

SURROGACY AND MATERNITY BENEFITS AVAILABLE TO THEM; A MOTHERHOOD RIGHT

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ABSTRACT

The lack of research on surrogacy poses a problem for Government agencies when it comes to initiating legal provisions and taking substantive action against those found guilty. A number of surrogacy related questions remains unanswered, one of them is addressed in this paper: is it legal to become surrogate mother in India and what benefits are available to them through legislation and judiciary? Such questions need thorough analysis before any policy relating to surrogacy is designed and legal provisions are made. According to senior advocate Kirti Gupta, "At present, it is not difficult to have a baby through surrogacy in India because there is no law to control or regulate it. The technique is cheap, when compared to other countries, and surrogate mothers here charge comparatively less for the services. Therefore, the risks and the disadvantages involved in the surrogacy arrangements often prove detrimental to the interests of the surrogate mother, and the child. At times the commissioning parents also face legal hassles, which was demonstrated in the case of a Japanese couple and the child born to them, which brought out many issues related to surrogacy arrangements. In light of this case and several other issues arising out of the misuse of surrogacy arrangements, the Ministry of Women and Child Development, Government of India called a meeting-cum-workshop of Government agencies, NGOs, Doctors, and concerned Ministry personnel on the 25th June 2008, to discuss various aspects of this issue.

KEYWORDS: Surrogates, Maternity benefits, Motherhood, Gestate, Commissioning mother.

1. MEANING

A particular aspect was given to its effects on the welfare of women and children born out of this arrangement, and to draft a legal procedure to address these issues. The supposed benefits of surrogacy are created by a capitalist patriarchal society. It is assumed that there is an equal exchange - money paid for the service rendered. In reality the contract between the parties to surrogacy would not exist if the parties were equal. The woman must give more than her egg in order to gestate a child - an important gender difference. Within this framework the contract is always biased in favour of the financially secure male. The freedom of the surrogate mother is an illusion. The arbitration of rights hides central social and class issues which make surrogacy contracts possible. In addition, bio-ethicists are concerned that Indian surrogates are being badly paid and working as surrogates in a country with a comparatively high maternal mortality rate. This paper is designed to address these issues relating to surrogacy.

Nature has bestowed the beautiful capacity to procreate a life within women and every woman cherishes the experience of motherhood. Unfortunately, some women due to certain physiological conditions can not give birth to their own off-spring. The desire for motherhood leads them to search for alternative solutions, and surrogacy presents itself as the most viable alternative.

Advances in assisted reproductive techniques such as donor insemination and, embryo transfer methods, have revolutionized the reproductive environment, resulting in 'surrogacy', as the most desirable option. The system of surrogacy has given hope to many infertile couples, who long to have a child of their own. Taking advantage of the advanced medical facilities, they seek alternative solutions like Artificial Reproductive Technology (ART), In-Vitro Fertilization (IVF) and, IntraUterine Injections (IUI), in the hope of having a child of their own.

The very word ‘surrogate’ means ‘substitute’³. That means a surrogate mother is the substitute for the genetic-biological mother. In common language, a surrogate mother is the person who is hired to bear a child, which she hands over to her employer at birth.

According to the *Artificial Reproductive Technique (ART) Guidelines*, surrogacy is an “arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a „surrogate mother“ is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents(s)”⁴.

In the past, surrogacy arrangements were generally confined to kith and kin of close relatives, family, or friends, usually as an altruistic deed. But, with the introduction of financial arrangements in the process, surrogacy has extended its network beyond family, community, state, and even across the country. The concept of 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 huge profits. The commercialization of surrogacy has raised fears of a black market and of baby selling and breeding farms; turning impoverished women into baby producers and the possibility of selective breeding at a price. Surrogacy degrades a pregnancy to a service and a baby to a product. Experience shows that as with any other commercial dealing, the ‘customer’ lays down his/ her conditions before purchasing the goods.

2. INDIAN POSITION

Slowly but steadily India is emerging as a popular destination for surrogacy arrangements for many rich foreigners’. Cheap medical facilities, advanced reproductive technological know-how, coupled with poor socio-economic conditions, and a lack of regulatory laws in India, in this regard combined to make India an attractive option.

Nevertheless, reasons for foreigners coming to India in search of surrogate mothers vary. Women from lower socio-economic backgrounds readily agree to become a surrogate mother in India in return for payment, as hiring a surrogate in the western countries⁵ is not only difficult, but, the treatment is also immensely costly. The legal prohibition of surrogacy in some countries also leads people to come to India. For example, a 37-year-old Russian came to Bhopal as the expense for surrogacy is prohibitive in her country - between Rs. 15, 00,000 and 20, 00,000 - as compared to the Rs. 200,000 cost in Bhopal. The issue of legal acceptance/non-acceptance of surrogacy arrangements in different countries of the world will be discussed at length in the next chapter of this report.

