

Assisted Reproductive Technique (Regulation) Bill 2016: Impact on the Abuse of Human Rights in India

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Abstract

Surrogacy allows a woman to legally carry someone else's child, but the desperation for a biological child has unfortunately turned the altruistic approach into commercial surrogacy. Prior to 2016, the absence of specific legal provisions to regulate commercial surrogacy in India along with a ban on such practices by most of the developing countries had led to the proliferation of the surrogate business in India. Perhaps the draft Assisted Reproductive Technique (Regulation) Bill 2005, The Immoral Trafficking Prevention Act (ITPA), 1956 and Sections 366(A) and 372 of the Indian Penal Code, 1860, were the only existing laws on the subject, but they were not sufficient in dealing with the emerging dimensions of commercial surrogacy, i.e., vicious violation of human rights. With the introduction of ART (Regulation) Bill 2016, it needs to be probed whether its implementation has made it ethical on the one hand as intended and helped to curb this unethical and inhuman practice on the other in the current scenario.

Keywords: Human rights, legal, surrogacy, unethical, inhuman

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INTRODUCTION

Surrogacy is a contract in which a woman carries a pregnancy for an infertile couple. Large numbers of desired couples from all over the world come to India for commercial surrogacy due to relatively low cost and due to lack of proper and stringent law. It has now been nicknamed the "rent-a-womb" capital and the "surrogate mom capital" of the world [1]. Although this appears to be mutually beneficial, there are certain sensitive issues which need to be flagged. Commercial surrogacy was a new form of business which was eventually leading to many inhuman practices. Keeping this in view, the ATR (Regulation) Bill 2016 was passed with the aim to effectively curb this menace.

MEANING OF SURROGACY

The American Law Report defines the term "Surrogacy" as, "a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father and to terminate all of her parental rights after the child" [2].

According to the Black's Law Dictionary, "surrogacy means the process of carrying and delivering a child for another person" [3].

TYPES OF SURROGACY [4]

Traditional Surrogacy

By this method, the sperm of the donor or the sperm of the father is artificially inseminated in the women and after getting pregnant, she carries the foetus till delivery. In this method, the woman is the biological mother of the child because of the fertilization of her egg and father's sperm.

Gestational Surrogacy

In this method, the fertilization is done through *In Vitro* Fertilization (IVF) technique, where the egg and sperm of the intended parent are collected for artificial fertilization. Once the embryo is formed, then it is transferred to the surrogate mother's womb with the help of Artificial Reproductive Technology (ART). The surrogate mother carries the baby until delivery. In this case, the surrogate mother is not the biological mother of the child because she only carries the child in her womb but is not an egg donor.

SURROGACY IN INDIA

In 2008, after Baby Manji Case, the Supreme Court of India allowed commercial surrogacy in India [5]. A Japanese couple approached an Indian surrogate for the desire of baby, but they divorced before the baby was born. After her birth, although, the genetic father wanted the child's custody but the Indian law bars single men from it and Japanese law did not recognise surrogacy. After many hustle and bustle and legal exercise, the baby was ultimately granted a visa [5]. The case highlighted in media and society at large, about the need for a regulatory framework for surrogacy in India. According to the Apex Court's directions, the Legislature had drafted the Artificial Reproductive Technology (ART), Bill. Indeed, this was the first step towards regulating the surrogacy industry which was earlier guided by the National Guidelines for Accreditation, Supervision, and Regulation of ART clinics in India, 2005 which was subsequently amended in 2008, 2010 and 2013. In addition, perhaps the surrogacy contract between the parties and the ART clinics guidelines were the only guiding force in the past.

Although, surrogacy in India is estimated to be a \$ 2.3 billion industry but surrogate mothers are paid less than a tenth of what they get in the USA. There is a rapid increase of IVF clinics in India, poverty plays a significant role in surrogacy, poor women and their guardian are willing to rent the womb easily in a very less price. The absence of a regulatory framework, in the past, was also an important factor which attracted foreigners in a large number to India. Exploitation of surrogate mothers, their health safety and child's health safety, rights of the surrogate mother, child and commissioned parents were some of the burning questions which needed proper regulation [6].

The Law Commission of India has submitted the 228th Report on "Need for legislation to regulate ART Clinics as well as rights and obligations of parties to surrogacy" in 2009. The following observations had been made by the Law Commission [7]:

1. It allows surrogacy through a contract with conditions in the favour of medical and

legal issues pertaining to surrogate mother and child. However, it restricts the commercialization of surrogacy.

