

Surrogacy-The Indian Perspective

*Shipra*¹

*Soham Bandyopadhyaya*²

Surrogacy or Assisted Reproductive Technologies (ART) are usually taken as the side option besides that of an adoption. One of the main targets of the childless couple who want surrogacy is the veritable and informed consent. It can also be called as taking someone's womb for rent. With it there are many issues including the main one that is to take care of the emotional content of the surrogate mother. When tested it was found that the mothers go through a lot of tension and problems related to pregnancy and its complications, religious, financial as well as family problems and many more. So, overall this face is a total negative phase for the surrogate mothers as it's not a kind of wealthy experience during that period. Apart from all these the other dangers during this period can be fear of husbands in their own marital relationships, uncertainty about telling her own child about the type of pregnancy, doubt of the acceptance by the society of that child and whether suitable money is to be paid to the mother by their real parents. Also, due to the media coverage it becomes a social problem rather than an individual one. Surrogacy contracts include implied contract of baby selling which makes it unenforceable which is because of the present laws pertaining to adoption. It makes illegal for a mother giving birth to a child to receive an extra payment in lieu of giving her consent with respect to giving up her right over the baby according to the laws of certain states. Reasons like failure of embryo to transplant, repeated miscarriages, pelvic disorder or hysterectomy, or high blood pressure or even heart or liver diseases as well as high sugar are responsible for some women to not be able to carry the baby till the end of the term because these reasons often cause miscarriage of the baby in between the pregnancy period which is usually of nine months (in some cases, it may be more or even less than nine months depending on the physical, economical, psychological and the various other factors by which the care of the

¹ Student, School of Law, KIIT University

² Student, School of Law, KIIT University

mother and the baby is taken accordingly) leading to non-payment of money to the surrogate mother as per the terms and conditions of the contract. In India Surrogacy was known and practiced from time immemorial, even in the times of Mahabharata, Gandhari³ the wife of King Dhritarashtra had conceived but the pregnancy went on nearly for two years after which she delivered a mass ⁴(Mole)⁵ which had 101 cells out of which 100 developed into male child and 1 into girl child and it happened with the help of Lord Vyasa who had put those cells in some nutrient solution.⁶Hindu mythology also talks about surrogacy during the time of Lord Krishna but notably it does not talk about Commercial Surrogacy.⁷Lutheranism or the a group of protestant Christianity which believes in the ideologies of Martin Luther are of the view that procreation done within the boundary of marriage is a blessing thus infertility treatments or solutions are treated as licit in this sect whereas Roman Catholics are of the opposite view that procreation within the stricter terms of marriage is only licit and other forms like the concept of Artificial Insemination in Vitro Fertilisation is morally incorrect. Islam or Abrahamic Monotheistic Religion which happens to be one of the significant religions in the world with over 23% followers of the total population believes that surrogacy is a form of adultery which leads to confusion in the lineage. Judaism claims that surrogacy degrades motherhood as well as it does promote imbalance of power between rich commissioning parents and poor surrogate parents but still it does believe that infertility is a saddening element in the mind of a couple thus to remove this if surrogacy is needed then it is legitimate.

There are basically two stand points from where a contract of surrogacy can be viewed, one is commercial surrogacy and another one is altruistic surrogacy. In commercial surrogacy a baby or a life who has been granted various fundamental

³Dr. Lily Srivastava-Law and Medicine-Page 86

⁴http://twocircles.net/2011oct11/surrogacy_mirror_hinduism_and_islam.html#.V8gyISnbvIU

⁵Karthik B Rao- Mahabharata Code-

⁶The Hindu-October 30,2012

⁷Religious perspective-Appendix F- Princeton University.-M.Charles

rights by the Indian constitution is viewed as a commodity for the purpose of economic gain whereas in the other segment a baby is not considered as a commodity and thus a baby is not up for sale. Commercial Surrogacy is an aspect in which many jurists, medical professionals are of the view that the element of coercion is there by the virtue of economic imbalances in the Indian society that is women due to their financial constraints are forced to sell their womb to generate earning for their family and it can be termed as exploitation as in this situation these women lack the bargaining power in comparison to the economically well settled couples who are opting for surrogate baby. Thus the element of coercion is present and it adds to the fact that free consent is absent thus one major ingredient of a valid contract is lacking making it a voidable contract. Some authors and jurists like Dworkin interpret the concept of rights as a person has the right to do wrong and then correct his mistake even without states intervention but if at all these types of arguments are taken into account then also it cannot stand valid in the eyes of the law as surrogacy is not only regarding the surrogate mother but also regarding the safe security and other issues concerning the child also.