Women, who undertake these assignments in India, usually come from lower class to lower middle class backgrounds, are married, and are often in need of money. Their need for money is so acute that more than often, childless couples can negotiate a better price as a result of competition. The amount of money given to a surrogate mother in India may appear very miniscule from any reasonable perspective, however, the amount may serve as the economic lifeblood for the families, and will be spent on the needs of the family (a house, education of the children, medical treatment). These are basic needs and may seem trivial from a notably rich

³ ‘Surrogacy from a feminist perspective’ by Malini Karkal, published in Indian Journal of Medical Science (IJME), Oct.- Dec. 1997 – 5(4), link; <http://www.Issuesinmedicalethics.org/054mi15.html>. Also in Nelson Hilde Lindemann, Nelson James Lindemann: Cutting motherhood in two : some suspicions concerning surrogacy. In: Holmes Helen Bequaert, Purdy Laura (Eds.): Feminist perspectives in medical ethics. New York: Hypatia Inc., 1992

⁴ The Assisted Reproductive Technologies (Regulation) Bill-2010, Indian Council of Medical Research (ICMR), Ministry of Health & Family Welfare, Govt. of India, pg. 4 (aa)

⁵ ‘Surrogacy Boom’ article by Shuriah Niazi, October 14, 2007, by arrangement with WFS, Source: <http://www.boloji.com/wfs/wfs1027.htm>

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westerners' perspective, but they become mega needs in a country like India, which lack social safety nets, and where the governance structure is attuned only to the needs of the rich and powerful sectors of the society.

Most women who become surrogates insist on anonymity for fear of social stigma. Some men, particularly the husbands of surrogate mothers, react badly to this 'encroachment' on their rights. Women who participate in surrogacy programmes report that their partners, initially agreeable to their undertaking the responsibility, often change their attitude after they take on their new role. One American woman told of being left by her fiancée for another woman. The husband of another surrogate mother would not look at her after she was inseminated.

Even as an increasing number of childless couples from overseas come to India, legal experts express their reservations. Many foresee hurdles after the child is born and caution that surrogacy should be carefully considered. As there are several clinics now that perform such services - gauged by the number of advertisements in the local media as well as on the Internet - it is easy to select a clinic. However, the real problem arises after the birth of the baby. In India, in the absence of clear laws on the issue, foreigners are unable to get legal assistance when it comes to taking their child back to their home country.

3. MATERNITY AND OTHER BENEFITS

However, with the entry of financial arrangements in exchange of the surrogate child, surrogate motherhood has raised difficult ethical, philosophical, and social questions. Surrogacy arrangements have made child a 'saleable commodity', and complications have arisen regarding the rights of the surrogate mother, the child, and the commissioning parents. As there is no legal provision to safeguard the interests of the surrogate mother, the child, or the commissioning parents in India, looking at such an issue from commercial or business point of view has complicated the matter further. For example, the surrogate may be forced to terminate the pregnancy if desired by the contracting couple and she will not be able to terminate it if it is against the desire of the couple. She has no right whether to abort the baby or keep it and continue with the pregnancy even if it is her womb which is carrying the baby. There have been instances where the contracting individual has specified the sex of the baby as well and even refused to take the baby if it was born with birth defects and filed a suit against the surrogate saying she had broken the contract.

In surrogacy, the rights of the child are rarely considered. Early handover of the child hampers breastfeeding. Transferring the duties of parenthood from the birthing mother to a contracting couple is denying the child its claim to both the mother and the father. It could affect the psychosocial well-being of children who are born as a result of a surrogate motherhood arrangement. A shocking case of surrogacy was recently unearthed in the Bombay International Airport, where a foreigner couple came for surrogacy arrangements in India in order to get an organ transplant to their sick child in their country. This revelation further highlights the need for studies on surrogacy to provide a foundation for the formulation of laws and regulations in surrogacy arrangements. Therefore, there is a clear need to protect the interests of both the surrogate mothers and the children produced out of such arrangements.

The practice of renting a womb and getting a child is similar to outsourcing pregnancy. The volume of this trade is estimated to be around \$ 500 million and the numbers of cases of surrogacy are increasing rapidly. The exact extent of this practice in India is not known, but inquiries have revealed that this practice has doubled in the last few years. There is a growing demand for fair-skinned, educated young women to become surrogate mothers for foreign couples. Often, couples have to wait for as long as eight months to a year for

desire for a child. Several American, Russian and British women are duly registered with the Akankshya Clinic of Anand and the Bhopal Test Tube Baby Centre for the procedure.

To address such issues and to regulate surrogacy arrangements, the Government of India has taken certain steps including the introduction and implementation of National Guidelines for Accreditation, Supervision, and Regulation of Assisted Reproductive Technology (ART) Clinics in 2006, and guidelines have been issued by the Indian Council of Medical Research (ICMR) under the Ministry of Health and Family Welfare, Government of India. However, till now there is no legal provision dealing directly with surrogacy laws to protect the rights and interests of the surrogate mother, the child, or the commissioning parents

4. JUDICIAL OBSERVATIONS

Surrogacy is practiced as commercial, overseas permitting surrogacy for all including national, foreigners, same sex, singles, under medical tourism policy since year 2002 in India. In the absence of legislation, there is a national level medical guidelines on surrogacy by the premiere national medical authority, Indian Council of Medical research ICMR, Ministry of health & family welfare Government of India in the year 2005³.