2. The contract also provides a financial support for a surrogate mother and child. Future aspect of the child is also considered in the case of death of any of the intended parents or their divorce.
3. The provision of life insurance for a surrogate mother should be provided in the contract.
4. One of the desired parents should be a donor. In case the desired parent is single, he or she should not be infertile or incapable to become a biological parent. In that case, adoption is suggested. This step is taken to reduce child abuse in society.
5. As a major of the right to privacy, the name of the surrogate mother should not be on the birth certificate, but it should have the names of the commissioning parents only.
6. Modes of business through surrogacy should be completely restricted, for instance, sex-selective surrogacy, complexion, IQ, family background etc. of a surrogate mother in the desire of good looking, intelligent and good character of a child.

On the recommendations of Law Commission, the ART Bill was first drafted in 2010. The draft prepared in 2012 has banned only those foreigners from hiring Indian surrogates whose own countries of origin did not recognise commercial surrogacy as practice in India.

ART (REGULATION) BILL 2016, PRESENT POSITION

- The Draft Bill does not allow surrogacy for foreigners, overseas citizens of India (OCIs), non-resident Indians (NRIs) and even foreigners married to an Indian citizen.
- Only close relatives can be a surrogate mother.
- Surrogacy is allowed only for an Indian couple, but not for bachelors, homosexuals and couples with live-in relationship status.
- However, it mandates that married couple should have five years of sustained

marriage. They also have to produce a certificate saying 'the woman is unable to conceive her own child.

- If any couple already has a child through adoption, they are not eligible to have a surrogate child.
- Couple already having a child are bared to use this technique.
- A surrogate child will have the same status as a natural child.
- The age limit has been prescribed for surrogacy, male between 26 and 55 and female between 25 and 50 years.
- National Surrogacy Board will be formed to keep a check.
- Punishment for the violation of the Act will be 10 years of imprisonment and fine of 10,0000/-.

ANALYSIS

- Although the proposed regulation seems to be beneficial and has adequate checks and balances to curb the practice of surrogacy as a business and as a mode of human trafficking, it still has many loopholes.
- If a couple is not having any close relative who could be a surrogate mother, then they cannot have a child.
- Maximum age limit should be reconsidered, as 50 years is almost an age of menopause.
- Surrogacy to foreigners, overseas citizens of India (OCIs), non-resident Indians (NRIs) and even to foreigners married to an Indian citizen should be allowed with certain restrictions, as in many countries it is completely banned.
- Corporate and businessmen should be prohibited entry in the field of ART, sperm/egg banking etc., it should be restricted only to the doctors.
- There is no specified monitoring system proposed to check ART clinics and the misuse of this technique.
- There must be a proper health check-up to identify the possibility of any potential communicable disease.
- Consent of surrogate mother is needed through a proper contract.
- Health issues are completely ignored, like, numbers of egg implantation, medical

complications, vulnerable disease and miscarriage.

- It should be made obligatory for all couples to accept the custody of the child or children irrespective of any abnormality they have.
- There are no strict laws pertaining to human trafficking and violation of human rights in the draft.
- Intended parent should directly approach the clinics and surrogate mother. No middlemen should be commissioned for this.

SURROGACY AS A NEW MODE OF BUSINESS

There is a complete ban on surrogacy in Germany, Norway, Italy, Sweden and Singapore. Only altruistic surrogacy is allowed in Canada, in certain Australian states, New Zealand, UK, Greece, Denmark and Netherlands. In the USA, some states allow commercial surrogacy, but in a highly regulated environment. In Russia and Ukraine, surrogacy is completely legal. India is one of the few countries that have recently passed a legislation to allow the practice of commercial surrogacy.

This paper attempts to highlight that there are numerous issues involving surrogacy. At times, the nation or state won't maintain or uphold a surrogacy contract. In different cases, you may not be perceived as the child's lawful guardians or the surrogate might be recorded as the birth mother (regardless of the possibility that she is not identified with the youngster). Examples of such countries where surrogacy laws do not exist are Nepal and Ireland.

International surrogacy involves bilateral issues, where the laws of both the nations should be uniform otherwise the concerns and interests of parties involved will remain unresolved. Thus, giving due regard to the emerging concerns and to prevent the commercialization of human reproductive system, exploitation of women and the commoditization of children, there is an urgent need for effective implementation of the existing laws.

