

Law and Policy on Surrogacy : A Comparative Study of India And Other Countries

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ABSTRACT

The present study represented some legal issues related to surrogacy and also some religious issues related to surrogacy. The present paper deals with a comparative analysis of surrogacy related laws and legal issues between India and other countries. Though there are either enacted or proposed laws in many countries with reference to surrogacy, there exist a lacuna of information and applications of these laws among the ones who are affected most by it. This was evident in many cases across the world. A case in point would be the enforced ban on surrogacy in China.

Keywords : Surrogacy, Preganancy, Law And Policy, Fertilization

I. INTRODUCTION

A surrogacy arrangement or surrogacy agreement is the carrying of a pregnancy for intended parents. There are two main types of surrogacy, gestational surrogacy (also known as host or full surrogacy) and traditional surrogacy (also known as partial, genetic, or straight surrogacy). In gestational surrogacy, the pregnancy results from the transfer of an embryo created by in vitro fertilization (IVF), in a manner so the resulting child is genetically unrelated to the surrogate. Gestational surrogates are also referred to as gestational carriers. In traditional surrogacy, the surrogate is impregnated naturally or artificially, but the resulting child is genetically related to the surrogate.

Surrogacy in its modern avatar has its roots originating from ancient Egypt, where infertile women were allowed to undertake the practice of allowing another women bear the biological child of her husband in order to avoid divorce. It was a practice though not held commonplace but was still considered an act and not a criminal offence.

In modern times, it was in the year 1978 that in the United Kingdom, the first successful IVF procedure was carried out and resulted in the birth of baby Mary Louise. This heralded a new found hope for childless couples as well as ushering in a new branch of science. This did however also raise a multitude of questions in morality, law and ethics with regards to the field of assisted reproductive techniques.

There is a amalgamated pool of ethical and legal issues that are hovering around the practice of assisted reproductive techniques and none are more important than in the case of surrogacy. The primary reason here is that in the case of surrogacy, be it gestational or traditional surrogacy, there is no specific outlined plan for the protection of the mother and the child, in case the contract is not honored by the intended parents.

Most insurance companies are not having plans to cover surrogate mothers specifically and even in places where schemes are available, the premiums are very high and the knowledge is not distributed among the surrogate mothers.

II. REVIEW OF LITERATURE

Anil Malhotra and Ranjit Malhotra in their article observed that despite the legal, moral and social complexities that shroud surrogacy, there is nothing stopping people from exploring the possibility of becoming a parent. Women who may choose to 'rent' their womb for a surrogate pregnancy are slowly shaking off their inhibition and fear of social ostracism to bring joy to childless couples. India's Assisted Reproductive Technology (Regulation) Bill & Rules 2010 has also been analyzed by the authors, has lacunae, lacks the creation of a specialist legal authority for adjudication and determination of legal rights of parties by a judicial verdict and falls into conflict with the existing laws prevailing in India.

Aniruddha Malpani and Anjali Malpani talked about assisted reproductive technologies, which is one of the spectacular success stories of modern medicine. But these advances have also come with innumerable government guidelines and laws, which regulate the clinical practice of these procedures. Since IVF was first developed in the UK, it is not surprising that the first country to regulate IVF technology was also the United Kingdom. The Human Fertilization and Embryology Act passed in 1990 was enacted in response to the report of the Inquiry Committee into Human Fertilization and Embryology, i.e., the Warnock Report. The authors compared the legal position of United States of America, wherein the government has found it not necessary to pass a federal law to govern the practice of assisted conception in the United States, except for the requirement of the 1992 Fertility Clinic Success Rate and Certification Act which are designed to report the annual pregnancy success rates of each IVF clinic to the United States Center for Disease Control and Prevention (CDC).

Babu Sarkar observes that with the enormous advances in medicine and medical technologies, today

85 % of the cases of infertility can be taken care of through medicines, surgery and/or the new medical technologies such as in-vitro fertilization. The author talked about surrogate motherhood, wherein the surrogate mother agrees usually by contract and for a fee, to bear a child for a couple who are childless because of the reason that the wife is infertile or physically incapable of carrying a developing fetus. The surrogate mother can be the genetic mother of the child where the sperm is put in her ovary or she can be the gestational carrier where the embryo is placed in her womb. The surrogate always carries on with the process of pregnancy with the intention of relinquishing the child after birth.

III. ISSUES IN SURROGACY

As mentioned, one of the core issues that need to be delineated is the issue of financial protection of the mother who is acting as the surrogate.