Surrogacy or altruistic surrogacy although being legal but still for countries like India, Bangladesh and other developing countries it can be deemed as illegal as most of the surrogate mothers are not will full surrogate mothers as the society in these types of countries are basically patriarchal in nature and thus a woman can be socially forced to be a surrogate mother for family members, friends, relatives and for other kind of social relations. To get the feeling of motherhood, a woman agrees for a surrogate child but many a times it is seen that in the name of male ego and due to male chauvinistic attitude and to hide the problem of infertility in men, women are forced to opt for surrogate Childs.

In the normal course of pregnancy there is a significant mental attachment of the mother to that of the baby which starts right after the beginning of pregnancy but in surrogacy in this significant bond of maternal attachment is absent.⁸The maternal attachment between the pregnant woman and the child is called significant as this

⁸ Iranian Journal of reproductive Medicine-PMCID: PMC4126251

attachment leads to proper growth and healthy status of the baby inside the womb as the baby derives its foods and nutrients required for growth and birth are derived from the mothers body and there plays an important role of the mental condition or emotional attachment of the mother. Surrogacy ruptures this significant bond between the two often resulting to the abnormalities in the birth of the child. Various other Socio-economic problems are being faced by women who agrees for surrogacy which are mainly that the husband of the surrogate mother refused to pay money or even look after his wife during the period of surrogacy on the ground that it is not his baby; even complications like excessive bleeding during the period of surrogacy which is a major health issue also arises; even fear of non-payment of money by the adoptive parents are also a constant fear for the surrogate mother as generally they belong from a lower strata of the society.⁹ Agencies which are dealing with surrogacy often subject the surrogate mother to a quantum of questions including personal life, criminal records, and medical backgrounds etc. which definitely push the surrogate mother to an uncomfortable situation and if often occurs that the surrogate mother is subjected to constant supervision of the adoptive family.

Surrogate mothers from the beginning expect that the relationship between the two families will be cordial and healthy even after the birth of the child and handing off the custody of the child. Therefore it happens that the woman who gave birth to the child gets deprived of the facilities which are required even after the birth of the child especially the medical facilities and also she often gets deprived the rights of seeing the child to whom she gave birth. Thus many a surrogates does explains this situation as exploitation of theirs facilities and rights. Conflict between the parents happen over custody of the Child which is more devastating and troublesome for the surrogate mother and mainly this situation happens if the child is born with disability. Those situations gives rise to the feeling that the child is a commodity and not a life which the constitution gives certain rights. But the sadness is that surrogacy being a new concept and socio-legal battles arising out of it are also new thus there is a complete dearth of legislations and civil societies also tend to ignore

⁹ Paper by Iona Institute-The ethical Case against Surrogate Motherhood: What we can learn from the law of other European Countries.

these issues. Moreover many conspiracy theories have also arisen and the most prominent one being the trafficking conspiracy. According to the ¹⁰US State Attorney Office and Federal Bureau of Investigations reports unveiled a conspiracy of US Attorneys specialising in reproductive law that use Gestational Carriers to create inventory of unborn babies that would sell for a huge amount of moneys. As of 2008 reports there are about 3000 surrogacy clinics in India which gave India about 30 percent rise in the medical tourism sector and according to another report of 2006 , around 445\$ billion business have been generated in India. Given the amount of money involved in this trade or in this sector it seems to be lucrative for Indian families to plunge into this sector for making some money but for few this is not an offer or an option but for them it's a compulsion to feed the hungry mouths in the family.