Many studies have pointed out that commercial surrogacy is a new mode of business involving exploitation of women and children. Generally, IVF cost about \$8,500 which is a big investment [8]. When a considerable amount is invested, it demands high expectations. There are varieties of options available in the market to attract commissioned parents, for instance, graduate egg donors, with high IQ level, good looking, fair complexion, good family background etc. [9]. Commissioned parents are ready to pay any significant amounts of money for a child. These demands and large investments result in a rapidly increased number of egg donations. Poor and needy people have started considering it as an easy mode to generate money. The risk level of a surrogate mother's health and emotional outburst is completely ignored [10].

Despite this dismal scenario, the mechanism of surrogacy market is like any other business sector. The eggs donors qualify many tests. Initially, they send their photos and categorised based on all aspects of the applicant's life: physical appearance, facial features, complexion, height, weight, medical background of the applicant and her family, including the age and cause of death of her grandparents, education, occupation, career goals, education and occupation of the parents and siblings, religion, musical abilities, sexual life and personal questions of all kinds [11].

The clinic or agency also certifies that the egg donor is not having any medical or judicial background [12]. Many clinics also offer pre-implantation genetic diagnosis, not only to avoid genetic diseases but also to enable commissioning parents to choose the sex of the baby [13]. Then, based on these choices available, a surrogate mother is selected. This demands many surrogate mothers and middleman are completely involved in human trafficking to bring girls/women having such qualities and use them in surrogacy business. Due to the popular demand and heavy paid amount this business is awfully blooming in India.

Although, surrogacy is an attractive alternative for an infertile couple to become biological

parents and a good source of income for a poor surrogate mother and the country earns foreign currency. But due to lack of proper legislation, in the past, both surrogate mothers and intended parents were somehow exploited and the profit was earned by middlemen and commercial agencies. There was no transparency in the whole system, therefore, the chances of getting involved in legal problems existed [14].

According to Dr. Roel Schats, the chief medical officer of the IVF centre of the VU Medical Centre, surrogacy is a form of modern slavery in which Indian women is used as a breeding machine [15]. This is an apparent violation of human rights. It was submitted in the report that if a woman is forced, coerced and exploited to become a surrogate mother, in that case, it will be considered as a crime which falls under trafficking [16].

According to the definition of the United Nations, "trafficking is any activity leading to recruitment, transportation, harbouring or receipt of persons, by means of the threat or use of force or a position of vulnerability".

Human trafficking for organs and sexual servitude has also been internationally noticed in the present scenario. Unfortunately, surrogacy which is the latest form of trafficking is not perceived at the same level by the international community. Surrogacy is a commodification of the human person where surrogate mother is used as an incubator to fulfil the demand of the party. This violates the dignity of both the surrogate mother and the child [17].

Many studies in the recent past have indicated that Commercial surrogacy is a major area of concern. It not only promotes forced surrogacy but also human trafficking, manipulation and violation of human rights. Women's bodies are sold as an object of marketing and a source of generating money.

The Immoral Trafficking Prevention Act (ITPA), 1956 and Sections 366(A) and 372 of the Indian Penal Code, 1860 are the existing laws in India, which deal with human trafficking. However, none of these provisions

specifically deal with this recent emerging serious form of trafficking of women/girls for commercial surrogacy in reproductive industries.

It needs to be pointed out that, India is at the leading edge of the worldwide surrogacy market which is an area of concerns due to unregulated and highly oppressive condition pertaining to the ethics of surrogacy in the recent past. Surrogates are poor, illiterate and in general from rural areas. They are usually kept in clinics where they are monitored around the clock. Even the recruiting process is notably like the human trafficking, especially of sex workers. Life of surrogate mother is commonly at risk because there is no limit to implant embryos. Violation of human rights is at peak because doctors are directed to insert more than one or two embryos to increase the chances to get a woman pregnant without losing time or money [18].

The predicament of Indian surrogates needs more concentration. According to Alison Bailey's study on the reproductive injustices faced by Indian surrogates; there was a 30% annual growth rate due to the promotion of medical tourism by the Indian government. However, the actual number of surrogacy clinics in India is unknown [19]. Till 2006, surrogacy was a \$445 million business with projections that profits would reach \$6 billion in the following years. However, India's maternal health statistics are harsh. India's 117,000 maternal deaths per year account for one-quarter of the world's annual maternal deaths [20]. Still, due to miserable financial situations of many Indian families, they find surrogacy is an attractive option to survive without thinking of harmful effects on human bodies to drugs and surgical process [21].

LEGAL LOOPHOLES IN INDIA

There were many legal loopholes due to which this malpractice was spreading in India. Some of them are discussed below:

The Technique Used by Traffickers [22]

- Egg donor and their families are sometimes threatened and even violence is used to indulge them in this business.
- They are even deprived of their necessities, such as food, water, or sleep.

