

SOCIO-LEGAL DIMENSION OF ALTRUISTIC SURROGACY IN INDIA : A CRITICAL STUDY

ABSTRACT

Introduction:

Every couple has an innate desire to have a natural offspring for continuation their family as well as legacy. It is essential not only for fulfilling the personal aspirations of the individuals but also for the continuation of the society. The desire is consummated by the act of procreation, which is a natural process. However, unfortunately a large number of people due to various reasons remain shunned from this magnificent gift of God.

Infertility is a source of social and psychological suffering for both men and women. It creates great pressure on the relationship within couple. But, nowadays infertility is not a bar to conceive a child both for the couples and for the individuals. Revolution in Human Reproduction is one of the miraculous achievements of last few decades. Presently, with the help of Assisted Reproductive Technologies (ART) a woman could conceive a child without any coitus relationship.

Surrogacy is one of the Surrogacy is a method of ART whereby a woman agrees to carry a pregnancy for another person or persons, who will become the parent (s) of the new born child after birth. It has become a different happening for present time due to the ways it has crossed borders in the highly globalized context of the world. In the absence of any kind of regulatory framework and monitoring mechanism, it creates various complexities to the parties concerned.

To regulate the commercial surrogacy recently, Govt. of India has proposed a policy i.e. the Surrogacy (Regulation) Bill, 2020, whereby it seeks to impose ban on commercial surrogacy and allows altruistic surrogacy. While irrespective of monetary contribution in surrogacy arrangement the probable involvement of all other issues such as social, psychological, biological, ethical, legal within altruistic surrogacy can't be disregarded. Hence, this study concentrates on acceptability of proposed policy in India from socio-legal dimension.

Objectives of the Study:

The objectives of the study are:

- To examine the concept of Altruistic Surrogacy and Commercial Surrogacy.
- To study legal positions of surrogacy arrangements in international as well as national level.
- To conduct a comparative study of Altruistic Surrogacy vis-a-vis Commercial Surrogacy.
- To analyse the socio-legal issues involved in altruistic surrogacy.
- To make a study of compatibility of the current policy and proposed legislation in present socio-legal context.

Research Methodology:

This Research work is consists of both doctrinal & non-doctrinal study. In doctrinal study primary sources include the Constitution of India, International treaties and instruments, different statues and various judicial pronouncements of the courts and secondary sources adhere to include books, journals, periodicals, law reporters and internet sources. To conduct non doctrinal study and to gather a

clear concept on entire treatment of infertility and ART visited three (3) significant hospitals in Guwahati. Interaction and unstructured method of interview were used to examine the opinion of medical personal on surrogacy and the acceptability of the proposed Altruistic surrogacy.

Chapter Plan:

The whole study comprises of total eight (8) chapters. These are:

CHAPTER-I of the research work is INTRODUCTION. This Chapter deals with the preliminary introduction of the concept of Assisted Reproductive Technologies and Surrogacy as one of the most popular form of ART. It focus how time has been playing a significant role in the evolution of human society, the significance and need of a child in a family, the problem of infertility and how the problem of childlessness is overcome through Adoption and various methods of ART including Surrogacy. It also emphasises on the picture of Surrogacy in India and quandary and debate related to surrogacy. To bring clarity on the topic by avoiding confusion, it also contains the concepts of the various terms used in this study. It also contains the scope of the study, objectives of the study, limitation of the study, review of the literature, research methodology and chapter plan.

CHAPTER-II of the research work is HISTORICAL DEVELOPMENT OF SURROGACY. This chapter is basically deals with the historical development of Surrogacy and it is required to understand and follow the entire process of development of surrogacy and surrogacy arrangements. It mentions the approach and methods provided in Manu Smriti in relation to procreation of a child when a husband

dies childless or incapable of fatherhood. The study of history of Surrogacy is carried out in two parts, first one is Indian Perspective and second one is International Perspective. In Indian perspective, it describes various incidents of occurrence of surrogacy in Indian Mythology and also describes how the Modern development of medical science and human reproductive technology has brought India to the front position among other countries after the born of World's second and India's first IVF baby Durga in Kolkata on 3rd October, 1978. In International Perspective, it describes about the references of Surrogacy found in Biblical times and in the history of Mesopotamia's Hammurabi Code, and the journey from Traditional Surrogacy to Gestational Surrogacy through various phases of development caused by the advancement of ARTs. It also mentions some monumental milestones in relation to Surrogacy Arrangements occurred in various countries. It also focuses on the development of a global phenomenon i.e. International Commercial Surrogacy Arrangement, where commissioning parents in one country directly or indirectly hire a woman in another country to bear a child on their behalf. It also focus how, there is gradual rise of Single Parent families through ARTs around the World.

CHAPTER- III of the research work is RIGHT TO PROCREATION AND RIGHT TO ASSISTED REPRODUCTIVE TECHNOLOGY-LEGAL PROVISIONS, POLICIES AND LEGISLATION CONNECTED TO SURROGACY. This chapter seeks to elucidates the recognition of need for a child as a basic human right and its incorporation as right to procreation including right to use ART at international as well as national level. It focuses on various International Human Rights Conventions, such as UDHR, ICCPR, ICESCR, CEDAW, ICPD, IPPF, Hague Adoption Convention etc.