While there is a dearth of local laws with regard to surrogacy there are certain parameters and certain norms, although very minimal in number does exist in this regard. Council of Europe has not written any treaty specifically on the issue of surrogacy but laws from other treaties does provide for a consistent stand on surrogacy laws. But Human dignity is kept as the core value or principle in this regard which also gives foundation for freedom, justice, equality and many more. With the growth of the need of surrogacy it has seen the darker side too that is mis-utilisation of surrogacy for sex determination and opting for mainly male child by the adopting parents. In the Hague Convention and in the Council of European Convention it has been stated out that no one shall be deprived of the any financial or other gain relating any activity with respect to adaptation of child as it would certainly mean degradation of the dignity of the child. Although there is a substantial difference between Surrogacy and Adaptation is there which is in adaptation the aim is to obtain a family for the baby whereas in surrogacy the aim is to obtain a baby for a family but this concept does gives a shape to the surrogacy initiatives at the International level.

¹⁰Paper by Iona Institute-The ethical Case against Surrogate Motherhood: What we can learn from the law of other European Countries. Page No.-11

In a symbolic case named ¹¹S.H v Austria, the grand chamber judged that the prohibition of IVF doesn't necessarily breach right to life and right to family and other private rights. In another case named Pini and others vs. Romania the court stated that the interest of the child is more important than others as the intention should be to provide a family to the child and not child to a family. Consistently if these are taken into view that these does form a solid structure to form an International convention for treaty.

Most Countries of Europe realised the dangers of surrogacy agreements and its consequences and therefore for the betterment of this sector countries like Germany, Austria, France, Sweden, Norway, Italy, Bulgaria and Switzerland have completely banned Surrogacy and some other countries have enacted strict legislations. But United Kingdom has shown a different approach towards surrogacy, they have differentiated between altruistic surrogacy and commercial surrogacy and thereafter has banned every kind of commercial surrogacy and the main reason behind this is that in commercial surrogacy the child is treated as commodity. Germany initially barred each and every dimension attached to surrogacy that is they can't even bring a surrogate child to Germany as German citizen but later allowed this bringing of surrogate child but it can be done so only through proper channel and informing proper authorities and they did this by keeping surrogacy as illegal in their own territory. Switzerland has expressly forbidden Surrogacy by their Federal Act on Medically Assisted Reproduction. Even Donation of embryos and all forms of surrogate motherhood are unlawful. Even Article 31 of the act provides punishment for those who are involved in surrogacy or any activity relating to that. Even Italy also amended their Italian Civil Code (1942, art.1325) so that they can also join the league of European Nations that have strict laws and regulations regarding Surrogacy.

¹²ICMR or Indian Council for Medical Research came out with guidelines relating to surrogacy but it did not serve the issue adequately. Strict legislations are needed

¹¹ Case of S.H and others vs Austria, Application No. 57813/00

¹² The Hindu-Article by SonaliKusum on July 28,2013

with regard to surrogacy as commercial surrogacy is finding its way out.¹³The draft bill that was presented was having various loopholes are also there in the draft prepared by Indian Council for Medical research. There were no maximum age specified by ICMR for couples to make use of ART or Assisted Reproductive Bill, where as in that same bill minimum age that is mentioned to make use of ART is 21 years. Moreover Surrogacy can easily be linked with the menace of pre-natal sex determination which is prohibited in this bill but what lacks is that there are no regulatory body to regulate the working of these clinics and also there are no provision of interim body to take hold of the situation while the bill is not enforced. But most importantly ART bill recognises and legalises the Commercial Surrogacy in India by providing monetary compensation to the surrogate mother. ART bill doesn't restrict anyone from surrogacy unlike Home ministry guidelines which restricted surrogacy to only heterosexual couples, but now any person with any type of sexual orientation can go for surrogacy and take help of this bill.¹⁴According to a judgement by the Honourable Supreme Court of India where the bench comprised of Justice Ranjan Gogoi and Justice N. V Ramana expressed that Commercial Surrogacy should not be allowed but was still going on rampantly without any legal sanctity. Moreover as per the Indian Evidence Act 1872, there can be no assumption that if a child is born with the help of a surrogate mother is the legitimate child of the parents who contracted for the baby. By this they have the prior and legal right to give a parental support, inheritance and other related rights and privileges to the baby that is born by the couple who got the embryo implanted into the surrogate mother. The only solution and remedy to it is a proper legislation which draws an exact assumption including adoption.

