

MOTHERHOOD THROUGH SURROGACY- IS IT SIMPLY A COMPROMISE BETWEEN THE ‘TWO MOTHERS’: A CONFLICT BETWEEN HUMAN RIGHTS LAW AND ‘RENTING WOMB FOR MONEY’

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Abstract

India, once being a ‘surrogacy hub’ has offered many childless families with a child. However, it was observed that gross violations of human rights were involved during the entire process of surrogacy. So, to provide relief to these poor surrogate mothers Indian government took a resolution to put an end to such practices of exploitation of the surrogates. By banning the practice do the Government is itself making the lives of these women harder as most of them have taken it as a profession. Such issues need proper analysis from both human rights and law perspective. The article will focus on the areas where rights, laws and needs of people do clash, as well as the role of Indian state in mitigating such challenges.

Keywords : Women, State, Law Surrogacy, Human rights, Child

Introduction

Over the years, human civilization has always embraced motherhood in some way or the other. Bearing motherhood is considered such an ability of woman, which makes her relationship with the child above all other relationships. Being a creator woman is easily connected to the Mother Nature for having similar attributes like life- giving, protecting as well as caring. Even in almost all societies, Goddesses are termed as ‘Maa’ (Mother), for protecting her devotees like her children. However, as not all fingers of the same hand have the same

measurement every woman in this universe do not possess the same capacity of birthing her child. Various health conditions may affect a woman while planning for motherhood. Under such circumstances, Assisted Reproductive Technology (ART) welcomes these women under its umbrella, by providing various alternative reproductive techniques, to fulfil their urge of becoming mothers of their biological child. It provides an artificial way of procuring motherhood and enjoying parenthood for lifetime. The techniques that involved are IVF, surrogacy and much more. IVF seems to be an alternate for those mothers who were unable to conceive naturally. However, certain cases are beyond that, where a woman can't be impregnate due to unexplained infertility, hysterectomy, abnormalities in ovaries and much more. So, in any such context surrogacy serves the purpose of these women to become mothers by providing an alternative mother to bear the child for them. Nevertheless, the journey of surrogacy in Indian land seems to be limited due to the number of regulations imposed on it. The cases of exploitation of the surrogate mother and the child became so prominent, which made the Government to come up with a regulation in this area.

Literature Review:

What if a woman's womb is removed? Or if she cannot conceive? Or, if she can never give birth to a baby? Does that make her less a woman? Or less of a nurturer? Or, indeed, a mother (Aravamudan,

2014)? Therein begins an unwritten chapter, stigmatizing themselves as failures (Virani, 2016, p 69). For thousands of years and millions of women, therefore, infertility remained a silent and irrevocable curse (Spar, 2006, p 8). The ideology of incompleteness without a descendant exists in every religion, every culture, hence in films of that culture which inform each other which further society's self-perception, and in every storybook (Virani, 2016, p 66). The social completion of the familial unit in India and elsewhere in the world has always rested on the birth of the child (Majumdar, 2017, p 64).

Infertility is a disease that has diverse effects on physical and psychological health, as well as social consequences, including marital instability, anxiety, depression, social isolation and loss of social status, loss of gender identity, ostracism and abuse (Hochschild, 2016, p 17). Thus, infertility and its treatment are constructed and marketed to a largely urban clientele, disregarding patients and requirements in the semi-urban and rural sectors (Majumdar, 2019, p 8). The emotional roller-coaster round of the parents unable of having a child is beyond anyone's imagination. During the later phase of their life it attacks the personality of the couples for not fulfilling the accustomed norm of parenting a child at the right age. The inability to have children is seen to compromise individuals' quality of life (Rudrappa, 2016, p 36).

Technological innovations have facilitated asexual reproduction/procreation involving more than two people required to create and birth a child (Majumdar, 2017, p 6). Assisted reproductive technology methods improve pregnancy rates for women and couples classified as infertile, but the number of successful pregnancies is lower among women over thirty-five years of age than among younger women (Clark, Davis, Hayes & Theall, 2009). While science and technology are able to provide alternatives to making kin in ways other than the conventional means of sex, marriage, friendship, and obligation, the real question is our desire for biological kin (Majumdar, 2017, p 7). Only biological affiliation is accepted for the practice to be performed (Benabed, 2016, p 57). Thus, when researching a practice of 'making kin' through assisted reproductive technologies, one must place biology at the centre (Majumdar, 2017, p 8). Practically, surrogacy is one of the simplest means of solving infertility (Spar, 2006, p 71). If carried out ethically, it is the biggest boon to infertile women who have a problem with their uteri in order to have their own biological children,

and a blessing for the surrogates who need those financial resources for better education of their children (Shah, Rasool, Nagarajan, 2016, p 108). As, technology has widened the realm of private choice, however, it has also pressed elements of this choice into the commercial markets (Spar, 2006, p 112).