It also discusses the existing legal frameworks for regulating surrogacy in international as well as national level. It also focuses on constitutional and various existing legislative provisions applicable to Surrogacy in India such as, ICMR Guidelines, 228th Report of Law Commission of India, draft ART Bills 2008, 2010, 2014, the Surrogacy (Reg.) Bill, 2016, 2019, 2020 and other laws applicable to surrogacy arrangements in India in absence of specific legislation.

CHAPTER-IV of the research work is SURROGACY–TYPES AND TECHNIQUES. This chapter deals with different types of Surrogacy Arrangements and scientific techniques and procedures used for Surrogacy. It elucidates the concept of different types of Surrogacy Arrangements considering contribution of monetary compensation and genetic materials. It describes stepwise procedures have to observed to get a child through IVF surrogacy such as, Ovarian stimulation, Preparation of the surrogate, Ovum pickup, ART for male factor infertility, IVF of gametes, Cryopreservation of embryos, Embryo transfer into the womb of surrogate, IVF success and failure and Complications of ART treatments. And it also mention about the basic procedures required to be followed for AI and IVF Surrogacy, namely, counselling for surrogacy, medical test for various diseases, surrogacy arrangement .

CHAPTER-V of the research work is SOCIO-LEGAL ISSUES OF SURROGACY: ALTRISTIC SURROGACY VIS-A-VIS COMMERCIAL SURROGACY. This chapter conducts a comprehensive study on Altruistic Surrogacy and Commercial Surrogacy. It discusses how ARTs techniques used for assisted reproduction creates a complex relationship among genetic mother/father, gestational

mother, and legal mother/father and a child born out of ART. It focuses on socio-legal issues involved in Altruistic surrogacy and Commercial surrogacy and especially issues involved in International Gestational Commercial Surrogacy Arrangements as surrogacy being controversial form of ART raise issues like interference with nature, commoditization of child, exploitation of surrogate women etc. It has made attempt to throw light over some other social and legal issues, those are often left unaddressed.

CHAPTER-VI of the research work is JUDICIAL FINDINGS. This chapter endeavour to study various judicial findings relating to surrogacy on various legal issues of various jurisdictions arising out of surrogacy arrangement including India.

CHAPTER-VII of the research work is DISCUSSION. It interprets and discusses critically the forgoing chapters critically. It also discusses the prevailing condition of surrogacy and legality of the Surrogacy (Reg.) Bill, 2020.

CHAPTER-VIII of the research work is CONCLUSION. It contains concluding observations, findings and recommendations. The study discloses that surrogacy is a fortunate thing to those individuals or couple who desire to beget genetically related child. Irrespective of hardships and issues involved in surrogacy practices, it has been accepted globally. It is difficult to conclude in one single sentence regarding acceptability of a particular form of surrogacy without understanding it very clearly. Hence, the study and discussion has been carried on certain finding and recommendations required to put forward for organizing the practice of surrogacy in India a more acceptable way.

Findings of the Study:

- i) Altruistic Surrogacy and Commercial Surrogacy are two classes of surrogacy, classified on the basis of financial transaction between the surrogate mother and the intended parent(s).
- ii) Presently, there is no uniform approach available globally. A different approach existing in countries has produced a vulnerable situation in inter-country surrogacy arrangements, where there are no legal safeguards for the parties concerned to the surrogacy arrangements. To resolve such problems and organize the uncertainty and ambiguity created by various national laws a Hague Convention on inter-country surrogacy arrangements has been proposed but this convention has not attained conclusiveness till now.

In India, till now, except the non-binding regulatory ICMR's National Guidelines 2005, there is no any regulatory framework to deals with surrogacy.

However, to regulate the ART services, the Union Cabinet has very recently approved the ART (Reg.) Bill 2020 and the Surrogacy (Reg.) Bill 2020.

- iii) Though Altruistic Surrogacy and Commercial Surrogacy, are two types of surrogacy arrangement but in fact there is hardly few numbers of cases where surrogate mothers were acted on purely altruistic basis. Very often there is a mixture of the two. It is very unfortunate that the sum received by

a altruistic surrogate mother of UK in the name of 'reasonable expenses' is equivalent to that received by a surrogate mother in a commercial surrogacy arrangement, but the just difference is how being the payments are categorized and communicated.

- iv) Except financial transaction all other issues involved in commercial surrogacy are associated with altruistic too. Sometimes it is seems to be more worsen than commercial surrogacy under our demanding patriarchal families' structures, where women are hardly to make any decision.

How can it we make sure that altruistic surrogacy with willing woman without payment is free from exploitation? Can a close relative, viewed as a prospective surrogate mother, provide genuine informed consent regarding the process, pregnancy difficulties, risks and its implications on relational complexities in future?

Is she conscious about the emotional collision of giving up the baby immediately after birth that she has carried for nine months?