- False promises of love or companionship and of a good job and home are often used.
- They are restricted to contact friends or family; their freedom of movement is also limited; their identification documents are also controlled.
- They cannot take any legal action.

Legal Issues [23]

- The lack of proper legislation, in the past, in India allowed the mediators to earn more profit while the surrogate mothers and intended parents are misguided and mistreated.
- The problems of trans-border surrogacy are generally in citizenship, nationality, motherhood, parentage and rights of such children.
- In the case of an adverse outcome of pregnancy, surrogate mothers are doubtful to be paid and there is no provision of insurance or post-pregnancy medical and psychiatric support for them.
- No minimum and maximum age have been defined of a surrogate mother.

Breach of Contract [24]

There can be a breach of contract by both the sides, either by the intended parents or through the surrogate mother. Some examples of breach of surrogacy contract are:

- Voluntary abortion by the surrogate without the consent of intended parents.
- The surrogate can also breach the contract by failing to follow certain behavioural restrictions (by indulging in drug abuse/alcohol consumption for example) during the gestation period.
- Failure of the intended parents to pay for all the expenses and fees.
- The surrogate's refusal to go for an abortion following the attending physician's recommendation.

Medical Problems [25]

There can be many obstetrical or medical complications during pregnancy.

- The surrogate mother is vulnerable to infection when another woman's eggs are transplanted into her body.
- The chances of miscarriage during pregnancy are high.

- Generally, more than one embryo are implanted into the uterus to enhance the chances of successful pregnancy; which results in the possibility of twins or triplets. If done frequently, it becomes crucial for the health of the mother as well as of the unborn babies.

Although commercial surrogacy has many unresolved issues, still there has been a steady rise in the number of surrogacy cases. The findings point out that the ART (Regulation) Bill 2016 has proposed many changes but the challenges in its implementation should not in any manner be allowed to overshadow the larger issue of disguised human trafficking. The implementation and enforcement mechanism of the Act must reflect the commitment of the Government to first and foremost, safeguard the interest of surrogate mothers and then to outline the ethical limit of regulatory authorities to regulate commercial surrogacy.

CONCLUSION

Parenthood is a dream of almost every couple. Unfortunately, due to some medical reasons, some couple cannot have their biological baby. Surrogacy is a convenient and appropriate solution for them. A surrogate mother is used for this purpose to carry and give birth to a child for another person or couple when they are unable to conceive or carry a child naturally/biologically. There are several medical, legal, ethical, religious issues that are associated with the concept of surrogacy. India has become a striking option for the desired couple due to cheap medical facilities, poor socio-economic conditions and lack of stringent regulatory laws till the recent past.

Gradually, surrogacy has become a new mode of business which generates a large amount of money. Surrogacy basically treats a woman's body as a breeding machine, without taking care of her emotions and health which is a violation of human rights. The condition of surrogate mother and a child is pathetic and needs a serious concern.

Human trafficking is one of the most inhuman and contemporary issues. In the absence of uniform, international law to regulate the reproductive industries, the black market of

organ trafficking for the supply of surrogate mothers and eggs for commercial surrogacy is flourishing day by day with a rapid increase in the incidences of trafficking of women and minor girls in Indian as well as the international market.

Although issues pertaining to human trafficking have been flagged and debated at the international level, unfortunately surrogacy and the associated issues like, violation of human rights of surrogate mother; child and intended parents; disguised human trafficking; the exploitation by mediators and unregulated ART clinics, etc. are yet to receive the attention that they deserve, especially in the rapidly changing scenario.

Several countries have already taken steps to significantly limit or ban surrogacy. In India, although the bill has been passed recently, still it has many inadequacies as discussed above.

There is an urgent need for effective implementation of ART (Regulation) Bill 2016 which, while dealing with the problems associated with surrogacy does not interfere with the reproductive rights of a woman and freedom of choice available to an individual by which commercial surrogacy related matters will be governed. Moreover, sufficient steps need to be taken to educate the people so that they can at least understand the ramifications of the legalization of commercial surrogacy.

There must be a strict provision or guidelines for every IVF centre to follow a code of ethics. A strict monitoring system should be developed and misuse of the code of conduct should be severely punished. However, it should not be a deterrent for patients or prevent infertile couples from availing the benefits of technological developments. An overall review of the scenario suggests that surrogacy is a baneful scientific technique which can be used to fulfil the void in the life of desired couples, but effective implementation of the legal provisions and related policies evidently stressing the Government's commitment to the overall welfare of the surrogate mothers should be made to prevent its misuse in any manner, particularly disguised human trafficking.

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