Surrogacy in India is a spectacular global phenomenon (Rudrappa, 2016, p 5). India has become the *world's largest supplier of gestational surrogates* (Twine, 2015, p 56). The IVF-surrogacy clinic in India occupies an important position within the globalization of reproduction (Majumdar, 2017, p 20). Today a growing number of children enter families via surrogate births and surrogacy contracts (Twine, 2015, p 12). The process starts with in-depth consultation and counselling of the intended parents and the surrogate on all aspects, including medical, legal, ethical and social (Shah, Rasool and Nagarajan, 2016, p 107). These contracts are essentially preconception legal agreements in which a woman agrees to rent her womb to another individual or couple for the purpose of gestating a fetus to which she may or may not have a genetic tie (Twine, 2015, p 12). The contract creates a relationship between the surrogate mother and the intended parent on similar antagonistic lines (Majumdar, 2017, p 40). Thus till the end of the contract the surrogate mother rents her womb to the intended parents for which a handsome amount of money will be paid to her. Commercially, surrogacy offers a seductive way for lower-income women to profit from their bodies without – theoretically at least – selling either their bodies or their children (Spar, 2006, p 72). Surrogacy rescues women from poverty as well as from more distasteful work alternatives such as sex work, factory work, or poorly paid domestic work (Deomampo, 2018, p 66). This exchange makes surrogacy overtly commercial and raises charges of commodification that are difficult to dismiss (Spar, 2006, p 71).

Commercial surrogacy can be best characterized as a form of **stratified reproduction** in which poor women and increasingly women from racial and ethnic backgrounds are renting their wombs out or "selling their uterus" to wealthier women (Twine, 2015, p 19). The same populations whose reproduction was "desisted" are now being enlisted in the bodily "assistance" of the wealthy people's reproduction, and in both scenarios, already existing offspring are supposed to benefit (Lewis, 2019, p 112). Birth becomes the subject of negotiation, and motherhood is exchanged in the

market (Spar, 2006, p 93). The humanist idealization of “fetal motherhood” rests on the conviction that gestation is not work but the very pinnacle of wholeness and self-realization (Lewis, 2019, p 48). The problem with the notion of the womb as a rental space is that it is impossible to separate womb from woman, and impossible not to recognize her labor (Rudrappa, 2016, p 108). Accordingly, taking the child away from the birth mother was wrong, and paying the birth mother for her labors constituted a complex mixture of baby – selling, prostitution, and rape (Spar, 2006, p 28). The deaths of commercial surrogates should make news, but they do not for the other side of the same coin- they were paid to run a nine-month errand (Virani, 2016, p 6).

Law or no law, problems or no problems, wealthy couples going in for surrogacy are able to manipulate the system and get the kind of babies they want (Aravamudan, 2014, p 193). Since, 2002 India legalized gestational surrogacy but no strict restrictions were available to keep these arrangements under surveillance. However various legislations and guidelines have been issued in India since 2005 by the Indian Council of Medical Science Research as well as by the Indian government to regulate the fertility industry. On similar lines as many as three ART Regulation Bills and two Surrogacy Regulation Bills were introduced which later on fail to defend itself in the Indian Parliament. The current survivor of this fraternity is Surrogacy Regulation Bill 2020 which is still under critical observation. If, properly passed the new Act will completely changed the entire scenario of surrogacy in India both from commercial as well as ethical perspective. The later part of the paper will focus on new resolutions of the Government on surrogacy and how it contradicts with the very notion of human rights.

Methodology:

The methodology adopted for this article is qualitative in nature. Hence, secondary sources were given priority while writing the article. For analyzing the concepts different books authored by renowned authors were taken into consideration. In addition, various articles were reviewed for preparing a more in-depth study on the area. The Government Bill, Parliamentary Standing Committee Reports were also studied to prepare the legal character of the article.

Limitations:

The area of the article is limited to the rights of surrogate mothers. It analyzes the Indian Copyrights @Kalahari Journals

Government perspective on surrogacy and how it tries to ensure the rights of its citizens. The article highlights several pertinent questions on surrogacy which needs proper attention by the Government.

Exploitation- the main reason behind banning commercial surrogacy:

A silent revolution starts within the mind and heart of every surrogate mother as to whether she is benefitting herself or she is pressurised by someone to do that only for the sake of money. There may be several reasons for her to become surrogate but one reason becomes very evident by its name that it is mainly for money as she involves herself to a commercial surrogacy. While taking about commercialization of surrogacy what does commerce actually means when it comes to enjoy motherhood? Is in the modern lifestyle the meaning of motherhood is also changed by science and technology? How can it become possible to play with human emotions by offering alternatives to become mothers? Are the commissioning parents fooling themselves by opting for surrogacy services to gain parenthood or the bundle of money is blindfolding the surrogate mothers? Are not they benefitting themselves by such alternatives, if not then who is making profit out of this commerce? These questions need proper answers while framing a law for surrogacy.