In countries where commercial surrogacy is allowed, such as India, Russia, Georgia, Ukraine, Thailand and a few states of the United States of America, there are legislations which provide for some relief to the surrogate but as was reported in media circles, its more often than not that the intended parents as well as the surrogate are exploited in the name of benefits and it's the middlemen who ultimately reap the monetary benefit. The legislations and guidelines in place are ineffectively enforced in such cases.

Another issue that hold place is the matter of the child born out of surrogacy. It was widely reported in Indian and some foreign media regarding the case of the Israeli couple that had faced hurdles in establishing parentage of their child or of the German couple who faced a long legal battle to get citizenship for their Indian surrogate child.

Mandatory testing in terms of psychological and health criteria is practiced in the United States of

America, however Indian laws focus only on the infectious diseases aspect of the matter without due note of the impact of psychological health on the subsequent intended parents as well as the surrogate.

Exploitation of the surrogate is rampant as many women from poor socio-economic strata are both attracted and lured to surrogacy with the promise of easy money. (4) These women are generally left high and dry with the middlemen and ART clinics taking a bulk of the payment and offering no post delivery care, as stipulated in Indian guidelines.(4,5)

IV. SURROGACY AND RELIGIOUS ISSUES

ART guidelines for Christians and Muslims are almost the same. For all religions, artificial insemination with husband's semen is permissible. Judaism allows the practice of all techniques of assisted reproduction when the oocyte and spermatozoa originate from the wife and husband, respectively. Third party gametes are also unacceptable to Muslims, so gamete donation, embryo-donation and surrogate motherhood are not allowed. In contrast, for the Sharia sect, oocyte donation, embryo donation and surrogacy within a frame of temporary marriage arrangements are permitted. The attitude towards reproductive practice differs among the various divisions of Christianity. The practice of assisted reproduction is not accepted by the Vatican, however, it may be practiced by Protestant, Anglican and other denominations.

Fertility and parenthood are highly valued in Africa to the extent that procreation is usually considered the most important purpose of marriage. As a result, infertility is often associated with marital instability and many other psychosocial consequences. Moreover, the high premium placed on fertility may act as a relevant barrier to the success of family planning strategies due to the wide-spread belief that contraception may result in permanent infertility. There is, in principle, an enormous demand for ART in African countries, especially because most

infertility cases are infection related and therefore best treated by ART. Clinics providing ART are, however, still few and mostly in private settings.

Latin America is a heterogeneous region with many different cultural and sociological influences. The high prevalence of catholicism has a great impact on reproductive issues. Although infertility is a social stigma in Latin American societies, most countries do not consider ART a priority. Public hospitals generally provide only infertility investigations but cannot offer ART. Private centres exist but are very expensive, and therefore ART is commonly perceived as a luxury for wealthy couples.

V. UNDERSTANDING OF SURROGACY WITH INDIAN REFERENCE

Surrogacy is flourishing in India because commercial surrogacy has been legalized by the Supreme Court since 2008 through the ratio of the decision of Baby Manji Yamada v. Union of India, wherein the Supreme Court has held that commercial surrogacy is permitted in India with a direction to the legislature to pass an appropriate law governing surrogacy arrangements in India. The ratio of this case has increased the international confidence for resorting to surrogacy in India and making India a very lucrative destination for surrogacy. It is consequently causing a serious concern for the health of the poor illiterate Indian women.

Surrogacy is a very knotty issue in India due to non-enactment of laws on the subject. Anand town in State of Gujarat is a hub of surrogate mothers. Not only this, Indore city in Madhya Pradesh, Pune, Mumbai, Delhi, Kolkata and Thiruvananthapuram are also emerging as surrogate centres because many childless foreigners from all over the world are flocking here due to low cost, less restrictive laws, lack of regulation of ART clinics and easy availability of poor Indian surrogate mothers. Generally,

surrogacy arrangements are drawn up in a random fashion and can be exploitative especially since surrogates are mostly from weaker socio-economic sections of the society. It is essential that the practice of surrogacy should be legally regulated to prevent victimization of both the surrogate and intended commissioning parents.

The proposed research work tends to highlight that India is in an urgent need of comprehensive legislations on the subject which can regulate and can have a check on the use and misuse of surrogacy arrangements. It is apparent that surrogacy is increasing as an industry in India and many clinics are providing these services to foreign couples and also to Bollywood heroes and heroines who do not want to compromise their career which is likely to be jeopardized due to maturity and de-shaping of the body of the female and they find it easier to give their eggs and sperms and hire a womb on rent. These clinics work as commission agents between the purchaser and donor/seller of the sperms or eggs.

