

Surrogacy: the changing trends in India

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Abstract

One amongst most controversial topics, 'Surrogacy', has complex, diverse and most unsettled laws. In most of the countries over the world, the woman giving birth to a child is considered as a child's legal mother. However, in very few countries, the intended parents are to be recognized as the legal parents. India is one of them, where intended/commissioning parents are recognized as legal parents [1].

Surrogacy-

Surrogacy is an arrangement whereby a woman agrees to become pregnant and deliver a child for a contracted party. There are two types of surrogacy such as traditional surrogacy and gestational surrogacy.

Traditional surrogacy is an arrangement where a woman is impregnated with the sperm of a married man with the prior understanding that the resulting child is to be legally the child of the married man and his infertile wife. Whereas, gestational surrogacy is the process by which the sperm of the married man is artificially united with the egg of his wife, and the resulting embryo implanted in another woman's womb.

Indian surrogacy laws-

India legalized commercial surrogacy in 2002, which certainly gave rise to a booming industry of foreign surrogacy requirements and fertility tourism, such so much that the commercial surrogacy was banned in 2015. The question of foreign surrogacy became specially relevant after the case of *Baby Manji Yamada* [2] [3]. In 2007, a certain Dr. Patel working at the Akanksha Infertility Clinic, arranged for Japanese couple Ikufumi and Yuki Yamada to have a surrogate baby by Pritiben Mehta. Pritiben was impregnated using a mix of Yamada's sperm and an anonymous Indian woman's egg. However, in the months to come, Yamada and his wife filed for divorce. None of the Indian laws covered whose child the baby (Manji) was: the woman who donated the egg, Pritiben, or Yuki Yamada. Furthermore, there was even a petition filed later in court that Dr. Patel was running a child trafficking racket by abusing the lack of surrogacy laws, and gaining easy money by enabling surrogacy. Although the case was resolved and Baby Manji was given to her grandmother Emiko.

Thus to curb situations like Baby Manji, on 24th August 2016, the proposed draft Surrogacy (Regulation) Bill, 2016, was passed in India by permitting it as

an option for couples who cannot naturally have children^[4].

Brief about Surrogacy (Regulation) Bill, 2016-

The prime motive behind this draft was to restrict the surrogacy custom. Those who have biological or adoptive children will not be eligible for a surrogate, a point emphasized by External Affairs Minister Sushma Swaraj, who targeted celebrities opting for surrogacy after having their own biological children. “I am sad that what was started to fulfill a necessity is now treated as fashion”, Swaraj had complained ^[5]. Few important features of this bill are-

1. Surrogacy will not be allowed for –
 - Homosexual couples
 - Single parents
 - Couples in live-in relationships
 - Foreigners
 - Couples with children
 - Attempts at commercial surrogacy
2. Couple must be married for at least 5 years.
3. Either one of couple must have proven infertility.
4. Only Indian citizens; NRIs are also not included
5. Age of couple: 23-50 for females and 26-55 for males.

6. Women can be surrogates only once and a married couple can only have one surrogate child.
7. The couple should employ an “altruistic relative”, i.e. the surrogate mother should be a relative who is sympathetic to the situation.
8. Egg donation is banned ^[2].

Assisted Reproductive Techniques (Regulation) Bill, 2014-

A draft legislation regulating assisted reproductive technology (ART), published by Indian Ministry of Health and Family Welfare, through its department of Health Research, published for public and stakeholders comments. The bill primarily aims at

- Proper regulation and supervision of ART clinics and banks in country, as well
- For prevention of misuse of technology.

The bill paves the way for setting up of National and State Boards for ART, and makes registration of ART clinics mandatory. It provides that only a healthy married woman between ages of 23 and 35, who has a child of her own above age of 3 years, is allowed to become a surrogate mother, with the consent of her spouse. The commissioning parents must bear all medical expenses, insurance, etc and are legally bound to accept the custody of

child/children may have, and whether the parents separate before the child/children are born. Violators face imprisonment of up to 5 years or a fine of Rs. 10,000, or both, for the first offence. The bill prescribes a minimum compensation for the surrogate mother [6]. The draft ART Bill has gone through a number of revisions over the years based on recommendation and suggestions made by different ministries and department of central government. Currently, reports states that it might be tabled in winter session of parliament.

Analysis and Suggestions-

The alarming data indicate that in past decades commercial surrogacy has grown up tremendously in India. Before November 2015, when government imposed a ban, foreigners accounted for 80 percent of surrogacy births in the country. Considering this, the step taken by government seems appropriate but when the social side of this issue is analyzed, the emotional urge expected liberal approach for such sensitive topic despite a draconian alteration in law.

Surrogacy is seen as last hope for childless couples, though they have options like adoption but the highly rigid culture and prevailing customs influence one to any how get their own biological heir, somewhere to fulfill their 'so called' *pious obligation* or somewhere to satisfy the orthodox rituals. Another point to be taken into consideration is about the **surrogate mother**. In cases like such, she is mere treated as a 'womb on rent', ignoring the fact that pregnancy is

fraught with risks and woman takes it up only when forced by circumstances. The concept of Altruistic Surrogacy takes away the last option left to such women in need due to adverse circumstances.

- Surrogacy must more be treated as a social issue despite a legal issue. It involves family, it involves emotions and much of above, it involves a new life. In the country where the laws governing family are more to conciliate than to complicate, surrogacy must also be treated with a bit liberal approach.
- As the guidelines provided under Assisted Reproductive Techniques (Regulation) Bill, 2014 provide enough elaborated data to frame legal outlines. Banning surrogacy altogether must be viewed again as this problem may be sorted by implementing regulation and sharing responsibilities with hospitals, medical clinics and banks.
- A proper transparent procedure with registration of all necessary data with government agencies may help to sort the problem of developing surrogacy as a blooming industry.
- The law must specifically provide for legitimacy and custody of child/children born out of surrogacy, in case of any conflict between the parties, as to avoid complexities developed in Baby Manji case.
- The proposed law, despite completely setting aside surrogacy for foreigners, may provide a

separate set of rules to be mandatorily followed by foreign couples.

Conclusion-

No doubt the Surrogacy (Regulation) Bill, 2016 will save the women from exploitation and surrogacy will not be seen as gainful employment anymore but the other side of coin reflects its criticism as well. The bill is at controversy especially for three issues. *Firstly*, for the concept of 'altruistic surrogacy' which necessitates only a relative to be surrogate, secondly, its ban on surrogacy rights of homosexual couples. This is the first time that the government's transparent homophobia has come out in the open. **Sushma Swaraj very clearly stated that surrogacy for homosexuals is against "Indian ethos"**, although homosexuality has been constantly mentioned in various Indian texts. And *lastly*, regarding the financial aid a surrogate mother was supposed to receive. The draft bill envisages that a surrogate mother cannot be paid in any manner except the medical bills ^[7].

The government passed the bill to prevent commercial surrogacy. Critiques says that government, indeed, reasonably regulate the laws instead eliminating commercial surrogacy altogether. The law needs to be scrutinized and an appropriate mechanism has to be come up to oust all the loopholes.

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