The Supreme Court of India formally legalized commercial surrogacy in a case pertaining to Japanese intending couple permitting overseas or transnational surrogacy in

Baby Manaji Yamnda vs Union of India⁷ leading to formulation of Assisted reproductive technologies (Regulation) Bill 2008. This bill has been revised in the year 2010, then in the year 2013 respectively. At present there is the ART Bill 2014⁷ is the fourth revised draft of ART Bill since its first ever formulation in the year 2008 which is placed before the legislative body for deliberation, awaiting enactment. During this pendency of Bill in order to better regulate overseas surrogacy by foreign nationals in India, the Ministry of Home affair issued Home Ministry Guidelines 2012⁸ excluding foreign same sex partners, singles from commissioning surrogacy along with other restrictions in India in the year 2012.

At present there is public interest litigation namely **Jayashree Wad Vs Union of India**⁸ before Supreme Court of India seeking prohibiting on commercial, overseas surrogacy for foreigners in India for reason related to exploitation of poor Indian women. The final verdict is awaited. During this interim period of litigation, there is a prohibition on clinics to undertake, offer surrogacy services to foreigners, overseas couples.

Amidst these legal developments and legal wrangling, the judiciary through its pronouncements in four successive cases at different state high courts namely in

K. Kalaiselvi vs Chennai Port Trust⁹ (Madras High Court),

P. Geetha vs The Kerala Livestock Development Board Ltd¹⁰ (Kerala High Court),

Rama Pandey vs Union Of India & Ors.¹¹ (Delhi High Court)

Dr. Hema Vijay Menon v. State of Maharashtra¹³ (Mumbai High court)

respectively granted child care leave for the women commissioning surrogacy after granting legal recognition to the commissioning or intending mother as the legal mother on same equal footing as adoptive

⁶ _Surrogate mothers: Outsourcing pregnancy in India' article by Joseph Gothia, 26th June 2008, link: <http://india.merinews.com/cat Full.jsp?articleID= 136421>

⁷ [2008] INSC 1656 (29 September 2008)

⁸ Writ Petition civil no. 95 of 2015 yr.

⁹ (2008) 13 S.C.C. 518

¹⁰ W.P.(C) No. 20680 of 2014, C.f. http://judis.nic.in/judis_kerala/content.asp...295

¹¹ 2009 (162) DLT 202

mother. The two of the recent ones are briefly discussed herein. It is highly pertinent to consider that none of the four revised draft of ART bill even mentioned the provision of “child care leave for the intending mother or intending father or intending parents” or the surrogate mother. Equally it is significant to note that the judiciary is advancing a right based perspective, seeking to extend the exercise, realization of right to privacy family formation for all sections of society through beneficial interpretation of laws despite the absence of legislation on the same. In the after math of these progressive judicial decisions the central government of India ushered Maternity benefits to surrogates.

beneficial child care leave policy for the central government employees using surrogacy for bearing child, attainment of parenthood by granting leave to both the intending mother and the intending father as well as

for the surrogate mother for the same. Some of the most breakthrough provision is to provide child care leave to surrogate mother as equally as the intending mother and to grant paternity leave to the intending father.

Rama Pandey vs Union Of India & Ors, ¹²Delhi High Court grants “Maternity leave” to central government women employees having a child through surrogacy. Brief facts - The petitioner named R. Pandey is a central government employee entered into a surrogacy arrangement leading to birth of surrogate twins the petitioner applied for grant of maternity leave along with surrogacy agreement and the birth certificate of the surrogate children. But this leave was not granted on the ground she wasn't the biological mother. The petitioner being aggrieved, filed, a writ petition under Article 226 of the Constitution to claim the same. Delhi High court directions: The Delhi HC held that “a commissioning mother is similarly circumstanced, as an adoptive mother” or “an adoptive parent is no different from a commissioning parent, which seeks to obtain a child via a surrogacy arrangement”. Thus entitled to similar child care leave. The HC held that denial of leave would be detrimental to both mother and child”¹⁵. The Delhi HC enumerates the legal basis for grant of leave to commission mother under the existing leave rules, The HC identifies the legal void that the term “maternity leave” is not defined under the existing central government services rules¹⁹⁷² (Rule 43 - maternity leave) in the absence of such definition, there is nothing in law central services leave rules which bars or impairs such maternity leave for women attaining maternity through surrogacy, rather there is scope for inclusion of the same. The Delhi HC fills up this legal void by including commissioning mothers who are central government female employee having child through surrogacy under such leave Rules.

Mumbai High Court - **Dr. Hema Vijay Menon v. State of Maharashtra,** - Mumbai High Court held “woman attaining having a child through surrogacy was entitled to maternity leave for 180 days”

While on one side the ART Bill 2014 is being revised, deliberated awaiting long pending enactment, but non the less, These court rulings, government of India policy paves way for creating a favourable condition for promoting of surrogacy in India. The judicial acumen, expertise beneficial, progressive interpretation of Indian judiciary, coupled with policy making of government of India, state development for seeking to uphold the most basic, cherished individual legal and human rights is laudable, praise worthy.

¹² Writ Petition No. 3288 of 2015
<https://naturalscience.fyi/>