Is it an exploitation ‘of the mothers’, by the mothers ‘to be mothers’:

To become parent at a certain age of life seems to very natural on the part of every human being. But due to certain infertility issues some couple fails to achieve parenthood. The advancement of science and technology has come up with various alternatives for those prospective parents to adopt certain new method of becoming parents. While searching for an alternative most couples prefer surrogacy as the suitable option for them. In general, gestational surrogacy is a method where a woman carries and delivers a child (who is not genetically related to her) for another couple who is facing infertility issues. Now-a-days gestational surrogacy is practiced whenever needed. If monetary compensation to the surrogate mother is involved for carrying the baby for nine months then it comes under the category of commercial surrogacy or if not then it is said to be altruistic surrogacy. However, claims like commercial surrogacy often leads to exploitation of the poor needy women who comes to compromise her health at the cost of money generally brings the entire arrangement under scrutiny. But who compels her

to do so? Is it role of poverty or something else? If it is due to poverty then other alternative might not have worked for her so far so she might have moved towards surrogacy.

Now, here comes the question why surrogacy is still prevailing irrespective of its loopholes? Why the literate sections of the society are allowing such things to happen? Is it just because of the desire for motherhood on the part of intended mothers. If the answer is yes, then is it wrong to desire to have one's own baby for attaining motherhood. Hence, it can be rightly called as an exploitation of the mother, by the mother 'to be mother'. Or is it bad that the needy poor women who engage themselves in surrogacy tries to make profit for themselves within a short period of time. Similarly, the ART techniques should also be criticized, as it is responsible for introducing such a method of conceiving a baby. So, the larger society should blame whom for such act? Because the intending mother is the one for whom the arrangement is made, it is the surrogate mother who made such practice possible and lastly, the ART methods is responsible for granting both the intended woman and surrogate woman, 'motherhood'.

While searching for an answer one thing becomes very evident that neither the intending parents nor the surrogate mother could be held responsible for such exploitation. Similarly, one cannot blame the ART techniques in such case. However, while looking in to the restrictions it is centred on these players of the process. The remaining actors involved are the clinics, doctors, fertility experts, surrogacy agencies, lawyers etc. Therefore, under such circumstances it can be said that awareness among the surrogate mothers and their family members specially husbands, regarding the pros and cons of the entire process should be spread eventually. Because in most cases it is seen that their husbands to become surrogate for money without the consent are coercing that surrogates. Rather than playing the blame game, the non-governmental organisations as well as the women organisations should play a pivotal role in this context. They should try to provide proper counselling related to the entire process. As illiteracy is also one major cause of poverty, so the surrogate mother without being aware of the surrogacy contract easily becomes victim in the process. So educating the young girls is very necessary so that they should not become the next prey in the hands of exploiters involved in the system. Along with the surrogate mothers, awareness should also be raise among the larger

society about surrogacy so that surrogacy should not be taken as a cheap work of selling one's own womb and babies. Due to society's unfamiliarity with surrogacy, the process remains concealed within a few people who are involved in it, but the majority population remains clueless. Therefore, simply drafting a law would not help these surrogates until and unless they get their due recognition as surrogates without shame. The fear of humiliation should be detached from their minds so that they can easily share their feelings as well as experiences with someone other than a surrogate mother. It will help her to become alert if exploitation from any kind is going on in the process because an outsider can automatically recognize it, as that individual is not gaining any profit out of it rather they will analyze the entire process keeping the rights of surrogate mothers at the forefront. Thus, surrogacy should be regarded as a strict professional work where society's involvement for providing its derogatory comments is not necessary. The payment for this service should be uniform basis and determined by the Government itself so that prior to the entering in the service they should become aware about their payment. The prior concern should be to stop exploitation of the surrogate mothers and the child by all possible means.

Protection by Prohibition-The role of Indian state and law in defending the rights surrogates:

Surrogacy is a process where specifically four persons are involved for procreating a child, the surrogate mother, the intending parents, and the donor. Thus, the more the humans are involved the more questions on human rights will emerge. In the entire process of surrogacy the rights of the surrogate, the intended parents and the child becomes very crucial. It is mainly because they are the one, who takes the risk of achieving parenthood at the cost of their money and emotions (intended parents), health (surrogate mother). In case of the child, his/her entire future remains unpredictable as it becomes almost necessary for the child to be born without any complications. So, the potential risk of exploitation is very high on each and every part of the process. So, in order to stop such probabilities the Indian Government is trying to issue various regulations guided by law to protect the rights of its citizens.