It is high time for the Indian Parliament to study in details the national and international perspectives on surrogacy and to understand the root of the problem and provide a comprehensive legislation including the rules and regulations for combating and controlling the use and misuse of surrogacy practices in India. The focus needs to be given on legalizing altruistic surrogacy and at the same time prohibiting commercial one. It is submitted that it is advisable to protect the society from onslaught of capitalism over Asian poverty and stop the exploitation of poor women being used as machines.

VI. INTERNATIONAL LEGAL SCENARIO

While instances of Commercial Surrogacy have raised by leaps and bounds, its regulation or rather non-regulation has been a matter of concern. Within this flourishing market, even as clinics and other players continue to make huge profits, there are several

ethical concerns that arise out of the increasing commercialization of women's bodies and bodily labor; this includes concerns about the health and rights of the Surrogate and the child/children born out of Surrogacy.

There are currently a variety of approaches to Surrogacy globally. Responses to Surrogacy are, however, somewhat in a state of flux: several nations have introduced legislation recently and several others have bills currently under consideration. However, despite this, there are distinct identifiable policy approaches amongst various Nations and, within these, many similarities in terms of Legislation and Judicial trends can be seen. Given such a context, the need for a comprehensive legal framework cannot be overemphasized. This is particularly evident in cases involving legal tussles about the citizenship status of children born through Transnational Surrogacy arrangements. Following are the joint initiatives taken by various International bodies to regulate Surrogacy universally

VII. LAWS OF VARIOUS COUNTRIES

As the use of Surrogates has become more prevalent, Courts and Legislatures have been challenged by the legality of Surrogacy agreements. The majority of countries worldwide have yet to establish legislation regulating Surrogacy, but in the past two decades there has been an increase, mostly among common law jurisdictions, in the regulation of Surrogacy.

Of the few countries that have legislation regulating Surrogacy, several, including Germany and Italy, prohibit all forms of Surrogacy.

In a developed country like the UK no contract or Surrogacy agreement is legally binding. In most states in the US, compensated Surrogacy arrangements are either illegal or unenforceable. In some states in Australia, arranging Commercial Surrogacy is a

criminal offence and any Surrogacy agreement giving custody to others is void.

In Canada and New Zealand, Commercial Surrogacy has been illegal since 2004, although Altruistic Surrogacy is allowed. In France, Germany and Italy, Surrogacy, Commercial or not, is unlawful. In Israel, law only accepts the Surrogate mother as the Real mother and Commercial Surrogacy is illegal. It is important here, to know that there is no National Policy regarding Surrogacy. Each state has come up with their own legal approach to this relatively new method of procreation. The laws vary from making Surrogacy contracts enforceable to criminalizing all forms of Commercial Surrogacy. In general many of the laws have been the result of cases, which have gone to courts, which has left judges to essentially write the laws with each ruling. Those laws usually are designed to protect women from exploitation and tend not to hold Genetic Fathers in the same regard as Birth Mothers. The cases shaping laws today tend to address the issue of whether a contract can be binding? Can a woman sign a contract regarding custody of a child not yet conceived with informed consent? Can payment be made to a woman for reproductive services but not the final product of a Surrogacy? These questions are legally and morally baffling at best and so while legislature tries to keep up with the ever changing reproductive needs of its citizens many states are left with laws which require parents to adopt their own genetic child and other such actions which at first glance seem to make little sense.

Many states regulations are similar to their State's Adoption Laws which are set up to protect Birth Mothers and prevent baby selling which is illegal in the many states. Those involved in Surrogate arrangements in those states define their financial reimbursement to the Surrogate as paying for the living and pregnancy expenses as permitted in adoption. Other states flat out prohibit Commercial Surrogacy, allowing only a Surrogate mother's medical

expenses to be paid for by the Intended Parents. There are states where Surrogacy is permitted by strictly defined in terms of custody and little to no reference of financial reimbursement is made. In most states Surrogacy is neither legal nor illegal. It is important to note the just because you may live in a state that lacks Surrogacy friendly legislatures that does not mean you may not partake in a Surrogacy arrangement legally.