What would be the remedies for parties concerned due to breach of contract by either party whilst other not willing to continue with the terms and conditions of the agreements, such as while the surrogate mother voluntarily abort without consent of the intended mother?

- v) The National guidelines, 2005 of ICMR is only recommendatory and non-mandatory. There is no definite strict roles and responsibilities which to be observed by the ART Clinics, for what these are frequently violated by the ART Clinics. The Surrogacy (Reg.) Bill, 2020 limiting reproductive

choices by permitting only willing women having one child to act as surrogate without any compensation. It restricts the choice of women that they can have over their body. The Bill of 2020 is needed to reconsider again on the matter of ban for single women (except widows and divorcees of certain age groups), single men (who do not to get married but still wants fatherhood), foreigners, LGBT.

Nevertheless, it is urged that surrogacy arrangement is sought to be governed by the Indian Contract Act, 1872. As the questions of validity and enforceability of such contracts in case of altruistic surrogacy too is important to analyze. Non applicability of contractual legal remedies in this context is not reasonable and justified too.

Recommendations:

- i) Since the right to procreation is a basic human rights of all individuals, it is required to be defined as aspect of the right to personal liberty and privacy under national laws and as well as under international law and it should be extended to include the right to access to ARTs for begetting a genetically related child.
- ii) To protect the reproductive right and right to reproductive health of individual, it is necessary to treat infertility as a disease and need it to be treated as any other disease.
- iii) Before passing the Surrogacy (Regulation) Bill, 2020, it is very indispensable to brought forth the ART Bill, 2020.

- iv) The right to commission for surrogacy and the right to act as surrogate mother for another must be recognized as a facet of right to personal liberty and privacy under the Constitution of India.
- v) To bring flexibility to the rigorous provisions of the proposed surrogacy Bill, it is suggested that instead of recognizing purely altruistic or commercial surrogacy should recognize a professional model of surrogacy, combination of both altruistic and commercial surrogacy, namely altruistic cum compensatory or gratuitous cum compensatory surrogacy.
- vi) The proposed Bill of 2020 substituted the term 'infertility' with cruel terminology 'a medical indication', which at first look includes more comprehensive medical conditions in addition to infertility. In reality, it seems to be keeping the stigmatic classification for both parties to a surrogacy arrangement. Hence, it could also be argued that the difference remains unclear.
- vii) The proposed Bill, permits willing woman in the place of only the "close relatives" of the intending couples to be act as surrogate mother. However, it is too difficult to affirm that how many of woman come forward wilfully to act as a surrogate mother without any compensation. It curtailing the accessibility of women to be acted as surrogate and restrictive the scope of surrogacy. Therefore, surrogacy is restricted to the willing woman is not justifiable and reasonable and it needed to be review.

- viii) The proposed Bill is necessary to reconsider again because it creates dissonance with the provisions of the Constitution of India. It excludes the single parents (except widows and divorcees of certain age group), homosexuals, live-in-couples, foreigners, and transgender persons from commissioning surrogacy. The restriction on export and import of embryos anymore would jeopardize the entire effort made by the foreign gamete donors earlier. Therefore, the government should take care of it reasonably and required to dispose the matter amicably.
- ix) Along with medical fitness certificate of the surrogate and written informed consent of the surrogate in her language, the Bill should have specific provision for counselling and medical test of the stakeholders before initiation of the surrogacy procedure.
- x) To deal with future protection and security of the surrogate mother and surrogate children, the Bill has no sufficient provision. It only speaks about insurance coverage to the surrogate mother for a period of thirty-six (36) months only covering postpartum delivery complication. Therefore, it is need to insured properly by insuring the surrogate mother for life time covering all after effects of surrogacy upon her health. And similarly, the surrogate child has to be required to insure if any he or she born with any congenital disability or abnormality.
- xi) To avoid abandonment of the surrogate child in case of unwanted situation such as death or separation of the intending couple, there

should be a specific provision in the surrogacy legislation who will take the custody of the child and about the compensation required for bringing up the child.

- xii) To provide appropriate protection of rights of surrogate women and for the welfare of the surrogate children, it is felt necessary to set up a separate authority under surrogacy legislation such as CARA under the Juvenile Justice Act, 2015 to deal with entire process of adoption including inter-country.

Recommendation for Amendments in Existing Legislations:

- i) It is need to amend the registration of Birth and Death Registration Act, 1969 in order to register the birth of surrogate children and the name of intending parents as legal parents.
- ii) It is need to amend the Indian Contract Act, 1872 and the specific Relief Act, 1963 by inserting specific provision in relation to surrogacy contract.
- iii) Section 112 of Indian evidence Act, 1872 is needs to amend to simplify the complication of legal parentage of surrogate child.
- iv) The Indian Succession Act, 1925 and the Hindu Succession Act, 1956 are need to be amend to help the surrogate children to succeed the property of intending parents as class – I heir.
- v) For the welfare of the surrogate children, it is required to bring them within the scope and ambit of the Juvenile Justice Act, 2015.