Since 2002, commercial surrogacy was legal in India. Earlier the ICMR guidelines are available for administering the ART as well as surrogacy practices that is not legally binding on the parties.

Although the Indian government has come up with various ART Bills to regulate, the procedure but it failed to be pass by both Houses of the Parliament. However, in the year 2016 Surrogacy (Regulation) Bill 2016 came up with some regulations to keep the entire arrangements under tight scrutiny. But Rajya Sabha did not pass the Bill. At this the Department – related Parliamentary Standing Committee on Health and Family Welfare came up with One Hundred and Second Report (Report No 102) on Surrogacy (Regulation) Bill 2016 which was presented to Rajya Sabha on 10th August and laid on the table of Lok Sabha on the same day. As a newcomer in the field the Surrogacy (Regulation) Bill, 2016 has many loopholes within it for which proper recommendations were presented by the said report. Still disregarding its suggestions the Surrogacy (Regulation) Bill, 2019 was introduced in Lok Sabha on 15th July 2019 and passed by it on 5th August 2019 with a little or no modifications. As such it was again criticized by the different stakeholders. Hence, history was repeated once again and on 21st November 2019, Rajya Sabha adopted a motion for reference of the Surrogacy (Regulation) Bill 2019, as passed by the Lok Sabha to a Select Committee of Rajya Sabha with the instruction to report to Rajya Sabha after carefully scrutinizing its deficiencies.

The recent Surrogacy Regulation Bill 2020 has maintained its stand in the House by facing severe criticisms. The Select Committee on Rajya Sabha has put forwarded several recommendations regarding the Bill. However, it acknowledges altruistic surrogacy to stop the exploitation part of surrogacy with respect to the surrogate mothers. It also mentions about any married willing women between the age group of 25-35 years can become a surrogate mother abiding by the rules and regulations for once in her life time. Further the waiting time period for intending couple is fixed at five years of marriage. They should also provide a certificate mentioning about their medical indication for availing surrogacy by the District Medical Board. The child should be given the status of biological child of the intending parents and all rights and privileges will automatically entitled to him/her. The abandonment of the child is not permissible at any case. However, single women who might be widow or divorcee can also avail the surrogacy services provided her age group should be between 35-45 years. Similarly, it also provides the age limit of the married heterosexual couples for which is for the woman it is 23-50 years and for

the man it is 26-55 years. The penalty for secretly conducting commercial surrogacy on the part of intending parents may be extend to five years of jail and a fine that may extend to five lakh rupees and for subsequent offences it may increase up to ten years of jail and fine up to ten lakh rupees.

Conclusion:

While in the battle between altruistic versus commercial surrogacy, although altruistic surrogacy prevails still there are certain questions which remains unanswered by altruistic surrogacy. The question is that if commercialization of surrogacy procedure is exploiting the poor woman then why the Government is still not successful in balancing the rights as well as needs of the surrogate mothers? Why for such a long period the exploitation part was encouraged and no one is paying due attention in this context? The banning of the service should not be the last resort; the Government should come up with more progressive reform along with alternatives in this sector because now it seems to fail to maintain the needs and rights of these women. While protecting the rights it has completely underrated the necessities of these women for money. If altruism would have worked easily then why it waited for a strict legislation to be imposed upon it? The needs of intending parents to have their own genetic child is being satisfied but what about the needs of surrogate mothers, is she simply be satisfied herself by gifting the child to others with the only compensations allowed which are basically the medical expenses. Therefore, who are suffering after this ban allows proper analysis from the needs perspective as well. However, it is also assume that banning the process of commercialization will automatically push surrogates under more pressure as now they will have to do this free of cost. Similarly, the rights of LGBTQ section wanting to avail the surrogacy were also banned. So, what answer the Government will provide when it comes to the protection of human rights of its citizens? It is not even that easy for the LGBTQ section to adopt a child, so what other alternative will be available for them.

A strict regulation with proper vigilant authority is the need of the hour in context of surrogacy in India. The fertility clinics where surrogacy is conduct should be keep under strict supervision so that exploitation part should be stop at any part of the process. Proper records should be maintained regarding the delivery of babies, health of surrogate mothers as well as miscarriages, and the possible reasons for it during the course of pregnancy.

Because cases of uninformed abortion by the doctors in case of twins or disabled child was also visible. So, informed consent on the part of surrogates are necessary for each and every activity related to the pregnancy as she is the only one who totally involved her body, mind and spirit in the entire process. Along with the theoretical part by passing, a Bill to stop exploitation the Government should look into its practical side that includes proper application of the orders given by the authority. When both theory and practice will come up with actual effect then only the possibility of declining the rates of exploitation of the surrogate mothers will be visible in India.

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