in the present context we are talking about rights and duties of surrogate and intended parents. The essentials of contracts are laid down under Section 10<sup>xvi</sup> and Section 56<sup>xvii</sup> of the Indian Contract Act. Section 2(aa) of Assisted Reproductive Technology Bill defines surrogacy contract as “where a woman agrees to a contract only if the gametes are neither of her own or of her husband (if married)”. To constitute valid contract both parties should agree on the same point in the same sense “consensus ad-idem” which means agreeing on the same thing is the same sense<sup>xviii</sup>. In many surrogacy agreements it is often seen that surrogates as well as the intended parents are restrained under reasonable restrictions which they have to abide by. The contract law also deals when there is a breach of contract. In surrogacy contracts it has been seen that most of the parties breach the contract either before or after the fertilization. Section

39 deals with anticipatory breach and discharge of contracts by breach. Further section 64 and 73 deals with the compensation part due to breach of contract.

## CONSTITUTIONAL PROVISIONS

The constitution of India which guarantees equal rights and equal protection of its citizen before law does not directly include reproductive rights under any of its articles but indirectly it has its mention in the Preamble and part III of constitution which specifically deals with fundamental rights of its citizens. Preamble secures social, political and economic justice that comes with the protection of basic human rights<sup>xxix</sup>. Reproductive rights are part of basic human rights and without its protection the main goal of social justice cannot be accomplished.<sup>xx</sup> Article 16 of Universal declaration states that “All man and women of full age without any restriction of age, race, religion, caste have basic rights to marry and form a family”. The key provisions of the constitution in relation with human rights and dignity are Article 14,15,21,23. Equal protection before law<sup>xxi</sup>. Prohibition of discrimination on the grounds race, gender<sup>xxii</sup>. Human trafficking, forced labor is prohibited and considered as offence (Article 23). The right to reproduction has been classified under article 21 of the Indian Constitution by the court in case of *BK Parthasarthi v Government of Andhra Pradesh*<sup>xxiii</sup>. The court held that Right to Privacy includes Right to Reproductive autonomy of individual. This decision was in sync with the decision given by the US Court in case of *Jack Skinner v State of Oklahoma*<sup>xxiv</sup>. In another case of *Suchita Srivastava v Chandigarh Administration*<sup>xxv</sup> the apex court held women right to make reproductive choices part of her personal liberty under Article 21. Hence we can see that the definition of personal liberty and human rights according to the Article discussed above is quite wider in nature and is difficult to interpret at once, therefore in recent times we have seen the apex court interpreting the meaning of personal liberty and scope of Article 21 in the constitution.

## SUGGESTION AND CONCLUSION

The author after analyzing the current scenario of the surrogacy industry comes to a conclusion that there is nothing in the Indian Contract Act 1872 which explicitly deals with surrogacy

contracts/ transaction. The term public policy which is stated under section 23 may not be applicable in case of surrogacy, the reason being the term public policy has not been defined anywhere. The Contract Act although as failed to provide remedies for the breach of contract after implantation of the embryo, breach of contract while the surrogate is carrying the child, and also breach of contract after the birth of the child. The new surrogacy bill of 2020 which has been introduced after the select committee report is also on the superficial level and does not answer our concerns. The imprisonment and penalties provided in the Bill portray the insensitivity of the people responsible for drafting and having it passed in Parliament, towards persons connected to helping forlorn couples. An imprisonment of 10 years and penalty up to Rs 10 lakh is totally inconsistent with the principles of proportionality as laid down in various judgments of the Supreme Court. The government has look after such issues that can make a huge impact on the society. Also, the author would like highlight that there are no inter regulatory bodies in India as are in some of the countries e.g UK. Presence of these bodies can help eliminate to problems and would act as a safe guard and would also administer quicker justice. There are several attempts made to implement legislation on the same but somehow failed, seeing the current scenario and condition of poor women as well as the young ones born there lies an urgent need for a legislation which takes care of all these aspects. The Indian Contract Act 1872, The Constitution of India and various other legislations have failed to serve the purpose, as constantly referring to these pieces of laws and every we look upon them we see a different perspective. So, a proper rigid legislation on laws which will protect the rights and lives of these innocent women against exploitation should be made. It has also been seen that surrogate mothers due to poverty are unable to recover once they are out of that contract as, majority of the money earned goes in either paying debts or in need of her family which ultimately risks the lives of women. With no laws governing the area and lack of information, awareness about the issues the infertility clinics have also started imposing their own rules and regulation which ultimately harms the intended parents. In India surrogacy is prevalent practice as here we give lot more importance to our family asset, including family property, in relation with money that force people to continue with their genes and not opt for adoption which is also a great idea if implemented as it would also give home to orphans. Keeping in view of legislation in the country for this particular aspect we see that many legislations that are prevalent not in a direct sense but says something about unborn child and human rights. So, looking at this current situation where the capitalist is ruling this world and poor, minorities

are been constantly suppressed there is an urgent need of legislation that will cover all the aspects of contract as well as safeguard the rights of each party involved in this whole process.

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