The laws regarding a Surrogacy depend on the state in which the birth takes place and how those laws are interpreted. At the time when the researcher was working on this chapter of thesis, several states as well as many foreign countries, were addressing their laws regarding Surrogacy. For this reason, it is impossible to define each country's state law, because they are ever changing and new interpretations of law's broad language are being made each month.

VIII. INDIAN SCENARIO AND INTERNATIONAL SCENARIO

In the year 2005 ICMR (Indian Council for medical research) drafted and enacted a set of guidelines that must be followed by any and all individuals or organizations associated with the field of assisted reproductive techniques or surrogacy.

It laid down specific protocols to be followed in the process of surrogacy and also specifically mentioned that gestational surrogacy is the accepted modality to be followed in a commercial sense in India. There were detailed provisions for the accreditation and recognition of ART clinics in the country as well as state and district level forums were constituted to monitor these clinics.

Thereafter the Assisted Reproductive Techniques Bill was proposed but not yet enacted in the country⁽⁷⁾. The bill was based on the guidelines that were mentioned in the notification by the ICMR, however as was the case in the ICMR guidelines so is with the proposed bill. There were many issues that were

addressed and appropriately moderated yet there is scope for further improvement still.

There was no single point redressal system enacted or proposed to be enacted by the law, through which a surrogate mother or the intended parents can seek to solve their complaints. The proposed law mentioned many factors like age, number of embryo implantations, blood transfusion etc. for the surrogate but was as yet silent on whether a specific demographic criteria must be laid for the intended parents or not. Though the act has not yet made distinction in the caste, creed or otherwise, the authors feel a minimum standard of care must be exercised in making sure that the intended parents are in fact genuine and not criminal elements, are they stable and can support a new member in their family, and finally are the children being treated fairly and without discrimination in their new household. This is a long process and should be done in a method as followed in the western countries where parents of adopted children are subjected to repeated, but un-intrusive verification of their child's welfare. In India this can be achieved by the Integrated Child Development Services (ICDS) scheme started by the Government.

Another legislation that holds interest is the "The Delhi artificial insemination (Human) Bill 1995." Which though effective only in the state was initially formulate to control the blooming of various ART clinics in the state. It has also now been replaced with the ICMR guidelines.

As per the guidelines prevalent, no punitive action is proposed on the malpractice by doctors in the clinics. The issue is left to the ambit of the Medical council of India (MCI) and the respective State Medical Councils (SMC).

The contract between the intended parents and the surrogate is considered a legally binding agreement as

per the Indian Contracts Act, and the surrogate relinquishes all right to the child.

In the USA, the picture is similar in a few states where through disputed cases; this matter has been maintained in a status similar to Indian laws where the surrogate relinquishes all rights to the child. However the scene is different in the UK, where the mother can claim right to the baby up to 2 years after delivery, and it is the discretion of the court to allow this.

However due to the USA following federal system of government, there are no unifications of the laws centrally. The state of California recognizes the act of commercial surrogacy while the state of Washington considers commercial surrogacy unacceptable. In California the traditional surrogacy is allowed but the biological mother is still the legal mother in this case, while in the UK and India traditional surrogacy is not legally acknowledged.

In the state of Utah, in USA, traditional surrogacy is prohibited and it's a matter of rule that at least one intended parent must provide one gamete in a gestational surrogacy. The state of Virginia does not register the intended parents as legal parents on birth of the child but instead requires a legal process to have the name of the parents changed after permission is taken both prior and after surrogacy is done.

In another State of the USA, the state of New York, any and all surrogacy agreements involving compensation of any kind are considered, void and unenforceable, similar to the laws in the UK and contrary to the proposed law in India.

IX. CONCLUSION

In keeping with the tradition of justice for all, the civil society and the legislators should form a legislation that is enacted with a focus on preventing

the exploitation and ambiguity in the practice of surrogacy. The emergence of India as a hub for Assisted reproductive technologies has proven beneficial for many childless couples, however we must ensure that the medical fraternity along with the surrogates and intended parents must be carefully looked after so as to avoid any problems to the family unit and especially to the children born out of surrogacy.

The laws enacted must be made in such a manner that the ultimate beneficiaries of the procedure must be the child, surrogate and intended parents and not the middlemen. Foreign individuals desirous of having surrogate children in India should be allowed only after proper credentials and verifications are done through the specific agencies and embassies.

Lastly a favorable and strict law must be enacted after due discussion and arguments which should involve all parties or organizations involved such as doctors, social activists and surrogacy clinics.

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