The idea of “**altruistic surrogacy**” expressed in the Bill, as has been reported, greatly limits both potential surrogate mothers as well as couples wanting children: since women can become surrogates only once, and since couples who cannot find willing

¹³ Need for Legislation to regulate Assisted reproductive Technology Clinics as well as Rights and Obligations of Parties, Law Commission of India-Report No.228

¹⁴ Supreme Court Asks Centre to bring Surrogacy within the ambit of law, The Indian Express- October 15,2015

relatives have only one way out – adoption (In other countries altruistic surrogacy is allowed but is not limited to relatives, and one-time pregnancy). Additionally, limiting a woman's surrogacy choice to only one time is in a large way limiting the income of those who survive on this business. Again, it comes down to the issue of consent. If a woman willingly consents to being a surrogate mother, is assured of a safe delivery; and the baby is assured of a safe home, why should she be limited to only one surrogacy? After the surrogacy industry boomed, a lot of women were dependent on the same. The issue here seems to be that the woman is “exploited” for her body. And this too, is a legitimate issue. Just as in the case of sex work, when a woman is coerced into the business because she has no choice, and because she desperately needs the financial resources, it does not mean that she has fully consented to the job. It means that she has not been provided, or is not able to find, alternate employment to sustain herself. However, if she is consenting and is being paid the proper amount, then this should not be an issue at all. In certain European countries, sex work is fully regulated and sex workers have full constitutional rights, unlike in India. This is very different from agreeing to go into sex work for lack of any other options. Similarly, surrogacy laws should be set out in such a way that there is full consent of the woman in question. Here, instead of regulating the ways and policies in which a woman's exploitation is prevented, what the bill has done is eliminate the idea entirely.

Additionally, egg donations are also banned, perhaps in order to curb child trafficking and illegal surrogacy racket. However, again a blanket ban will not help in this situation. Policies need to be structured and laws need to be implemented in such a way that the issue is resolved without censoring the entire industry itself.

One of the most contentious points of the bill is its blatant ban on surrogacy rights of homosexual couples. This is the first time that the government's transparent homophobia has come out in the open. **SushmaSwaraj very clearly stated that surrogacy for homosexuals is against “Indian ethos”**, although homosexuality has been constantly mentioned in various Indian texts. Now, even though this ban could be construed as a mere following of the law (Section 377 against “unnatural” intercourse), this would only make sense if heterosexual couples also violating the

section were denied surrogacy rights. Since there is no way to conclusively find out, this is obviously a huge denial of justice to the queer community. Furthermore, since according to marriage laws only heterosexual couples are allowed to get married; the explicit stating of the ban of surrogacy to homosexual couples means two very saddening things: one, since this is the first time there has been an explicit stating of “homosexuality”, this only reveals that the government is not even open to the idea; and two, the government is almost stating that the community might as well cease to exist in the former’s eyes, since the latter have almost no rights with regard to their sexuality. Although formulated to curb the exploitation of women and trafficking of children; again, it exhibits the general policy of a state banning or censoring an activity almost completely, instead of looking at ways to use laws to regulate and improve the situation. Additionally, while most countries, especially in Europe, only allow altruistic surrogacy, surrogate mothers are not limited to relatives, and medical expenses are covered. It can be said that although India has not banned surrogacy completely (like Germany, France and Italy), the laws need to be relooked so that they actually benefit surrogate mothers, prospective parents, and children born from surrogacy. Slowly but steadily, the government is proving true what was left unsaid all this while: homophobia, discrimination towards non-heteronormative relationships, and a paternalistic enforcement of cultural norms. The bill exhibits a lack of understanding of agency which ought to be given to a woman; that a woman should be able to make decisions when the question is with regard to her body. There is no need for the State to be the Big Brother.